In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHARLES ALEX BLACK,** **Defendant and Defendant.**	Case No. S206928

First Appellate District, Division One, Case No. A131693
Alameda County Superior Court Case No. C163496
The Honorable Allan D. Hymer, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RENÉ A. CHACÓN
Supervising Deputy Attorney General
BRUCE ORTEGA
Deputy Attorney General
State Bar No. 131145
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004
Telephone: (415) 703-1335
Fax: (415) 703-1234
e-mail: bruce.ortega@doj.ca.gov
Attorneys for Respondent

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CONSTITUTIONAL PROVISIONS

ISSUE

Whether a conviction should 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?

INTRODUCTION

Criminal defendants have a Sixth Amendment right to an impartial jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) The seating of a prospective juror after an erroneous denial of the defendant's for-cause challenge requires reversal. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 85.) If no biased or legally incompetent juror sits, as where the defendant exercised a peremptory challenge to excuse the prospective juror, reversal is inappropriate; the defendant has suffered no violation of a rule-based or constitutional right. (*Id.* at pp. 88-91; *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 307, 316.)

The California Constitution also guarantees the right to an impartial jury. (Cal. Const., art. I, § 16; *People v. Williams* (1997) 16 Cal.4th 635, 666-667.) Similar to the Oklahoma law discussed in *Ross*, California requires the defense, to preserve claimed error in the denial of a challenge for cause, to "exercise a peremptory challenge to remove the juror in question," "exhaust all available peremptory challenges," and "express dissatisfaction with the jury as finally constituted." (*People v. Weaver* (2001) 26 Cal.4th 876, 910-911; accord, *People v. Millwee* (1998) 18 Cal.4th 96, 146.) Harmonizing with *Ross* and *Martinez-Salazar,* state law provides that the defendant's exercise of a peremptory challenge to excuse a venire person whom the trial court should have excused for cause is not reversible, if no biased or otherwise unqualified (i.e., legally incompetent)

juror sits. (E.g., *People v. Gordon* (1990) 50 Cal.3d 1223, overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835; *People v. Yeoman* (2003) 31 Cal.4th 93, 114; *People v. Farley* (2009) 46 Cal.4th 1053, 1096; *People v. Mills* (2010) 48 Cal.4th 158, 187; *People v. Clark* (2011) 52 Cal.4th 856, 902; see *People v. Bonilla* (2007) 41 Cal.4th 313, 340 [*Yeoman* construed to refer to "a juror incompetent under *Wainwright v. Witt* [(1985)] 469 U.S. 412"; while *Wainwright* does not to use the term "incompetent," it discusses jurors "properly excused for cause" (*id.* at p. 430)].)

Gordon held that a defendant's use of peremptory challenges to cure a trial court's erroneous denial of a challenge for cause does not abridge the defendant's rights to an impartial jury and to due process. (*People v. Gordon*, *supra*, 50 Cal.4th at p. 1248, fn. 4.) Nevertheless, the Court has said that a defendant can obtain reversal "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." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088.) More recently, it said, "To 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 . . . , 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." (*People v. Blair* (2005) 36 Cal.4th 686, 742.)

This case presents the tension among these competing lines of state authority. (See *People v. Black* (Oct. 25, 2012, A131693), pp. 4-8 (Opn.).) Respondent has not defended the trial court's denial of defendant's two for-cause challenges to prospective jurors whom he later peremptorily challenged. (Opn. at p. 4.) Defendant has not claimed that a third prospective juror who ultimately sat, but whom he wanted to peremptorily

challenge and could not because he had no peremptory challenges left, was excusable for cause. (Opn. at pp. 4, 9-10 & fn. 3.) The appellate court found *Gordon* dispositive and affirmed the judgment. (Opn. at p. 9.)

Defendant acknowledges that he cannot obtain reversal under federal constitutional law because he cannot show a biased or otherwise legally incompetent juror sat. (ABOM 14.) But he urges this Court to reject *Ross* and *Martinez-Salazar* under state law and to "adopt the rule embraced by other 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." (ABOM 6, 12.)

To the contrary, the Court should hold, under California law, that the erroneous denial of a challenge for cause, followed by the defendant's exercise of a peremptory challenge to remove the juror and the trial court's denial of the defendant's request for additional peremptory challenges, is harmless when a fair and impartial jury convicts.

STATEMENT OF THE CASE AND FACTS

A. Trial Evidence

In the summer of 2009 Steelee Faltis lived at 1632 12th Avenue in Oakland with his brother, Vincent Faltis. (3 RT 288, 322, 358-360, 393, 395-393.) Vincent had a girlfriend, Libby Van Horn, who often stayed overnight at their apartment. (3 RT 288-289, 360.) The rear of the Faltis apartment encompassed a view of an apartment balcony at 1227 East 17th Street, where appellant lived with a pit bull named "Blue" (nicknamed "Blueberry"). (3 RT 289-291, 300-301, 327-328, 365-366, 426; 4 RT 470-473, 504, 703.)

On June 30, 2009, around 11:00 or 11:30 a.m., Steelee heard Blue yelping or screeching again. (3 RT 302, 318-319.) Steelee then heard

defendant yelling. Steelee grabbed his video camera and began filming defendant and Blue on the balcony. (3 RT 302-304, 334-337; People's Exhibit 2.) Steelee saw defendant holding a wooden mop or broom handle. Defendant swung the stick at Blue in an overhead motion, hitting Blue across the back at least once and perhaps three or four times. Steelee also heard the stick hit Blue and the dog yelp loudly from one of defendant's blows. (3 RT 304-308, 310-312, 341, 343-344, 354-355.) Defendant said to the dog, "'[W]hat you looking at?'"; "'[D]on't look at me. I dare you to look at me.'" (3 RT 308, 346.) Defendant also spoke the words "'death row,'" said Blue was "'pound bound'"; and said, "'[Y]our ass is going to the pound.'" (3 RT 308-309, 344.) Steelee testified that he may have seen defendant kick Blue that day. (3 RT 309.) Steelee did not hear Blue growl at, lunge, bite, or otherwise attack defendant. (3 RT 310.)

By February 19, 2010, Vincent, Steelee, and Libby had a superior video camera and were ready to tape any more such incidents. (3 RT 313-314, 377-380, 417-418.) Around 5:30 to 5:45 p.m., Vincent and Libby heard Blue begin screaming, whimpering and yelping again. (3 RT 380-381, 404-405, 433; 4 RT 458.) Seeing defendant with Blue on the balcony, Vincent got his camera. (3 RT 381.) Libby saw defendant raise a crow bar over his head. Blue was not biting, growling or lunging at defendant. Libby, shocked and scared, turned her head at defendant's subsequent "swinging motion"; she heard Blue scream. (3 RT 434-436; 4 RT 439, 459-461, 463-464.)

In the 90 to 120 seconds before Vincent's filming, he heard Blue screaming and defendant yelling. (3 RT 382, 386, 391-393.) Vincent heard defendant tell Blue, more than once, "'I'm going to kill you.'" (3 RT 382-383, 386, 416.) As Vincent filmed, he and Libby saw defendant "taking swings over his head" at Blue with the metal end of an axe. (3 RT 383-384, 408-409, 436-437; 4 RT 439, 461, 463, 465-467.) With each of

defendant's strikes at Blue, it looked like there was "dust and fur coming off the dog." (3 RT 385.) Blue ran past defendant and back into the apartment without lunging at defendant. (3 RT 386.) Vincent called the police. (3 RT 387, 420; 4 RT 439.)

Oakland Housing Authority Police Officers Michael Morris arrived at the Faltis apartment around 6:20 p.m. Vincent showed Morris the video that he had just made. (3 RT 421; 4 RT 467, 503-504, 509, 515, 518.) Morris contacted Sergeant Todd Farris, then went to defendant's apartment. (4 RT 504, 520.) Morris observed a "red liquidy substance" on the front door of apartment 5. (4 RT 506-507.) Morris and Officer Godfrey loudly knocked several times on the front door, identified themselves, and demanded a response. (4 RT 505.) Morris heard someone inside say something like he was not going to open the door. Morris also heard a dog barking. (3 RT 505-506, 509-510, 521-522.)

Oakland Housing Authority Police Sergeant Farris responded to apartment 5 around 7:00 p.m. (4 RT 468-470.) Farris saw three red marks below the handle on the front door of the apartment. (4 RT 475-476.) Officers gathered to make a "tactical entry." (4 RT 476.) As they waited for the necessary equipment, Farris knocked on the door to the apartment "very loudly several times," and announced, "'Police department. We demand entry. Open the door.'" (4 RT 476-477.) No one answered, and Farris heard no sounds inside. (4 RT 478.)

Sergeant Farris struck the door twice with a ram, then heard a male voice say, "'Wait, wait. Who is it? What do you want?'" (4 RT 478, 494.) Farris stopped and answered, "'It's the police department. We demand entry. Open the door.'" (4 RT 478.) The front door lock started to move, but the door did not open. Farris rammed the door open and saw defendant. (4 RT 479, 495.) He was the only person inside. (4 RT 480, 508.)

