

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 159346

v.

JACQUES JEAN KABONGO
Defendant-Appellant.

Lower Court No. 16-010745-FH
Court of Appeals No. 338733

BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE

Filed under AO 2019-6

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Statement of the Questions

I.

The party challenging a peremptory strike or strikes of a juror or jurors must prove purposeful discrimination, and the trial judge's decision on the question is entitled to great deference. The trial judge found that the challenged strike was not discriminatory. Did the trial judge clearly err in so finding?

Defendant answers: YES

Amicus answers: NO

II.

Is the loss of a peremptory challenge reversible error?

Defendant answers: YES

Amicus answers: NO

Statement of Facts

Amicus adopts the statement of the People of the State of Michigan.

Argument

I.

The party challenging a peremptory strike or strikes of a juror or jurors must prove purposeful discrimination, and the trial judge's decision on the question is entitled to great deference. The trial judge found that the challenged strike was not discriminatory. The trial judge did not clearly err in so finding.

Introduction: the Issues

This Court has directed that the following issues be briefed:

- (1) whether the prosecution's exercise of a peremptory challenge against prospective juror no. 2 violated *Batson v. Kentucky*, 476 US 79 (1986);
- (2) whether the trial court erroneously precluded the defendant from exercising a peremptory challenge against prospective juror no. 5;
- (3) if so, whether such an error should be subject to automatic reversal or harmless error review, *Rivera v Illinois*, 556 US 148, 162 (2009) (holding that a trial court's erroneous denial of a defendant's peremptory challenge, standing alone, is not a structural error under the federal constitution requiring automatic reversal, but that "[s]tates are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error per se") and compare, e.g., *People v Bell*, 473 Mich 275, 292-295 (2005) (stating in arguable dictum that harmless error review applies to such errors) with *Hardison v State*, 94 So 3d 1092, 1101 & n 37 (Miss, 2012) (plurality opinion) (citing "[a]t least five states" that have adopted an automatic reversal rule as a matter of state law and following those states); and

- (4) if so, whether reversal is warranted in this case.

Amicus answers that no *Batson* error occurred. And the loss of a peremptory challenge, even if the result of a mistake, is not constitutional error, and thus is not structural error. It is therefore subject to review under MCL § 769.26, and does not occasion a miscarriage of justice. Reversal is thus not warranted in this case.

Discussion

A. The framework, and a note on establishment of a prima facie showing of discriminatory use of peremptory challenges

1. The framework of the inquiry

There are three steps to a *Batson* challenge, all of which must be met in order for error to be found.

- First, the *opponent* of the peremptory challenge must make a prima facie showing of discrimination. To establish a prima facie case of discrimination based on race, the opponent must show that:
 1. he or she is a member of a cognizable racial group;
 2. the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and
 3. *all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race.* So long as the sum of the proffered facts ‘gives rise to an inference of discriminatory purpose,’ the first step is satisfied.

- Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the *proponent* of the peremptory challenge to articulate a race-neutral explanation for the strike. This does not require an explanation that is persuasive, or even plausible; rather, the issue is whether the proponent’s explanation is facially valid as a matter of law. A neutral explanation means an explanation based on something other than the race of the juror. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral
- Third, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the *opponent* of the challenge has proved purposeful discrimination.¹

In considering these steps, it must be remembered that “the ultimate burden of persuasion regarding racial motivation rests with, *and never shifts from*, the *opponent* of the strike.”²

2. A note on establishment of a prima facie showing of discriminatory use of peremptory challenges

As is common, the first step in the inquiry here was skipped because the prosecutor immediately defended her peremptory challenges by offering race-neutral reasons for their use. This is common with prosecutors—and likely defense counsel, when challenged—as attorneys are naturally offended by accusations of racism in the discharge of their duties. And “[o]nce a prosecutor has offered a race-neutral explanation

¹ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *People v. Knight*, 473 Mich. 324, 337-338 (2005).

² *Rice v. Collins*, 546 U.S. 333, 338, 126 S. Ct. 969, 974, 163 L. Ed. 2d 824 (2006) (emphasis added).

for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.”³ There is thus no issue here on this point. But amicus believes the Court would do well to emphasize to trial courts that in their control of the proceedings⁴ the step of establishment of a prima facie showing of discriminatory challenges should not be skipped, and further, that it is not, as it was not here, made out simply by reference to numbers (the only defense claim was that the prosecutor had used three of four challenges to excuse African-American jurors).⁵

As the federal circuits have said, “a party ‘who advances a *Batson* argument ordinarily should come forward with facts, not just numbers alone,” for “[by] itself, the number of challenges used against members of a particular [group] is *not sufficient to establish ... a prima facie case.*”⁶ The Third Circuit in *Lewis v Horn* said:⁷

³ *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991).

