

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

SUPREME COURT  
**FILED**

JUL 24 2013

Frank A. McGuire Clerk

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

Deputy

**APPELLANT'S REPLY BRIEF ON THE MERITS**

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**APPELLANT'S REPLY BRIEF ON THE MERITS**

Appellant believes that the issues raised in his opening brief have been fully joined by respondent's brief. Appellant does not wish to reiterate the arguments put forth in his opening brief, but rather intends to address in this reply brief only those points raised by respondent on which he believes that the Court will benefit from further argumentation. Specific points of argument which are discussed in appellant's opening brief, but not repeated in this reply brief, are by no means abandoned.

## ARGUMENT

### **I. A HOLDING THAT REVERSIBLE ERROR FLOWS FROM THE USE OF A PEREMPTORY CHALLENGE TO CORRECT AN IMPROPER DENIAL OF A CHALLENGE FOR CAUSE COUPLED WITH AN UNSUCCESSFUL REQUEST FOR AN ADDITIONAL CHALLENGE TO REMOVE AN OBJECTIONABLE JUROR DOES NOT RUN AFOUL OF THE CALIFORNIA CONSTITUTION**

#### **A. INTRODUCTION**

According to respondent, appellant's "argument that when a challenge for cause is erroneously denied, prejudice results and reversal is required if [appellant], having 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." (RBM 39.) In other words, respondent claims that such an error is one of procedure only from which no miscarriage of justice results. (RBM 40.) As a result, argues respondent, the error is not susceptible to reversal under California law.

Appellant disagrees with respondent that a rule classifying such error as per se reversible runs afoul of the California Constitution. Respondent is mistaken when he suggests that this Court is somehow barred from ruling in appellant's favor.

**B. A TRIAL COURT'S DEPARTURE FROM THE STATUTORY PROCEDURE PRESCRIBED FOR THE SELECTION OF A JURY RESULTS IN ERROR THAT IS REVERSIBLE PER SE**

Respondent correctly notes that Article VI, section 13 of the California Constitution requires a reversal of the judgment in those instances where the record reveals a miscarriage of justice. (RBM 39-40; *People v. Watson* (1956) 46 Cal.2d 818, 836.) But with that said, no matter how conclusive or strong the evidence may be against a defendant, appellate courts in this state have not hesitated to reverse convictions where, in the context of jury selection, the record merely reveals a departure from established procedure.

Thus, in an analogous context, where a trial court denies jointly tried defendants their allotment of peremptory challenges, the error could not be deemed harmless under any circumstance. (*People v. O'Connor* (1927) 81 Cal.App. 506, 517-519.) "From what has been said," observed the *O'Connor* court, "the conclusion necessarily follows that the defendants were compelled to submit to a trial against which they had a legal right to object and against which they did object and, therefore, that the jury was not impaneled in this case as provided by law and the trial court was not authorized to proceed with the trial with the jury in the impanelment of which the rights of the defendants were not allowed to be exercised." (*Id.* at p. 519.) The constitutional provision requiring reversal only upon a showing of a miscarriage of justice did not apply, because the end result was not a mistake in procedure, but rather a substitution of procedure. (*Id.* at p. 520.) Moreover, "the defendants were deprived of the right of trial by jury, as it should have been constituted by law, in that they were compelled to go to trial before jurors whom

they were entitled to reject, which brings it in principle on a parallel basis with decisions of courts relative to the right of trial by jury.” (*People v. O’Connor, supra*, 81 Cal.App. at p. 520.) According to the *O’Connor* court, to give the “miscarriage of justice” of language its proper application, “the juror impaneled must be such a juror against whom the defendant has no legal objection and *against whom he is not deprived of exercising any legal objection or right accorded him by law.* (*Id.* at p. 521, italics added.)

The *O’Connor* court’s analysis is not an anomaly. More recently, this Court has recognized that “[t]he failure to grant a defendant the prescribed number of peremptory challenges when the record reflects his desire to excuse a juror before whom he was tried is reversible error.” (*People v. Armendariz* (1984) 37 Cal.3d 573, 584, accord *People v. Coleman* (1988) 46 Cal.3d 749, 770 and cases cited therein.)

Appellant submits that if reversible error results when a trial court erroneously denies a defendant the use of his full panoply of peremptory challenges, no logical reason can exist for holding that a different standard applies in this case. Put another way, where a defendant is denied the use of a peremptory challenge in order to correct an error that is not of his own making such that he is deprived of an opportunity afforded to him by law to assist in the formation of the jury and he complains of the loss to the trial court, the error necessarily results in a denial of a defendant’s full use of his panoply of peremptory challenges and should be reversible, notwithstanding whether the target of a lost peremptory is an objectionable or an incompetent juror. Otherwise, “[i]f one of an accused’s peremptory challenges could be taken away from him, why not five be taken, and if five, why not ten, leaving none, and all jurors be acceptable save unfair and partial



ones.” (*Wolfe v. State* (Tex. Crim. App. 1944) 178 S.W.2d 274, 279-280, opn. on reh’g.) Significantly, appellant is aware of no case that holds that a trial court’s failure to grant a defendant his prescribed number of peremptory challenges is harmless in the absence of a showing that an incompetent juror sat on the panel. The error in this case was prejudicial as a matter of law.

### CONCLUSION

For the foregoing reasons and the reasons stated in appellant’s opening brief, appellant respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: July 23, 2013

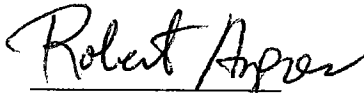
Respectfully submitted,



ROBERT L.S. ANGRES  
Attorney for Appellant

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 1,065 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 July 23, 2013.

  
Robert L.S. Angres  
Attorney for Appellant

## 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 July\_\_\_\_, 2013, I served the attached:

### APPELLANT'S REPLY BRIEF ON THE MERITS

- BY MAIL** - I deposited a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail in Clovis, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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- (BY ELECTRONIC SUBMISSION)** – I am personally and readily familiar with the preparation and process of documents in portable format (PDF) for e-mailing, and I caused said document(s) to be prepared in PDF and then served by electronic mail to the party listed below.

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I declare under penalty of perjury of under the laws of the State of California that the foregoing is true and correct. Executed on July\_\_\_\_, 2013 at Clovis, California.

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ROBERT L.S. ANGRES