Inside a back bedroom closet was a yellow-handled axe or "splitting moll." (4 RT 480-481, 511.) It was the weapon defendant swung at Blue in the video. (4 RT 511.) Its metal edge had a dry red liquid substance. (4 RT 511-512, 523-524.) A crow bar on the balcony "had the same dried, liquidy substance that had a red tint that the splitting moll or axe also had on it." (4 RT 482, 513-514, 525.)

Blue was found cowering in the apartment's bathroom. (4 RT 482, 508-509, 523.) Sergeant Farris later entered the bathroom, and Blue growled, but did not bite, show his teeth, or attack. (4 RT 483.) Officer Morris testified that Blue never growled, bit, or attacked the officers. (4 RT 509-511.) Sergeant Farris described Blue as "very docile" when removed from the apartment. (4 RT 485-486.) Defendant did not need treatment for dog injuries and was taken to jail. (4 RT 488.)

B. Procedural Background

1. Trial

The district attorney charged defendant with two counts of animal cruelty (Pen. Code, § 597, subd. (a)), a prior strike conviction (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), and a prior prison term (Pen. Code, § 667.5, subd. (b)). (1 CT 94.)

During voir dire, Prospective Juror M.P. raised her hand when the court asked the venire if anyone had a religious or other belief that would prevent them from sitting as a juror. (1 ART 19.) M.P. subsequently stated that she had been "raised a very devout Hindu" and "taught to not harm any animals whatsoever." (2 ART 77.) "So I think it would be a little bit difficult for me in this particular case to try and separate 27 years of upbringing and be unbiased." (2 ART 78.) M.P. said she would "try" to put aside her beliefs, but she could "probably not" be "completely impartial" and "unbiased" in "this particular case." (2 ART 78, 98-99.)

Defendant used his second peremptory challenge to excuse M.P. (2 ART 121.) Defense counsel later said that he had asked the court at sidebar to excuse M.P. for cause because she was unable to promise that she could be fair and impartial in this case. (2 ART 153-154.) The court confirmed, without elaboration, that it had denied the defense challenge for cause. (2 ART 154.)

The next day Prospective Juror A.D. said that he "didn't believe in hitting anyone or animals," and that if the prosecutor proved his case beyond a reasonable doubt A.D. would "follow the law" and find defendant guilty. (3 ART 237-238, 255.) A.D. elaborated that his view that hitting animals in any fashion was cruel came in part from his "prior experience with being abused." (3 ART 255-256.) A.D. also told the court and counsel that defendant's "actions outside the courtroom" had already left A.D. siding with the prosecution. A.D. said that he had witnessed "disrespectful" behavior by defendant that morning and at lunch (being late and "singing and stomping his feet"). (3 ART 256, 258-260.) A.D. said "unfortunately" that he "wouldn't be fair" to defendant, and "didn't think" he could follow the court's order to follow the law in this case and give defendant a fair trial based only on the evidence in the case. (3 ART 260, 262-263.) The trial court denied defendant's for-cause challenge to A.D. without analysis. Immediately afterward, defense counsel peremptorily challenged A.D. (3 ART 263-266.)

A third prospective juror, eventually seated as Juror No. 8, expressed concern in a note to the court that he was employed as a process server and (1) had served legal papers for the Oakland Housing Authority, and (2) had attempted to serve a man named Charles Black in 2010. (3 ART 215.) Juror No. 8 never saw Charles Black, and did not know if he was defendant. (3 ART 216.) Juror No. 8 said that he did not "want to go forward without that knowledge to everyone here." (3 ART 216.) In

chambers, Juror No. 8 said that he had served residents of the Housing Authority "[o]ver 100 times," but that this attempt at service stood out in his memory because he had received a police escort, which only occurred if "guns and/or drugs were involved in the reason for the eviction." (3 ART 216-220.) Juror No. 8 stated that he would "try" not to let the incident affect his consideration of the case, and he promised not to disclose it to other jurors. (3 ART 220-223.) Defense counsel moved the court to excuse Juror No. 8 for cause "in an abundance of caution." The court denied the challenge, ruling that Juror No. 8 was conscientious and that there was no evidence of a gun in this case. (3 ART 223-224.)

After exhausting his peremptory challenges, defendant sought additional peremptory challenges in order to remove Juror No. 8 and another unspecified juror. The trial court denied the request. (3 ART 307-308.)

The jury convicted defendant of two counts of animal cruelty, as charged (Pen. Code, § 597, subd. (a)). (CT 206-208; 6 RT 1025-1027.) The court sustained the allegations of prior convictions. (CT 208; 6 RT 1046.) The court sentenced defendant to four years in state prison. (CT 221, 223-225, 241-242; 6 RT 1062-1063.)

2. Appeal

Relying primarily on *People v. Gordon*, *supra*, 50 Cal.3d 1223, the Court of Appeal rejected defendant's argument that he was prejudiced by the trial court's refusal to excuse Prospective Jurors M.P. and A.D. for cause: "Defendant's argument is legally indistinguishable from the argument rejected in *Gordon*. Defendant's argument is *not* that his right to a fair and impartial jury was compromised because a juror who should have been excused for cause actually sat on his jury. Rather, he argues he was prejudiced because his need to remedy the trial court's erroneous failure to excuse two jurors for cause left him unable to remove Juror No. 8, a sitting

juror whom he would otherwise have removed using a peremptory challenge. In the absence of a demonstration that Juror No. 8 should have been removed for cause, this argument is no different from the general claim made in *Gordon* of prejudice from the unnecessary use of peremptory challenges. Defendant has merely identified a particular juror whom he would have removed had he not been required to exhaust his peremptory challenges." (Opn. at p. 9.)

SUMMARY OF ARGUMENT

Defendant's proposed rule—that reversal is required when a trial court erroneously denies a for-cause challenge, and the defendant unsuccessfully attempts to obtain an additional peremptory challenge to remove an unbiased prospective juror from the panel—is inconsistent with federal constitutional law. Defendant does not argue otherwise.

Oklahoma v. Ross, *supra*, 487 U.S. 81, and *United States v. Martinez-Salazar*, *supra*, 528 U.S. 304, provide, as a matter of federal constitutional law, that a showing of prejudice—in the way of a biased juror sitting on the case—is required before a trial court's erroneous denial of a challenge for cause and the defendant's use of a peremptory challenge to strike the erroneously-retained juror requires reversal. This Court has followed *Ross* and *Martinez-Salazar* under state law. Defendant presents no cogent reason for the Court to depart from that rule.

California's requirement that parties use their peremptory challenges curatively implements a major purpose for peremptory challenges. The state has a strong interest in ensuring that the parties use their peremptory challenges curatively because it helps ensure that close-call prospective jurors are excused from serving one way or the other. Defendant was not deprived of any right guaranteed under the law either by the fact that he used peremptory challenges curatively against M.P and A.D. or by the

denial of an additional peremptory to excuse Juror No. 8. He received all that the law provided.

In essence, defendant seeks reversal of his conviction because the defense exhausted peremptory challenges to cure a for-cause challenge error and pronounced itself dissatisfied with the seated jury. Peremptory challenges are a statutorily-created means to the constitutional end of an impartial jury and a fair trial. Requiring a defendant to help ensure that his jury is fair and impartial outweighs the residual interest in what defendant characterizes as molding the jury to his side. There is no fundamental unfairness in affirming a defendant's conviction by a fair and impartial jury, notwithstanding a defendant's frustrated preference for additional peremptory challenges to mold his jury to the fullest conceivable extent.

His proposed rule for reversal has been previously rejected by this Court as a matter of federal and state law. And it has been rejected by the majority of state courts that have addressed the issue. The rule lacks adequate statutory or constitutional basis. It ignores the primary purpose behind peremptory challenges. And it facially violates article VI, section 13, of the California Constitution, which permits reversal only for a miscarriage of justice.

Defendants are entitled to a fair and impartial jury, not to one of their own choosing. And while defendants are entitled to a fair trial, they are not entitled to a perfect one. It makes no sense to reverse a conviction and order a new trial when a peremptory challenge used to cure trial court error also helped to ensure the defendant's right to a fair and impartial jury.

ARGUMENT

I. THE IMPROPER DENIAL OF A CHALLENGE FOR CAUSE IS HARMLESS WHEN NO SEATED JUROR WAS BIASED OR OTHERWISE LEGALLY OBJECTIONABLE, INCLUDING WHERE THE DEFENDANT EXHAUSTED PEREMPTORY CHALLENGES BY REMOVING THE ERRONEOUSLY-RETAINED JURORS, AND WAS DENIED AN ADDITIONAL PEREMPTORY TO REMOVE AN UNBIASED PROSPECTIVE JUROR

Defendant contends that the trial court prejudicially erred in not granting his for-cause challenges to Prospective Jurors M.P. and A.D because he was denied an additional peremptory challenge to strike Juror No. 8, a legally competent juror who served on his jury. (AOBM 6, 11-14.)

Defendant is mistaken. He is not entitled to reversal.