⁴ MCL § 768.29.

⁵ See part B., *infra*.

⁶ *Aspen v. Bissonnette*, 480 F.3d 571, 577 (CA 1, 2007), quoting *United States v. Esparsen*, 930 F.2d 1461, 1467 (CA 10, 1991) (emphasis supplied). And see *Sangineto-Miranda*, 859 F.2d 1502, 1521 (CA 6, 1988) (stating that evidence “standing alone” that the government exercised all of its peremptory challenges against black members of the venire “does not raise the necessary inference of purposeful discrimination” to establish a prima facie case). See also *United States v. Charlton*, 600 F.3d 43, 56 (CA 1, 2010).

⁷ *Lewis v. Horn*, 581 F.3d 92, 104 (CA 3, 2009).

Here, Lewis alleges that the prosecutor exercised eight peremptory strikes against African American potential jurors and four against white potential jurors, and that Lewis was tried and convicted by an all-white jury. However, Lewis does not cite to any record support, nor does he offer other support outside the record, to substantiate this bare allegation, and therefore we cannot rely on this information to evaluate whether he has demonstrated a *prima facie* *Batson* violation.

A pattern is something different than shown here. The Seventh Circuit has said that an inference of discrimination may be drawn where “there are only a few members of a racial group on the venire panel and one party strikes *each one of them*.”⁸ It was pointed out here that after the strikes the jury panel had three African-Americans jurors (and an Asian juror with a Hispanic name, and an Arabic male).⁹ While when “a party strikes all or nearly all of the members of one race on a venire . . . this pattern of strikes against ‘jurors of one race . . . may be sufficient by itself to establish a *prima facie* case,” that did not happen here. Indeed, if using strikes to remove all members of one race from the venire is relevant, *not* doing so is also relevant. As the Court of Appeals has said,

⁸ *McCain v. Gramley*, 96 F.3d 288, 292 (CA 7, 1996) (emphasis supplied). See also *United States v. Walker*, 490 F.3d 1282, 1291 (CA 11, 2007) (when “a party strikes all or nearly all of the members of one race on a venire,” we have noted that this pattern of strikes against “jurors of one race . . . may be sufficient by itself to establish a *prima facie* case”). And see *United States v. Martinez*, 621 F.3d 101, 110 -111 (CA 2, 2010) (“the district court did not abuse its discretion in concluding that the Government’s pattern of four strikes in a row against men did not, by itself, establish a *prima facie* case of gender discrimination”).

⁹ T 3-30, 145 (Def’s Apx., 37a).

the fact that “[t]hat the prosecutor did not try to remove all blacks from the jury is *strong evidence* against a showing of discrimination.”¹⁰

Defendant presented nothing by way of proof other than the numbers. Had the issue not been mooted, the claim here would have stopped at the first step of the *Batson* inquiry. The step should not be skipped, though it is understandable why counsel accused of discrimination leap first to defend themselves against baseless charges of this sort.

B. The context of the peremptory challenge of juror two is evidence that there was no discriminatory use of challenges by the prosecutor

Here, after the prosecutor had exercised four peremptory challenges, defense counsel alleged that the use of three of the four challenges on African-American jurors was discriminatory, pointing only to the numbers:

The prosecution has excused four people and I can't – I can't recall whether or not the fourth person was an African American but three of them were. And I believe that this Court needs to at least attempt to get a definitive answer from the prosecutor about dismissing at least three, and I'm not sure of myself, the four people that she has excused. I'm positive, as I say, about the three but not number four.

The trial judge observed that the fourth challenge was “a Caucasian person” and that “currently, our jury panel has one, two, three, African Americans,” with the prosecutor adding that “one of the jurors is Asian with a Hispanic name. Also, we have juror eight who is an Arabic male

¹⁰ *People v Eccles*, 260 Mich App 379, 388 (2004), quoting *People v Williams*, 174 Mich App 132, 137 (1989) (emphasis supplied).

on the panel just so the record is clear.”¹¹ The prosecutor then gave her reasons for the challenges, though there had yet to be a finding of a prima facie case of discriminatory use of the challenges. This Court has only asked whether the challenge of juror number two violated *Batson*. But the reasons given for the challenges of the other two jurors, and the trial court’s findings with regard to those reasons—which this Court does not question—are important for context, and for the reliability and credibility of the prosecutor’s reasons for the dismissal of juror two.

1. The reasons for the peremptory challenge of juror three were neutral and defense counsel did not carry his burden of showing they were a pretext for discrimination

With regard to juror three, the first juror struck by the prosecutor peremptorily, the prosecutor said:

She clearly did not want to be here. She was refusing to make eye contact with myself asking her questions, she was sitting down rolling her eyes, she had her arms crossed a number of points. When the Court asked about real hardships it was my job, it was my kids. The Court asked about medical reasons, oh, I have arthritis. And then also she said she had a torn ligament in her leg and she said it made it difficult for her to sit stand and then she said she had a broken – and then didn’t even tell us what the broken part of her body was.

And the People would like jurors that – I know everyone doesn’t necessarily want to be here, it’s not their favorite thing, but people that are going to be attentive jurors. And based on her body language and her lack of interaction with me when I was trying to interact with her as well as the

¹¹ T 3-30, 145 (Def’s Apx., 37a).

multitude of excuses she gave that is the reason that the People excused her.¹²

Defense counsel's wilfully blind rejoinder to this recitation was "That's the usual responses about the lack of contact, and she didn't look at me, and her body language, and she really didn't want to be here. . . . I just don't believe we've heard anything other than the usual excuses that cover up a use of a peremptory for racial reasons."¹³ This in no way rebutted the prosecutor's statement, which is confirmed by the record.¹⁴ And the trial judge affirmed the prosecutor's observations in finding the strike to be neutral, and the reasons given not to be a pretext for discrimination:

The first step in a Batson challenge is whether the facts and circumstances of the voir dire suggests that racial discrimination motivated a strike. And in this case the prosecution volunteered an explanation for the strikes.

[S]tep two there has been a neutral explanation related to the particular case. And, again, the second step does not require articulation of a persuasive reason or even a plausible one so long as the reason is not inherently discriminatory. And here the prosecution provided several reasons, and *I would concur with her*, because the first question out the box with juror number two was is a one to two day trial a genuine hardship and she [juror number three] was the first person to raise her hand. *She then did sit with her arms crossed. I did notice the eyes rolling.* She proffered her reasons for not wanting to be on the jury; her

¹² T 3-30, 149-150 (Def's Apx., 41a)

¹³ T 3-30, 150.

¹⁴ T 3-30, 35, 36.

job, her children, and physical condition. So I'm going to find that there has been a reason offered that is not inherently discriminatory. And as to the third step I'm going to make the final determination of *whether the challenger has established purposeful discrimination and I'm going to find out they have not, the defendant has not*. I believe the prosecutor's explanation is reasonable, it is not improper, and it has a proffered rationale, has some basis and suspected [sic] trial tragedy [sic: strategy].¹⁵

2. The reasons for the peremptory challenge of juror fourteen were neutral and defense counsel did not carry *his* burden of showing they were a pretext for discrimination

With regard to juror fourteen, the prosecutor said:

With regard to juror 14, Ms. Reynolds, it's not on record but Ms. Reynolds was clearly quite pregnant. She indicated that she had gone to the doctor the day before for severe pain. As she's sitting in the jury seat her head was in her hand and she also just appeared to be in extreme pain. It did not appear to the People that she was going to be necessarily inattentive or trying to [sic: get] off the jury but based on her quite extreme pregnancy and the fact that she said she was having severe pains the day before the People had a concern both with her being able to sit through today as well as possibly losing her over the weekend if she has to keep going back to the doctor.

But, again, the head in her hands, her eyes are closing, and she's clearly in distress. The People excused juror number 14.¹⁶

Defense counsel's sole response was:

[O]ther than the fact that she was pregnant there was absolutely nothing whatsoever — and that didn't disable her

¹⁵ T 3-30, 151-152 (emphasis supplied).