A. *Ross* and *Martinez-Salazar* Preclude Reversal as a Matter of Federal Constitutional Law

Citing *Ross v. Oklahoma*, *supra*, 487 U.S. 81, defendant correctly acknowledges that the federal Constitution does not require the reversal of his conviction, because the jury that heard his case was fair and impartial. (AOB 14.) In *Ross*, the trial court erred in failing to excuse for cause Prospective Juror Huling, who expressed disqualifying pro-death penalty views. The defense subsequently used a peremptory challenge to remove Huling, and eventually exhausted peremptory challenges. (*Id.* at pp. 83-84.) Although defense counsel objected to the composition of the jury at the conclusion of jury selection, nothing showed any juror who sat on the case was legally objectionable. (*Id.* at pp. 84-85.) The high court rejected the defendant's argument that he was entitled to reversal. The court recognized that had the trial court's error in failing to excuse Huling for cause resulted in Huling sitting on the jury, reversal would be required. (*Id.* at p. 85.) "But Huling did not sit. Petitioner exercised a peremptory challenge to remove him, and Huling was thereby removed from the jury as effectively

as if the trial court had excused him for cause." (*Id.* at pp. 85-86.) "Any claim that the jury was not impartial, therefore, must focus not on Huling, but on the jurors who ultimately sat." (*Id.* at p. 86.) The high court held that the Sixth and Fourteenth Amendment rights to an impartial jury are not violated when the defense expends a peremptory challenge to cure the trial court's erroneous denial of a challenge for cause and the jury that ultimately sits is in fact fair and impartial:

> Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. *Gray* [*v. Mississippi*], [] [] [481 U.S. 648,] [] 663 [(1987)]; *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Stilson v. United States*, 250 U.S. 583, 586 (1919). They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. See *Hopt v. Utah*, 120 U.S. 430, 436 (1887); *Spies v. Illinois*, 123 U.S. 131 (1887). We conclude that no violation of petitioner's right to an impartial jury occurred.

(*Ross v. Oklahoma*, *supra*, 487 U.S. at p. 88, fn. omitted.)

Ross also rejected the defendant's argument that the trial court's erroneous denial of the challenge for cause violated his Fifth and Fourteenth Amendment right to due process. The court noted that the right to exercise peremptory challenges is one of the most important of the rights secured to the accused, but even if the court were to impose a per se rule of reversal in state court proceedings for the denial or impairment of peremptory challenges, defendant's due process challenge would nonetheless fail. (*Ross v. Oklahoma*, *supra*, 487 U.S. at p. 89.) "Because peremptory challenges are a creature of statute and are not required by the Constitution, [citation], it is for the State to determine the number of

peremptory challenges allowed and to define their purpose and the manner of their exercise. [Citation]." (*Ibid.*) The "right" to peremptory challenges is "denied or impaired" only if the defendant does not receive that which state law provides, and under Oklahoma law, a defendant forfeits the right to argue that a trial court erroneously denied a defense challenge for cause if the defendant fails to use an available peremptory challenge to remove the erroneously-retained juror. (*Ibid.*). From this premise, the court further reasoned that Oklahoma intended that the peremptory challenges it chose to give criminal defendants necessarily included any peremptory challenges that a defendant might have to use curatively. (*Id.* at pp. 89-90.) This, in turn, defeated the claim of a due process violation: "As required by Oklahoma law, petitioner exercised one of his peremptory challenges to rectify the trial court's error, and consequently he retained only eight peremptory challenges to use in his unfettered discretion. But he received all that Oklahoma law allowed him, and therefore his due process challenge fails." (*Ross v. Oklahoma*, *supra*, 487 U.S. at pp. 90-91, fn. omitted.)

Ross clearly holds that reversal from the erroneous denial of a challenge for cause turns on whether the defendant's right to a fair and impartial jury was affected, i.e., whether constitutional error occurred. *Ross* also left open "the broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been removed for cause." (*Ross v. Oklahoma*, *supra*, 487 U.S. at p. 91, fn. 4.)

In *United States v. Martinez-Salazar*, *supra*, 528 U.S. 304, the high court resolved the issue left open in *Ross*. In *Martinez-Salazar*, defendants were indicted in federal court on charges of conspiracy to sell heroin, drug trafficking in heroin, and carrying a firearm in the course of the drug

trafficking. (*Id.* at pp. 308.) During jury selection, defendants challenged a prospective jury member, Gilbert, for cause, but the trial judge erroneously denied the challenge. (*Id.* at pp. 308-309.) The defendants used one of their eleven shared peremptory challenges to strike the juror, and later exhausted all of their peremptory challenges. The codefendants did not request an additional peremptory challenge. (*Ibid.*) Thus, as in *Ross*, the impact of the trial court's error was that the defense had one fewer peremptory challenge than it otherwise would have had. After conviction, Martinez-Salazar argued on appeal "that the District Court abused its discretion in refusing to strike Gilbert for cause and that this error forced Martinez-Salazar to use a peremptory challenge on Gilbert." (*Id.* at p. 309.)

The Supreme Court thus had to "focus on this sequence of events: the erroneous refusal of a trial judge to dismiss a potential juror for cause, followed by the defendant's exercise of a peremptory challenge to remove that juror. Confronting that order of events, the United States Court of Appeals for the Ninth Circuit ruled that the Due Process Clause of the Fifth Amendment requires automatic reversal of a conviction whenever the defendant goes on to exhaust his peremptory challenges during jury selection. 146 F.3d 653 (1998)." (*United States v. Martinez-Salazar*, *supra*, 528 U.S. at p. 307.) The Supreme Court reversed the Ninth Circuit's judgment. It rejected "the Government's contention that under federal law, a defendant is obliged to use to use a peremptory challenge to cure the trial court's error," but also held "that if the defendant elects to cure such an error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right. (*United States v. Martinez-Salazar*, *supra*, 528 U.S. at p. 307.)

The high court rejected the Ninth Circuit's conclusion that Martinez-Salazar was "forced" to exercise a peremptory challenge to cure an

erroneous for-cause refusal. (*United States v. Martinez-Salazar, supra*, 528 U.S. at p. 314.) The Court reasoned that a hard choice is not the same as no choice; Martinez-Salazar chose to exercise a peremptory challenge because he did not want a particular person to sit on the jury. (*Id.* at p. 315.) Instead of allowing the juror to sit and pursuing a Sixth Amendment challenge on appeal following the conviction, the defendant chose instead to use his peremptory challenge curatively. (*Ibid.*) In removing the juror, Martinez-Salazar did not lose a peremptory challenge, but used it for what it was for: to help secure an impartial jury. (*Id.* at pp. 315-16.) Martinez-Salazar, together with his codefendant, exercised 11 peremptory challenges, which is all he was entitled to under federal rules. (*Id.* at p. 315.)

There were two short concurring opinions in *Martinez-Salazar*, but all nine justices viewed peremptory challenges as a corrective for trial court errors in failing to strike prospective jurors for cause. (*United States v. Martinez-Salazar, supra*, 528 U.S. at pp. 315-316; *id.* at p. 318 (conc. opn. of Souter, J.) ["Martinez-Salazar simply made a choice to use his peremptory challenge curatively"]; *ibid.* (dis. opn. of Scalia, J.) ["The fact that he voluntarily chose to expend [a peremptory challenge] upon a venireman who should have been stricken for cause makes no difference]".)

Justice Souter's concurring opinion added this:

> I concur in the opinion of the Court. I write only to suggest that this case does not present the issue whether it is reversible error to refuse to afford a defendant a peremptory challenge beyond the maximum otherwise allowed, when he has used a peremptory challenge to cure an erroneous denial of a challenge for cause and when he shows that he would otherwise use his full complement of peremptory challenges for the noncurative purposes that are the focus of the peremptory right. Martinez-Salazar did not show that, if he had not used his peremptory challenge curatively, he would have used it peremptorily against another juror. He did not ask for a make-up peremptory or object to any juror who sat. Martinez-Salazar simply made a choice to use his peremptory challenge curatively.

(*United States v. Martinez-Salazar*, *supra*, 528 U.S. at p. 318 (conc. opn. of Souter, J.).)

The present case involves a defendant who, had he not used a peremptory challenge curatively, would have used it peremptorily against another juror. Defendant asked for a make-up peremptory and objected to Juror No. 8. However, defendant does not attempt to distinguish *Martinez-Salazar* (indeed he does not even discuss the case). As stated, he has not argued that he is entitled to reversal under federal constitutional law.

Instead, he seeks a ruling under California law, that where a challenge for cause is erroneously denied, prejudice results when the defendant, having his 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. (ABOM 6, 12.) We confine this brief to that issue.

B. This Court Has Ruled Consistently with *Ross* and *Martinez-Salazar* that the Erroneous Denial of a For-Cause Challenge Compels Reversal Only When a Biased Juror Sits As a Result of the Error

Defendant asserts that this Court's 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," and that "this Court has never squarely addressed the standard of prejudice when a defendant exercises one or more peremptory challenge to correct a trial court's erroneous denial of a challenge for cause." (AOBM 8-9.)

Since *Ross v. Oklahoma*, *supra*, 487 U.S. 81, this Court has repeatedly held, as a matter of both federal and state constitutional law, that where a defendant exercises a peremptory challenge to excuse a prospective juror whom the trial court erred in not excusing for cause, reversal is only appropriate if the defendant can establish that his use of the peremptory

challenge to remove the erroneously-retained juror left him unable to prevent the seating of a legally incompetent juror. This Court has suggested, post-*Ross*, that reversal is in order where the defendant can show that the use of a peremptory challenge to cure the trial court's error left the defendant without a peremptory challenge to excuse a legally competent but undesirable juror who ultimately sat on the case. However, post-*Ross*, this Court has not actually reversed a case on that basis.

The first case in which this Court addressed *Ross v. Oklahoma* was *People v. Coleman* (1988) 46 Cal.3d 749. There, defendant argued that the trial court had erred in failing to excuse for cause four prospective jurors whose voir dire, defendant argued, made it unmistakably clear that he or she would automatically vote for the death penalty. Defendant peremptorily challenged all four jurors, and used 24 of his 26 available peremptory challenges. (*Id.* at p. 763.) This Court found that the trial court had erred in denying one challenge for cause, but held that "the erroneous denial of a challenge for cause, with the result that a defendant uses one of his peremptory challenges, is not the type of constitutional error which should automatically result in a per se reversal." (*Id.* at pp. 763-764.) The court noted that an erroneous ruling on a challenge for cause was subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 23, and that in the case before it, "the erroneous ruling on the challenge for cause merely resulted in the temporary inclusion of a venireman. He was not a regular or alternate member of the jury eventually empanelled, and there is no indication that the bias for which he should have been excluded infected any other member of the venire who later sat on the jury." (*People v. Coleman*, *supra*, 46 Cal.3d at pp. 768-769, fn. omitted.) The Court's opinion continued:

> It might be suggested, however, that the erroneous denial of the challenge for cause was not harmless because the effect of

> that ruling was that defendant was forced to use one of his peremptory challenges to remove the prospective juror. Such an argument was recently rejected by the United States Supreme Court in *Ross v. Oklahoma*, *supra*, 487, U.S. 81, involving similar facts.

(*People v. Coleman*, *supra*, 46 Cal.3d at pp. 769.)

This Court next pointed out that *Ross* rejected the argument that the forced use of peremptory challenges to cure erroneous denials of challenges for cause denied due process. California law, it said, was similar to Oklahoma law in that "the defendant must exercise his peremptory challenges to remove prospective jurors who should have been excluded for cause, and that to complain on appeal of the composition of the jury, the defendant must have exhausted those challenges." (*People v. Coleman*, *supra*, 46 Cal.3d at pp. 769-770.) The *Coleman* court next noted that California courts had never considered whether an erroneous ruling on a challenge for cause was, in effect, the denial of a peremptory challenge, but that in other cases involving the denial of peremptory challenges California courts had found a potential effect on the selection of the jury only where the defense used all of its available challenges, but remained dissatisfied with the venire. (*Id.* at p. 770.) This Court concluded:

> Here, the defense indicated its satisfaction with the jury after having exercised only 24 of its 26 peremptory challenges. No juror to whom defendant objected was seated on the jury that heard his case, and he did not object to the jury as constituted, even though he had peremptory challenges remaining. In this situation, we cannot find defendant was denied a peremptory challenge in a way which affected his right to a fair and impartial jury. Because there was no possible prejudice to defendant in such circumstances, no reversible error occurred.

(*People v. Coleman*, *supra*, 46 Cal.3d at p. 771, fn. omitted.)

In *People v. Bittaker*, *supra*, 48 Cal.3d 1046, the defendant argued that he was deprived of his right to a fair and impartial jury because he had

been required to use peremptory challenges to remove five prospective jurors who should have been excused for cause, and the trial court granted him only two compensatory peremptory challenges. (*Id.* at p. 1087.) The Court continued:

> The denial of a peremptory challenge to which defendant is entitled is reversible error when the record reflects his desire to excuse a juror before whom he was tried. (*People v. Armendariz* (1984) 37 Cal.3d 573, 584.) Since the erroneous denial of a challenge for cause compels the defense to use a peremptory challenge, a similar analysis applies to denial of a challenge for cause. (*People v. Coleman, supra*, 46 Cal.3d 749, 770-771.) Defendant must show that the error affected his right to a fair and impartial jury. (P. 771.)
>
> Thus, defendant must show that he used a peremptory challenge to remove the juror in question, that he exhausted his peremptory challenges (see *Coleman, supra*, 46 Cal.3d 749, 770 and cases there cited) or can justify his failure to do so (*People v. Box* (1984) 152 Cal.App.3d 461), 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. (See *People v. Helm* (1907) 152 Cal. 532, 535; *People v. Diaz* (1951) 105 Cal.App.2d 690, 696-699.)

(*People v. Bittaker, supra*, 48 Cal.3d at pp. 1087-1088.)

The defendant was required to show the trial court erred in denying at least three challenges for cause to gain a reversal, since that court had provided two additional peremptory challenges. (*People v. Bittaker, supra*, 48 Cal.3d at p. 1088.) No reversal was ordered because only two of the denials were erroneous. (*Id.* at pp. 1088-1091.)

In *People v. Gordon, supra*, 50 Cal.3d 1223, the defendant challenged three jurors for cause during voir dire. One of the jurors was never seated, but the defendant was required to use peremptory challenges to remove the other two. (*Id.* at p. 1246.) When the trial court swore in the jurors,

defendant did not indicate dissatisfaction with the panel and had a peremptory challenge remaining. (*Ibid.*) This Court assumed that the trial court had erred in denying the challenges for cause, and held that the error "is not automatically reversible but is subject to scrutiny for prejudice under harmless-error analysis." (*Id.* at p. 1247.)

> After review, we can discern no prejudice. None of the prospective jurors whom defendant found objectionable actually sat on his jury. Hence, none could have tainted the panel's members with his alleged bias. Accordingly, none could have affected the process or result of the deliberations to defendant's detriment.

(*People v. Gordon, supra*, 50 Cal.3d at p. 1247.)

Although no juror challenged for cause was actually seated, the defendant responded that he suffered "actual prejudice" as a result of the trial court's erroneous for-cause rulings. This Court rejected that argument:

> Defendant says he was harmed because he was "forced to accept" a jury he "was not satisfied with." But we discern in the record no dissatisfaction and no compulsion. Defendant says he was harmed because he was effectively denied two peremptory challenges when he chose to exercise those challenges to "cure" the "error." But we can find no denial. A criminal defendant may, and indeed must, exercise the peremptory challenges granted him by law "to remove prospective jurors who should have been excluded for cause" (*People v. Coleman, supra*, 46 Cal.3d at p. 770)—that is to say, to cure the very kind of error claimed here. In view of the foregoing, we simply cannot deem defendant's *exercise* of his peremptory challenges to amount to a *deprivation*.

(*People v. Gordon, supra*, 50 Cal.3d at p. 1248, original emphasis, fn. omitted.)

In a footnote the *Gordon* court stated:

> Defendant claims in substance that the court's "error" (1) abridged his right to a fair trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16, of the California

Constitution; and (2) infringed his right to due process of law under the Fourteenth Amendment and article I, sections 7 and 15, by arbitrarily depriving him of his full complement of peremptory challenges. After review, we find no such violations.

Insofar as it rests on the United States Constitution, defendant's claim must be rejected under the reasoning of *Ross v. Oklahoma*, *supra*, 487 U.S. 81.

First, the court's refusal to remove the three prospective jurors for cause did not infringe defendant's right to a fair trial by an impartial jury: none sat on his jury. That defendant had to use two peremptory challenges to cure the "error" as to two of the prospective jurors does not mean that the right in question was violated: the loss of those challenges does not constitute deprivation of that right. (*Ross v. Oklahoma*, *supra*, 487 U.S. at pp. 85-88.)

Second, the court's refusal to remove the three prospective jurors for cause did not infringe defendant's right to due process by arbitrarily depriving him of his full complement of peremptory challenges. Since peremptory challenges are a creation of state law and not constitutionally required, the right to exercise such challenges would be denied or impaired only if the defendant did not receive what the law provides. Although at the time relevant here state law gave capital defendants 26 peremptory challenges (former Pen. Code, § 1070, subd. (a), Stats. 1978, ch. 98, § 2, p. 261), it did so subject to the requirement that the defendant exercise those challenges to cure erroneous refusals to excuse prospective jurors for cause (*People v. Coleman*, *supra*, 46 Cal.3d at p. 770). This requirement was plainly not arbitrary. Accordingly, defendant received all that state law provided. (*Ross v. Oklahoma*, *supra*, 487 U.S. at pp. 88-91.)

Insofar as it rests on the California Constitution, defendant's claim must also be rejected. We find the reasoning of *Ross* to be applicable to the state constitutional analogues to the federal constitutional rights considered there. And we also find that reasoning persuasive.

(*People v. Gordon*, *supra*, 50 Cal.3d at p. 1248, fn. 4.)

Accordingly, under *Gordon*, a prejudicial constitutional violation flows from the erroneous denial of a challenge for cause only when the defendant can show that the use of a peremptory challenge to remove that juror left the defendant unable to prevent the seating of another juror who should have been excused for cause. *Gordon* implicitly, if not explicitly, disapproved *Bittaker* to the extent the latter suggests that a prejudicial violation of the defendant's right to an impartial jury is established by showing that the defense wanted, but was unable, to excuse one or more jurors who sat because peremptory challenges were used to remove still other jurors who should have been removed for cause.