¹⁶ T 3-30, 152.

in anyway, you don't become disabled, generally speaking, by being pregnant. I can't speak, I'm a guy. But that's no basis to excuse somebody because they're pregnant. And other than that there wasn't anything that this witness exhibited that wasn't exhibited by other jurors as well.¹⁷

Defendant again did not rebut the prosecutor's statement, which is supported by the record.¹⁸

The trial judge noted that:

I also remember that juror number 14 was one of the first people to raise her hand when I asked if a two day trial would be a genuine hardship. She was also one of the jurors who said that coming back on Monday may be a problem for her because her hours are flexible. She also indicated she may have trouble coming back depending upon her mother's schedule because she has other children at home that need to be taken care of, is that correct?

Defense counsel agreed this was so.¹⁹

The court concluded:

This lady is pregnant, she did have her head in her hand, she testified to having a doctor's appointment, she was clearly not feeling well.

She testified she has flexible work hours, she has children at home, she dependant upon her mother for childcare assistance. In step two the prosecutor must articulate a neutral explanation related to the particular case to be tried. I believe that has been established. Again, Batson's second stipulate does not require articulation of a persuasive reason or even a plausible one so long as the

¹⁷ T 3-30, 153.

¹⁸ T 3-30, 75, 77-78,

¹⁹ T 3-30, 153.

reason is not inherently discriminatory. And in this particular case we have, now, several reasons why juror number 14 — why the dismissal of juror number 14 using a peremptory would have been appropriate.

The third step requires the trial Court to make a final determination of whether the challenger of the strike has established purposeful discrimination. And in this particular case I'm going to hold that the defense has not established purposeful discrimination. The reasons stated by the prosecution were reasonable, they were not improbable, they were subject to observation by both the prosecution, the defense, and the Court. And I will also find that the proffered rationale has some basis in accepted trial strategy particularly given the fact that this juror number 14 testified she has a flexible work schedule and the fact that she's experiencing problems with this pregnancy make it of concern that she may not be able to return to court on Monday. So far all the reasons I'm going to deny the Batson challenge as to juror number 14.²⁰

And so, defendant challenged the prosecutor's exercise of peremptory challenges with regard to three African-American jurors, and with regard to two, neutral reasons were given, which the trial judge found supported by the record, as well as by the court's own observation. In other words, the prosecutor was found to be a reliable and credible expositor of neutral reasons. With this context, amicus turns to the challenge this Court has directed be examined with regard to *Batson*.

²⁰ T 3-30, 154-156.

C. The reasons for the peremptory challenge of juror two were neutral, and defense counsel did not carry *his* burden of showing they were a pretext for discrimination

1. The standard of review is one of great deference

“The clear error standard governs appellate review of a trial court’s resolution of *Batson’s* third step,”²¹ and the trial court’s decision is entitled to great deference.²² Though Michigan appears not to have addressed the point as yet, the standard applied by the trial judge is preponderance of the evidence; that is, with the benefit of all relevant circumstances, including the prosecutor’s explanation, the opponent of the challenge must demonstrate that it is “more likely than not that the challenge was improperly motivated.”²³ To reverse the trial court’s determination, the reviewing court must be left with “a definite and firm conviction that the trial court made a mistake.”²⁴ The standard is highly deferential. As noted in the federal cases, the trial court’s ruling on the matter is reviewed “through a highly deferential glass.”²⁵

²¹ *Knight*, at 345. “The clear error standard governs appellate review of a trial court’s resolution of *Batson’s* third step.”

²² “Since the trial judge’s findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.” *Batson*, 106 S. Ct. at 1724.

²³ *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417, 162 L. Ed. 2d 129 (2005). See also *Currie v. McDowell*, 825 F.3d 603, 605 (CA 9, 2016); *People v. Beauvais*, 393 P.3d 509, 512 (Colo., 2017).

²⁴ *People v. Johnson*, 502 Mich. 541, 565 (2018).

²⁵ *Sanchez v. Roden*, 808 F.3d 85, 90 (CA 1, 2015). See also *Hernandez v. New York*, 111 S. Ct. at 1863 (the “decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal”).