However, in *People v. Crittenden* (1994) 9 Cal.4th 83, in addressing the defendant's argument that the trial court's erroneous denial of challenges for cause denied his state and federal constitutional rights, including the rights to a fair and impartial jury and due process, this Court returned to the language that defendant was entitled to reversal if he could "actually show that his right to a fair and 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." (*Id.* at p. 121, citing *People v. Bittaker*, *supra*, 48 Cal.3d at p. 1087.) This Court did not have to determine whether defendant was entitled to reversal because it found that the trial court did not err in denying defendant's challenges for cause. (*People v. Crittenden*, *supra*, 9 Cal.4th at pp. 122-123.)

In *People v. Hawkins* (1995) 10 Cal.4th 920, defendant argued that the trial court had erred in denying two for-cause challenges to prospective jurors and that this error led to the seating of a biased jury in violation of his rights under the Sixth Amendment and its California counterpart. (*Id.* at p. 938.) Defendant asserted that the error forced him to exercise peremptory challenges to excuse the prospective jurors at issue, which left him without a peremptory challenge to Prospective Juror R.C., whom

defendant claimed he would have peremptorily challenged had he had any challenges left. (*Id.* at pp. 938-939.) This Court held:

> Defendant concedes, however, that [R.C.] was not challengeable for cause because of his unabashed profession of willingness to put aside his personal feelings in favor of the prosecution and to follow the law. It is well settled that even if the trial court erred in denying a defendant's motion to remove a juror for cause, that error will be considered harmless if "[n]one of the prospective jurors whom defendant found objectionable actually sat on his jury." (*People v. Gordon*[,] [*supra*,] 50 Cal.3d [at p.] 1247; see also *Ross v. Oklahoma*[,] [*supra*,] 487 U.S. [at p.] 86.) "[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." (*Ross, supra*, 487 U.S. at p. 88.) In this case, none of the jurors that were challenged for cause actually sat on the jury. Moreover, defendant did not communicate to the trial court any dissatisfaction with the jury selected. (See *People v. Crittenden*[,] [*supra*,] 9 Cal.4th at 121; *People v. Morris* (1991) 53 Cal.3d 152, 184.)
>
> Therefore, defendant's right to an impartial jury was not violated, and any error by the trial court in denying defendant's motion to excuse veniremen M[.] and S[.] for cause, if error there was, was not prejudicial.

(*People v. Hawkins, supra*, 10 Cal.4th at p. 939.)

In *People v. Cunningham* (2001) 25 Cal.4th 926, defendant contended that the trial court had erred in denying several of his challenges for cause, obliging him to employ peremptory challenges in order to excuse those prospective jurors. (*Id.* at p. 975.) Citing *People v. Crittenden*, *supra*, 9 Cal.4th at page 121, this Court again returned to the language that defendant was entitled to reversal if he could "actually show that his right to a fair and 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." (*People v. Cunningham, supra*, 25 Cal.4th at p. 976.) This Court found that the trial court did not err in denying the challenges for cause. (*Id.* at pp. 976-979.) But it also found no prejudice because the

defendant "did not exercise all of his peremptory challenges, nor has he justified his failure to exercise them, and therefore he cannot establish that the selection of jurors would have been different had he not exercised his peremptory challenges against these prospective jurors. Nor did defendant express dissatisfaction to the trial court with the jury ultimately selected." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 976.)

In *People v. Weaver, supra,* 26 Cal.4th 876, this Court found the defendant's challenge to the trial court's denial of his for-cause challenges to venire persons B.M. and F.M. both forfeited and without merit. (*Id.* at pp. 909-913.) "Moreover, because neither prospective juror actually sat on defendant's jury, he was not deprived of his constitutional right to an impartial jury." (*Id.* at p. 913, citing *Ross v. Oklahoma*, *supra*, 487 U.S. at p. 86.)

> In the alternative, defendant argues the trial court's erroneous denial of his two challenges for cause forced him to excuse Jurors B.M. and F.M. by exercising two of his peremptory challenges, thereby infringing on his federal constitutional right to a state-created liberty interest in his full statutory complement of peremptory challenges. He claims he should not be forced to surrender one constitutional right (his asserted state-created liberty interest in a full complement of peremptory challenges) to vindicate another constitutional right (his right to a jury free from biased jurors). We rejected this argument in *People v. Gordon*[,] [*supra,*] 50 Cal.3d [at p.] 1248, footnote 4, and defendant does not convince us we should reconsider that decision.

(*People v. Weaver*, *supra,* 26 Cal.4th at p. 913, fn. omitted.)

In *People v. Hillhouse* (2002) 27 Cal.4th 469, this Court found the defendant's challenge to the trial court's denial of his for-cause challenges forfeited because he had failed to use all of his peremptory challenges. (*Id.* at pp. 486-487.) This Court ruled that it did not matter to the forfeiture issue that one of the challenged jurors ultimately became an actual juror, and that nothing in *United States v. Martinez-Salazar*, *supra*, 528 U.S. 304,

compelled a different forfeiture result. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 487.) This Court continued:

> Even if the issue were cognizable, defendant would not prevail. As to the four individuals who did not sit on defendant's jury, "[d]efendant could not possibly have suffered prejudice as a result of the court's refusal to excuse them at his request." (*People v. Millwee*, *supra,* 18 Cal.4th at p. 146; see also *Ross v. Oklahoma*, *supra*, 487 U.S. at p. 86.) As to the actual juror, we see no error.

(*People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 487-488.)

In *People v. Boyette* (2002) 29 Cal.4th 381, this Court found that the trial court had erred in denying defendant's for-cause challenge to Prospective Juror K.C. (*Id.* at pp. 415-417.) Defendant did not garner a reversal, however:

> Because defendant removed Prospective Juror K.C. from the jury using a peremptory challenge, . . . the juror never served on the jury and the impartiality of defendant's jury was not undermined by the trial court's error. Defendant's argument is thus reduced to a claim that the trial court's error forced him to use one of his peremptory challenges, thereby reducing the number he had on hand later in the trial.
>
> Relief is not warranted on this theory. "It is well settled that even if the trial court erred in denying a defendant's motion to remove a juror for cause, that error will be considered harmless if '[n]one of the prospective jurors whom defendant found objectionable actually sat on his jury.' [Citations.] '[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury.' [Citation.]" (*People v. Hawkins*[,] [*supra,*] 10 Cal.4th [at p.] 939, overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 89-91.) Furthermore, defendant did not express dissatisfaction with the jury as constituted and, although we decline to find he forfeited the issue as a result, that omission is relevant to determining whether he was prejudiced by the trial court's error. To the extent defendant now suggests he was unhappy with the composition of the jury, his "belated recitation of dissatisfaction with the jury is speculative. Consequently, he fails to demonstrate that he was harmed by the denial of his

challenges for cause." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1211.)

(*People v. Boyette, supra*, 29 Cal.4th at pp. 418-419.)

In *People v. Yeoman, supra,* 31 Cal.4th 93, the defendant argued that the trial court had deprived him of due process and a fair trial by denying his challenges to four prospective jurors for cause. (*Id.* at p. 114.) Defendant peremptorily challenged each of those prospective jurors, and expressed dissatisfaction with the jury. (*Ibid.*) This Court rejected the defendant's argument without examining the merits of his challenges for cause because he could not show prejudice:

> To prevail on such a claim, defendant must demonstrate that the court's rulings affected his right to a fair and impartial jury. (*People v. Crittenden*[,] [*supra,*] 9 Cal.4th [at p.] 121.) None of the four prospective jurors could possibly have affected the jury's fairness because none sat on the jury. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1159; see *Ross v. Oklahoma*[,] 487 U.S. [at p.] 81, 85-86.) The harm to defendant, if any, was in being required to use four peremptory challenges to cure what he perceived as the trial court's error. Yet peremptory challenges are given to defendants subject to the requirement that they be used for this purpose. (*People v. Gordon*[,] [*supra,*] 50 Cal.3d [at p.] 1248, fn. 4.) While defendant's compliance with this requirement undoubtedly contributed to the exhaustion of his peremptory challenges, from this alone it does not follow that reversible error occurred. An erroneous ruling that forces a defendant to use a peremptory challenge, and thus leaves him unable to exclude a juror who actually sits on his case, provides grounds for reversal only if the defendant "*can actually show that his right to an impartial jury was affected* . . . ." (*People v. Bittaker*[,] [*supra,*] 48 Cal.3d [at p.] 1087-1088, italics added.) In other words, the loss of a peremptory challenge in this manner " 'provides grounds for reversal only if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*' " (*People v. Hillhouse*[,] [*supra,*] 27 Cal.4th [at p.] 487, italics added, quoting *Ross v. Oklahoma, supra*, at p. 89; cf. *United States v. Martinez-Salazar*[,] 528 U.S. [at pp.] 315-317.) Here, defendant cannot show his right to an impartial

> jury was affected because he did not challenge for cause any sitting juror. No incompetent juror was forced upon him.

(*People v. Yeoman*, *supra*, 31 Cal.4th at p. 114.)

The Court of Appeal in the present case noted that while *Yeoman* cited *Bittaker* without acknowledging any disagreement with it, *Yeoman* "appears to impose a stricter standard of prejudice than *Bittaker* by requiring the defendant to demonstrate that the exhaustion of his peremptory challenges resulted in the seating of an 'incompetent' juror, rather than merely a juror whom the defendant would have preferred to remove." (Opn. at p. 6.) Another Court of Appeal has stated that *Yeoman* "impliedly disapproved *People v. Bittaker*, *supra*, 48 Cal.3d 1046, to the extent *Bittaker* might be read to hold that a defendant may establish that his right to an impartial jury was affected if he shows that he wanted, but was unable, to excuse one or more jurors who sat on his case (none of whom he challenged for cause) because he had to use peremptory challenges to remove jurors who should have been removed for cause." (*People v. Baldwin* (2010) 189 Cal.App.4th 991, 1001.)

In *People v. Blair*, *supra,* 36 Cal.4th 686, the defendant contended that the trial court violated his right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution by refusing to excuse for cause Prospective Jurors L., Q., and V., who all asserted they always would vote for the death penalty for certain forms of murder. (*Id.* at p. 740.) This Court cited the *Bittaker* language that a defendant can establish that the erroneous denial of a challenge for cause violated his or her right to a fair and impartial jury if he or she can show 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." (*People v. Blair*, *supra*, 36 Cal.4th at p. 742, citing *People v. Bittaker*, *supra*, 48 Cal.3d at pp. 1087-1088.)

> Here, defendant used peremptory challenges to remove Jurors Q. and V. from the panels of prospective regular and alternate jurors, and Juror L. was excused for other reasons. Accordingly, none of these jurors sat on the jury that ultimately decided defendant's case. Further, defendant does not identify any sitting juror whom he challenged for cause. (See *Ross v. Oklahoma*, *supra*, 487 U.S. at p. 86; *People v. Yeoman*[,] [*supra*,] 31 Cal.4th [at p.] 114.) . . . . Finally, defendant fails to identify any juror whom he would have excused had he not used his peremptory challenges to remove Jurors V. and Q. (*Ross v. Oklahoma*, *supra*, 487 U.S. at p. 88; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 418-419; cf. *People v. Williams*, *supra*, 16 Cal.4th at p. 668.) Accordingly, focusing on the 12 jurors who actually decided defendant's case, as we must (see *Ross v. Oklahoma*, *supra*, 487 U.S. at p. 86), we conclude that defendant has not established that his right to an impartial jury was violated.

(*People v. Blair*, *supra*, 36 Cal.4th at pp. 742-743.)

The *Blair* court went on to rule that the trial court had properly denied each of the defendant's for-cause challenges in any event. (*People v. Blair*, *supra*, 36 Cal.4th at p. 743.) *Blair* lastly held:

> Defendant asserts that he "used all of his peremptory challenges to excuse these jurors, leaving him no peremptory challenges when the final juror was seated." To the extent this assertion can be interpreted as a claim that the trial court arbitrarily deprived defendant of peremptory challenges due him under state law in violation of his Fourteenth Amendment right to due process of law (see *Hicks v. Oklahoma* (1980) 447 U.S. 343), this claim must fail. Defendant received and exercised the 20 peremptory challenges allotted to him under state law. (See Code Civ. Proc., § 231.) State law required him to use those peremptories to cure any erroneous denials of challenges for cause. (*People v. Gordon*[,] [*supra*,] 50 Cal.3d [at p.] 1248, fn. 4 . . . .) Defendant received all that was due him under state law. (*Ross v. Oklahoma*, *supra*, 487 U.S. at pp. 88-91; *People v. Gordon*, *supra*, 50 Cal.3d at p. 1248, fn. 4.)

(*People v. Blair*, *supra*, 36 Cal.4th at pp. 743-744.)

In *People v. Alfaro* (2007) 41 Cal.4th 1277, the defendant asserted that the trial court had erred in denying her for-cause challenge to A.P., as

to whom defendant used her last peremptory challenge. Defendant claimed that the court's refusal to sustain her challenge to A.P. for cause resulted in the denial of her Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair and impartial jury. Defendant also claimed that the trial court had erred in denying her request for additional peremptory challenges. (*Id.* at pp. 1313-1314.) This Court rejected the arguments, as follows:

> A defendant who claims a trial court wrongly denied a challenge for cause must demonstrate that his or her right to a fair and impartial jury thereby was affected, by establishing that he or she (1) was deprived of a peremptory challenge that he or she would have employed to excuse a juror who sat on the case, (2) exhausted all available peremptory challenges, and (3) expressed to the court dissatisfaction with the jury selected. (*People v. Crittenden*[,] [*supra*,] 9 Cal.4th [at p.] 121-122; *People v. Hawkins*[,] [*supra*,] 10 Cal.4th [at p.] 939; *People v. Horton* (1995) 11 Cal.4th 1068, 1093.) Defendant has not identified any person who sat on her jury panel whom she would have peremptorily challenged but for the circumstance that she had used her final challenge to excuse another prospective juror. Accordingly there was no error in failing to excuse A.P. for cause. Moreover, any error in failing to excuse A.P. for cause would not have been prejudicial, because there is no basis for us to conclude that the jury empanelled was anything but impartial. (*Ross v. Oklahoma*[,] 487 U.S. [at pp.] 86-91; *People v. Yeoman*[,] [*supra*,] 31 Cal.4th 93 [].)

(*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1314.)

This Court continued:

> Defendant claims the trial court erred in failing to grant her request for additional peremptory challenges. The court was not required to grant such a request absent a likelihood that defendant otherwise would receive an unfair trial before a partial jury (*People v. Pride* (1992) 3 Cal.4th 195, 230), a standard not met in the present case. As noted above, defendant has not demonstrated that the trial court erroneously denied any challenge for cause, and no basis for reversal has been shown. (*Ibid.*)

(*People v. Alfaro*, *supra*, 41 Cal.4th at pp. 1313-1314.)

In *People v. Wallace* (2008) 44 Cal.4th 1055, this Court held that the defendant had forfeited his appellate challenge to trial court's denial of seven of his for-cause challenges to prospective jurors, because defendant did not exhaust all of his peremptory challenges. (*Id.* at p. 1055.) This Court further held:

> In any event, defendant fails to show prejudice. " 'To prevail on such a claim, defendant must demonstrate that the court's rulings affected his right to a fair and impartial jury.' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1099.) Here, none of the seven purportedly "pro-death" jurors served on defendant's jury. Thus, the trial court's failure to excuse these prospective jurors could not possibly have affected the fairness of the jury that decided defendant's case. (*People v. Weaver*[,] [*supra*,] 26 Cal.4th [at p.] 913; *Ross v. Oklahoma*[,] [*supra*,] 487 U.S. [at p.] 86.)
>
> Nor, contrary to defendant, did the trial court's refusal to excuse the seven prospective jurors "pollute the jury pool," "alter the random order," or "force" the defense "to make further challenges for cause or exercise peremptory challenges which could have been saved for more productive use." (See *People v. Yeoman*[,] [*supra*,] 31 Cal.4th [at p.] 114 [loss of a peremptory challenge is a ground for relief " ' "only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him" ' "]; see also *Ross v. Oklahoma*, *supra*, 487 U.S. at p. 88 [rejecting the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury].)

(*People v. Wallace*, *supra*, 44 Cal.4th at p. 1056.)

In *People v. Farley* (2009) 46 Cal.4th 1053, the defendant contended that the trial court had erred in denying a defense challenge to Prospective Juror E.D. for cause, in violation of defendant's rights under the Sixth, Eight, and Fourteenth Amendments. (*Id.* at p. 1095.) Although defendant used a peremptory challenge to excuse E.D. after the trial court had refused to excuse her, he failed to exhaust his peremptory challenges. This Court

thus found the issue forfeited. (*Id.* at pp. 1095-1096.) The Court further held:

> We also reject defendant's contention that the assertedly erroneous denial of the challenge for cause to Prospective Juror E.D. is "reversible error because it in effect deprived him of a peremptory challenge." "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." (*Ross v. Oklahoma*[,] [*supra*,] 487 U.S. [at p.] 88; see *id.* at pp. 89-91 [the court also rejected a challenge under the 14th Amend.]; *People v. Richardson* (2008) 43 Cal.4th 959, 987-988 ["where defendant did not exhaust all his peremptory challenges, he cannot even begin to demonstrate that his right to an impartial jury was impaired"]; *People v. Ashmus* (1991) 54 Cal.3d 932, 966 ["That an allegedly biased juror might have sat had he or she not been removed by peremptory challenge does not implicate the right to a fair and impartial jury in any substantial way."], abrogated on other grounds in *People v. Yeoman*[,] [*supra*,] 31 Cal.4th [at p.] 117.)

(*People v. Farley*, *supra*, 46 Cal.4th at p. 1096.)