2. The trial court’s finding—review of which is highly deferential—is not clearly erroneous

Concerning the challenge of juror number two, the prosecutor said:

[S]he had what seemed, at least to me, to be a very difficult time with short-term memory. She could not remember the Court’s first question when asked what her occupation was and she couldn’t remember any of the additional questions after that.²⁶ She had to ask a few times. Also, she indicated she’s having a senior moment here and there.²⁷ She indicated, when asked about contact with the police, she thought she had been pulled over or she thought she had contact with the police before. She couldn’t remember any sort specifics.²⁸ Same with whether herself or her family were a victim of the crime she thought, yes, maybe robberies or armed robbery or something, I can’t remember, I can’t remember, I don’t remember how long ago, I don’t remember anything.²⁹ So she had a problem with memory and it’s the Peoples [sic] concern for her that if we’re going to hear testimony today and then have a long weekend and come back on Monday. And, so, the likelihood that she

²⁶ The Court of Appeals said “The prosecutor appears to have erred by stating that Juror No. 2 could not remember a question about her occupation, but the gist of the prosecutor’s concern about Juror No. 2 was memory, and the trial court did not clearly err by finding that this concern was supported by the record.” Slip opinion, p. 5 (fn 1).

But the trial court asked a compound question, which most prospective jurors answered in all its parts, some asking a question regarding a remaining part. Juror two was prompted through some of the parts, and it may well be that the demeanor of the juror showed that prompting was necessary. T 3-30, 38-43.

²⁷ T 3-30, 49 (Def’s Apx., 26a).

²⁸ T 3-30, 63 (Def’s Apx., 29a) (“I’m sure I have been pulled over and stuff like that before but I don’t remember how long ago that was”).

²⁹ T 3-30, 49-50 (Def’s Apx., 27-27a).

would forget testimony seemed fairly probable and the People were concerned about that.

Defense counsel's only response was that "That witness indicated only a difficulty in remembering whether something happened 10 years ago. . . There was no memory problem whatsoever."³⁰

The trial judge concluded:

I'm going to find in this case that the prosecutor as to juror number two has offered a race neutral explanation for the peremptory challenge and further has articulated a neutral explanation for the dismissal. Juror number two *did indeed have a difficult time with memory* she did discuss senior moments. She had to kind of had *to step back and reach back in her memory to recall things* such as whether or not she had been the victim of a crime, such as — there were some other specific ones. But I do remember she did seem to have a problem keeping up with this case. And Batson's second step does not required [sic] articulation of persuasive reason or even a plausible one so long as the reason is not inherently discriminatory it suffices.

[T]he third step . . . requires that the trial Court make a final determination of whether the challenger of the strike, which would be the defense, has established purposeful discrimination. And whether there is purposeful discrimination is the persuasiveness of the prosecutor's justification for the peremptory strike. It comes down to whether the trial Court finds the prosecutor's race neutral explanations to be creditable. And in this case I will find that it was reasonable, her explanation is not improbable, there was a rationale that had some basis in accepted trial strategy.³¹

³⁰ T 3-30, 146-147 (Def's Apx., 38-39a).

³¹ T 3-30, 148-149 (Def's Apx., 40-41a) (emphasis supplied).

The trial court's finding is not clearly erroneous. As the United States Supreme Court has said, "A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes," for "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," so that "*in the absence of exceptional circumstances*, we [will] defer to the trial court."³² While the prosecutor's reasons for the strike would not justify a challenge for cause, they need not. Defendant was required to show by a preponderance that the strike was racially motivated—not that the reasons given were poor, or even mistaken—and the trial judge concluded that he had not.³³ The trial judge found the race-neutral reasons of the prosecutor credible, and deference is owed that conclusion. No *Batson* error occurred here.

³² *Davis v. Ayala*, 576 U.S. 257, 135 S. Ct. 2187, 2201, 192 L. Ed. 2d 323 (2015).

³³ The most that can be said, taking the matter most favorably to the defendant, is that the prosecutor was mistaken, as the Court of Appeals said, with regard to the juror's memory in answering the initial questions of the trial court put to the juror (though, as amicus has said, the cold record cannot reveal any hesitations by the juror, and the trial judge found that the juror "had to kind of had to *step back and reach back in her memory to recall things*." But even assuming a mistake by the prosecutor in this regard, an honest factual mistake in the exercise of a peremptory challenge does not result in a *Batson* error. See was *Lee v. Comm'r, Alabama Dep't of Corr.*, 726 F.3d 1172, 1226 (CA 11, 2013); *Aleman v. Uribe*, 723 F.3d 976, 982 (CA 9, 2013) ("For a prosecutor to eliminate a prospective juror by peremptory strike based on an honest mistake as to what that juror had said in voir dire is not the same, for constitutional purposes, as striking the juror based on an intentionally discriminatory motive").

II.