In *People v. Mills* (2010) 48 Cal.4th 158, defendant argued that the trial court had erred under the Sixth, Eighth and Fourteenth Amendments in denying his challenges for cause to three prospective jurors, K.W., L.S., and R.G. (*Id.* at pp. 185-186.) This Court found that defendant had forfeited his appellate challenge to the trial court ruling regarding K.W. and L.S. because they were considered as alternate jurors only and defendant did not exhaust the peremptory challenges allotted him for alternate jurors. (*Id.* at p. 186.) "But even were we to overlook this procedural forfeiture, we would find no possible prejudice irrespective of whether the trial court erred, because K.W. and L.S. were considered as alternate jurors only, and no alternate jurors served in defendant's trial." (*Ibid.*) With respect to R.G., this Court found that defendant had forfeited his appellate challenge to the trial court's for-cause ruling because, while defendant peremptorily challenged R.G. and used all of his peremptory challenges, defendant did

not express dissatisfaction with the jury ultimately constituted. (*Id.* at pp. 186-187.) In any event:

> Were we to reach the merits of the issue, we would conclude it lacked merit. "To prevail on such a claim, defendant must demonstrate that the court's rulings affected his right to a fair and impartial jury." (*People v. Yeoman*[,] [*supra*,] 31 Cal.4th [at p.] 114.) "[T]he loss of a peremptory challenge in this manner ' "provides grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him." ' " (*Ibid.*) Because none of the identified prospective jurors served on defendant's jury, nor was he forced to tolerate an incompetent juror on his jury as a result of exhausting his allotted peremptory challenges, the trial court's decision to deny his challenges for cause could not have affected his right to be tried by a fair and impartial jury. (*People v. Wallace*[,] [*supra*,] 44 Cal.4th [at p.] 1056.)

(*People v. Mills*, *supra*, 48 Cal.4th at p. 187.)

In *People v. Clark*, *supra*, 52 Cal.4th 856, the defendant claimed he was denied his right to a fair and impartial jury by the court's erroneous denial of defense challenges for cause against eight prospective jurors who, defendant claimed, exhibited strong antidefense or pro-death-penalty biases. (*Id.* at p. 901.) This Court rejected the argument, in reliance on *Gordon* and *Yeoman*:

> The record shows that the defense used five of its 20 peremptory challenges to excuse some of the complained-of jurors from the petit jury: Prospective Jurors V.D., D.M., L.M., C.W., and S.L. Later, after expressing dissatisfaction with the jury as then constituted, counsel declined to use her final peremptory challenge because Prospective Juror M.L., whom she had unsuccessfully challenged for cause, was in line to fill the next vacancy in the jury box. Counsel asked for additional peremptory challenges, but the court denied the request. During selection of alternate jurors, counsel exhausted all three of her allotted peremptory challenges, using two of them to excuse M.L. and Prospective Juror S.F., whom she also had unsuccessfully challenged for cause. Prospective Juror M.K., another unsuccessful challenge, was not called to the jury box.

> Defendant's claim of error does not succeed because he fails to show he was prejudiced by the court's denial of his challenges for cause. As previously noted, to prevail on his claim, defendant must show the court's denial of the challenges for cause " 'affected his right to a fair and impartial jury.' " (*People v. Mills*, *supra*, 48 Cal.4th at p. 187; see *People v. Yeoman* (2003) 31 Cal.4th 93, 114.) Here, none of the eight prospective jurors actually sat on the jury. Thus, none of the court's rulings could have affected defendant's right to a fair and impartial jury. (*People v. Yeoman*, *supra*, at p. 114.)

(*People v. Clark*, *supra*, 52 Cal.4th at pp. 901-902, fn. omitted.)

Finally, in *People v. Whalen* (2013) 56 Cal.4th 1, the defendant asserted that the trial court had erred in denying numerous defense challenges to prospective jurors. Defendant employed peremptory challenges against only some of the allegedly erroneously-retained jurors, He used only 16 of his 20 allotted peremptory challenges as to the regular jurors, and none of his four allotted peremptory challenges during selection of the alternate jurors, expressed no dissatisfaction with the jury ultimately selected, nor requested additional peremptory challenges. This Court therefore found defendant's claim forfeited (*id.* at pp. 42-44), but additionally held:

> Even were we to find the claim preserved for review, however, we would reject it on the merits. To prevail on this claim, "defendant must demonstrate that the court's rulings affected his right to a fair and impartial jury." (*People v. Yeoman*[,] [*supra*,] 31 Cal.4th [at p.] 114.) Here, none of the 15 identified prospective jurors sat on defendant's jury. (*Ibid.*; accord, *People v. Mills*, *supra*, 48 Cal.4th at p. 187.) Further, although defendant used five of his peremptory challenges to remove some of these 15 from the jury, the loss of a peremptory challenge in this manner " 'is grounds for reversal only if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*' " (*People v. Hillhouse*[,] [*supra*,] 27 Cal.4th [at p.] 487; italics added, quoting *Ross v. Oklahoma*[,] [*supra*,] 487 U.S. [at p.] 89.) Here, defendant did not challenge for cause any of the 12 jurors who decided his case. Moreover, as we explain *post*, none of the 12 jurors was

> biased against defendant. Because defendant "was not forced to tolerate an incompetent juror" as a result of having used peremptory challenges to excuse the five prospective jurors identified above, and because none of the 10 other prospective jurors whom defendant unsuccessfully challenged sat on his jury, the court's assertedly erroneous denials of challenges for cause "could not have affected [defendant's] right to be tried by a fair and impartial jury." (*People v. Mills*, *supra*, at p. 187.)

(*People v. Whalen*, *supra*, 56 Cal.4th at p. 45, fn. omitted.)

C. The Majority of State Jurisdictions Reject Defendant's Proposed Rule

Subsequent to *Ross v. Oklahoma, supra*, 487 U.S. 81, a number of courts in other states have addressed the issue of whether the use of peremptory challenges to excuse jurors who should have been excused for cause compels reversal. The overwhelming majority have either rejected that rule, or reaffirmed their jurisdiction's law that the curative use of peremptory challenges is not reversible error, absent prejudice to the defendant in the form of a legally incompetent juror being forced upon the defense: See, e.g., *Minch v. State* (Alaska Ct. App. 1997) 934 P.2d 764, 769-770; *State v. Hickman* (Az. 2003) 68 P.3d 418; *Ferguson v. State* (Ark. 2000) 33 S.W.3d 115, 124-125; *Manley v. State* (Del. 1998) 709 A.2d 643, 655-656, fn. 15; *State v. Ramos* (Id. 1991) 808 P.2d 1313, 1314-1315; *People v. Gleash* (Ill. App. Ct. 1991) 568 N.E.2d 348, 353; *State v. Neuendorf* (Iowa 1993) 509 N.W.2d 743, 747; *State v. Ackward* (Ks. 2006) 128 P.3d 382, 400; *Grandison v. State* (Md. 1995) 670 A.2d 398, 417-418; *State v. Barlow* (Minn. 1995) 541 N.W.2d 309, 311-313; *Mettetal v. State* (Miss. 1992) 602 So. 2d 864, 869; *State v. Nicklasson* (Mo. 1998) 967 S.W.2d 596, 612; *State v. Quintana* (Neb. 2001) 621 N.W.2d 121, 134; *Blake v. State* (Nev. 2005) 121 P.3d 567; *State v. DiFrisco* (N.J. 1994) 645 A.2d 734, 751-753; *State v. Entzi* (N.D. 2000) 615 N.W.2d 145, 149; *State v. Barone* (Ore. 1998) 969 P.2d 1013, 1018-1019; *Commonwealth v.*

Ingram (Pa. Sup. Ct. 1991) 591 A.2d 734, 739, fn. 4; *Green v. Maryland* (S.C. 2002) 564 S.E.2d 83; *State v. Verhoef* (S.D. 2001) 627 N.W.2d 437, 441; *State v. Mann* (Tenn. 1997) 959 S.W.2d 503, 533; *State v. Menzies* (Utah 1994) 889 P.2d 393, 398; *State v. Fire* (Wash. 2001) 34 P.3d 1218, 1222-1224; *State v. Phillips* (W. Va. 1995) 461 S.E.2d 75, 92-93; *State v. Lindell* (Wis. 2001) 629 N.W.2d 233, 236-252.

Defendant cites cases from a few state courts that have, as a matter of state law, adopted a rule of reversal identical or similar to the one he asks this Court to adopt for California: *State v. Esposito* (Conn. 1992) 613 A.2d 242, 250; *Hill v. State* (Fla. 1985) 477 So.2d 553, 556; *Salgado v. State* (Fla. Dist. Ct. App. 2002) 829 So.2d 342, 345; *Whiting v. State* (Ind. 2012) 969 N.E.2d 24, 30; *Gabbard v. Commonwealth* (Ky. 2009) 297 S.W.3d 844, 854-855; *Commonwealth v. Fletcher* (Pa. Sup. Ct. 1976) 369 A.2d 307, 309; *Saldano v. State* (Tex. Crim. App. 2007) 232 S.W.3d 77, 91; *State v. Doleszny* (Vt. 1986) 508 A.2d 693, 694.) (AOBM 11-12.)

The Connecticut Supreme Court found in *Esposito* that the trial court had erred in denying one of defendant's for-cause challenges, noted that "the Connecticut constitution guarantees a criminal defendant the right to exercise peremptory challenges in the selection of his jury, [citations]," and thus concluded "that the trial court's action abridged this constitutional and statutory right of the defendant. Accordingly, we agree with numerous other courts throughout the nation 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.' [Citations.]" (*State v. Esposito, supra*, 613 A.2d at pp. 249-250.) The *Esposito* court did not discuss *State v. Pelletier* (Conn. 1989) 552 A.2d 805, a case it had decided three years earlier.

In *Pelletier*, the defendant claimed that the trial court had erred in denying his motion to excuse for cause eight prospective jurors, thereby forcing him to expend his peremptory challenges. The court found "no error," ruling first that the defendant's claim "rested on the presumption that if he had not been forced to use those extra peremptory challenges on the eight prospective jurors, he might have used them to peremptorily challenge certain venirepersons who subsequently became jurors or alternates. This reasoning is speculative at best and clearly does not rise to the level of proof required to establish that the trial court abused its discretion in denying the defendant's for cause challenges." (*State v. Pelletier, supra*, 552 A.2d at pp. 809-810.) Second, the court found that on the record before it the trial court had not abused its discretion in refusing to excuse any of the challenged jurors. (*Id.* at p. 810.) "Finally, the defendant did not accept any juror or alternate whom he requested to be removed for cause. Therefore, even if those prospective jurors were biased, the defendant was not harmed because those individuals never became members of the jury." (*Ibid.*, citing *Ross v. Oklahoma, supra*, 487 U.S. 81.)

In addition to the state courts identified by defendant, a few others follow his proposed rule or one virtually similar: See e.g., *People v. Lefebre* (Colo. 2000) 5 P.3d 295, 307; *State v. Kauhi* (Haw. 1997) 948 P.2d 1036, 1041; *Fortson v. State* (Ga. 2003) 587 S.E.2d 39, 41; *State v. Taylor* (La. 2004) 875 So.2d 58, 62; *State v. Good* (Mont. 2002) 43 P.3d 948, 959-960; *People v. Cahill* (N.Y. 2003) 809 N.E.2d 561, 578; *Brown v. Commonwealth* (Va. Ct. App. 2000) 533 S.E.2d 4, 8, fn. 2.

D. The Reasons Defendant Offers in Support of His Proposed Rule Do Not Withstand Scrutiny, and the Rule is Inconsistent With the California Constitution

The Court should decline defendant's invitation to overrule cases like *People v. Gordon, supra*, 50 Cal.3d 1223, *People v. Yeoman, supra*, 31

Cal.4th 93, and *People v. Clark*, *supra*, 52 Cal.4th at p. 856, to adopt his rule of reversal. Defendant offers three arguments in support of that rule. None of them withstand scrutiny. (ABOM 6, 12.)

First, defendant contends that his rule furthers fundamental fairness because it "gives due deference to the importance of peremptory challenges in our judicial system" and "ensures that a trial court's error does not deprive a defendant of the full use of the peremptory challenges allotted him by law." (AOBM 6, 12-13.) Defendant ignores what this Court has stated previously—peremptory challenges are a creation of state law and not constitutionally required and are denied or impaired only if the defendant does not receive what the law provides. (*People v. Gordon*, *supra*, 50 Cal.3d at p. 1243 & fn. 4.) Because in California defendants are required to use exercise those challenges to cure erroneous refusals to excuse prospective jurors for cause, defendants do receive all that state law provides by using peremptory challenges curatively. (*Ibid.*)

That defendant requested and was denied additional peremptory challenges—a distinguishing fact from cases like *Gordon* and *Yeoman*—does not provide support for his proposed rule. The law requires that defendants to use peremptory challenges curatively and that is not a deprivation of a peremptory challenge to which the defendant is entitled by statute. A trial court's denial of the defendant's request for additional peremptory challenges does not change the equation. As this Court has previously stated, trial courts are not required to grant a request for additional peremptory challenges "absent a likelihood that defendant otherwise would receive an unfair trial before a partial jury." (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1314.) That standard is one that defendant has not acknowledged, let alone met, in the present case.

Peremptory challenges, while a "venerable" part of criminal trials, are not of constitutional dimension and are intended principally to help

secure the constitutional guarantee of trial by a fair and impartial jury. (*United States v. Martinez-Salazar*, *supra*, 528 U.S. at pp. 311, 316.) Here, defendant's peremptory challenges allowed him to receive a trial by a fair and impartial jury—he does not contend otherwise. It would be incongruous to hold that the use of the peremptory itself forms the basis for reversing the verdict of that fair and impartial jury.

Defendant argues next that his proposed rule "ensures that counsel will be able to mold the jury to the extent possible so that it is receptive to his side." (AOBM 13.) Certainly many criminal practitioners attempt to use peremptory challenges this way. But a defendant does not have a right to a jury of a particular composition. Defendants do have a right to a fair and impartial jury. Accordingly, a defendant receives an unjustified windfall from reversal by virtue of the defense's use of peremptory challenges that helped to ensure a fair and impartial jury but prevented "molding a receptive jury" to the fullest possible extent. This is especially true given that the state could choose to eliminate peremptories altogether. (*Stilson v. United States*, *supra,* 250 U.S. at p. 586.) "Peremptory challenges are . . . not an end in themselves, but rather a means to an end: an impartial jury. Where a party receives an impartial jury, the issue of peremptories is moot. The question is . . . whether [the party challenging the trial court's ruling] obtained a fair jury despite the imbalance of peremptories. Where a defendant receives an impartial jury, the issue of peremptories is moot." (*Minch v. State*, *supra*, 934 P.2d at p. 769, quoting *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin* (Alaska 1992) 828 P.2d 745, 762-763.)

Defendant's third argument is that "a rule whereby prejudice only appears when the record establishes that the juror sought to be removed was incompetent results in a fundamental unfairness" because peremptories "are creatures of statute, and the loss of one or more stemming from the

correction of an erroneous denial for cause, means that the defendant is denied the ability to use them as the Legislature intended." (AOBM 14.) Defendant again forgets or ignores that California law requires defendants to use peremptory challenges to correct an erroneous denial for cause. And that requirement serves a valid state goal: it helps render trial court errors harmless and thus improves judicial efficiency.

Defendant's argument, that when a challenge for cause is erroneously denied, prejudice results and reversal is required if the defendant, having his exhausted his allotment of peremptory challenges, expressed dissatisfaction with a sitting juror and failed in his or her attempt to obtain an additional peremptory challenge to ensure that person's removal from the panel, amounts to a request for per se reversal. That is inconsistent with the California Constitution.

Whatever the biases of M.P. and A.D., neither prospective juror decided defendant's guilt. Hence, any search for prejudice cannot focus on the trial court's refusal to excuse them. Defendant's claim of prejudice from the unavailability of a peremptory challenge to Juror No. 8 after defendant exercised peremptories against M.P. and A.D. likewise fails. Absent a factual showing that Juror No. 8 or some other member of the jury was not impartial, it is wholly speculative to assert any of the regular juror's seating as prejudice. To reverse without requiring such a showing is thus tantamount to per se reversal. Such reversals, however, are reserved for "structural defects in the trial mechanism," errors which defy analysis under harmless error standards because the effect of the error cannot be quantitatively assessed in the context of other evidence presented in order to determine whether it was prejudicial or harmless. (*People v. Cahill* (1993) 5 Cal.4th 478, 493.) When, as here, one can determine from the record that the trial court's erroneous denial of for-cause challenges did not

lead to a biased or otherwise legally incompetent juror sitting on the case, the error is harmless.

Article VI, section 13 of the California Constitution provides:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Clearly an error in denying a for-cause challenge during jury selection is an error in procedure. There is no miscarriage of justice when the defendant uses a peremptory challenge to excuse the erroneously-retained juror, even when that challenges leaves the defense without any peremptory to challenge any undesirable sitting juror, provided the sitting jurors are all legally competent. In such a situation the trial court's error did not deny the defendant what the state and federal Constitutions guarantee: a fair and impartial jury.

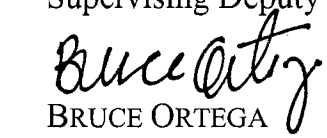
CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: July 8, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
RENÉ A. CHACÓN
Supervising Deputy Attorney General



BRUCE ORTEGA
Deputy Attorney General
Attorneys for Respondent

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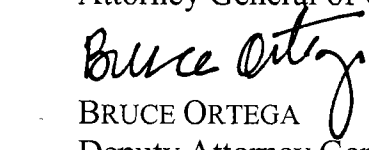
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13,423 words.

Dated: July 8, 2013

KAMALA D. HARRIS
Attorney General of California



BRUCE ORTEGA
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Black** No.: **S206928**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 8, 2013, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Robert L.S. Angres
Attorney at Law
4781 E. Gettysburg Avenue, Suite 14
Fresno, CA 93726
(2 copies)

First District Appellate Project
Attn: Executive Director
730 Harrison St., Room 201
San Francisco, CA 94107
(sent via email: eservice@fdap.org)

The Honorable Nancy O'Malley
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

Clerk, California Court of Appeal
First Appellate District, Division One
350 McAllister Street
San Francisco, CA 94102

County of Alameda
Criminal Division
Rene C. Davidson Courthouse
Superior Court of California
1225 Fallon Street, Room 107
Oakland, CA 94612-4293

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 8, 2013, at San Francisco, California.

E. Rios
Declarant

E. Rios
Signature

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