The loss of a peremptory challenge is not reversible error

- A. Under *People v. Bell*,³⁴ which is binding precedent, the loss of a peremptory challenge is reviewed for harmless error; that is, the defendant must show that without the error a different result is probable**

The same standard for determination of a *Batson* challenge by the trial judge, and for review of that decision on appeal, applies whether the challenge was upheld or overturned, and whether the proponent of the strike was the prosecutor or defense counsel. And so those standards are applied to the trial court's finding that defense counsel's strike of juror 5 was racially motivated.³⁵ Amicus leaves that analysis to the People, and will concentrate instead on the question of whether the loss of a peremptory challenge is reversible error in any event.

³⁴ *People v. Bell*, 473 Mich. 275 (2005). That the erroneous preclusion of a defense peremptory challenge is not constitutional error was confirmed by the United States Supreme Court in *Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009).

³⁵ See T 3-30, 173-179 (Def's Apx, 42-48a)..

One criminally accused has a right under both the state³⁶ and federal³⁷ constitutions to trial by an impartial jury. *This* is the constitutional right, which is inviolate. Challenges for cause are designed to secure the right; persons who may be biased by circumstances, such as relationship to a party, and those expressing a bias, are disqualified from service.³⁸ Peremptory challenges, on the other hand, though possessing a venerable pedigree, are nonetheless auxiliary to the challenge for cause.

³⁶ “In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury....” Mich. Const. 1963, Art. 1, § 20.

³⁷ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” United States Const., Amend. VI.

³⁸ MCR 2.511(D): A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:

- (1) is not qualified to be a juror;
- (2) has been convicted of a felony;
- (3) is biased for or against a party or attorney;
- (4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;
- (5) has opinions or conscientious scruples that would improperly influence the person’s verdict;
- (6) has been subpoenaed as a witness in the action;
- (7) has already sat on a trial of the same issue;
- (8) has served as a grand or petit juror in a criminal case based on the same transaction;
- (9) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;
- (10) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;
- (11) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;
- (12) has a financial interest other than that of a taxpayer in the outcome of the action;
- (13) is interested in a question like the issue to be tried.

The United States Supreme Court has said that “Unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. . . . (‘There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges’).”³⁹ This Court has also said that the right to peremptory challenges flows from statute and court rule.⁴⁰ Even before the decision by the United States Supreme Court in *Martinez-Salazar*, that Court considered the situation where defense counsel is required to expend a peremptory challenge to remove a juror who should have been removed on counsel’s challenge for cause, thus, in effect, losing a peremptory challenge by expending it in this way:

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....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.⁴¹

In *People v. Bell*⁴² the defense lost two peremptory challenges when the trial court found, as in this case, that defense counsel had exercised

³⁹ *United States v. Martinez-Salazar*, 528 U.S. 304, 311, 120 S. Ct. 774, 779, 145 L. Ed. 2d 792 (2000).

⁴⁰ *Bell*, at 283 (“In Michigan, the right to exercise a peremptory challenge is provided by court rule and statute”).

⁴¹ *Ross v Oklahoma*, 487 US 81, 88, 108 S Ct 2273, 2278, 101 L Ed 2d 80 (1988).

⁴² *People v. Bell*, *supra*.

the challenges with a racial motivation. Though this Court found that the trial court had initially failed to follow the correct procedure, it found that the trial court had cured its error, and that the challenges were properly denied as racially motivated. But the Court also made an *alternative* holding; that is, in response to the dissent, which argued that the challenges were improperly denied, this Court said that even in that situation—that is, had the defense peremptory challenges been improperly denied—the standard of harmless error would be applied. And the error would be nonconstitutional error—“[a]n improper denial of such a peremptory challenge is not of constitutional dimension”⁴³—defendant thus having the burden of showing that it was more likely than not that without the error a different result would have obtained.⁴⁴

Bell was confirmed by the United States Supreme Court in *Rivera v. Illinois*. There the Court held that “the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution,” rejecting a claim that this nonconstitutional error should cause automatic reversal of a conviction, holding that the error did not deprive the defendant of “his constitutional right to a fair trial before an impartial jury,” while automatic reversal is only appropriate when “the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence,” which the mistaken denial of a peremptory challenge does not do.⁴⁵

⁴³ *Id.*, at 294.

⁴⁴ *Bell*, at 294-295; *People v. Lukity*, 460 Mich. 484 (1999).

⁴⁵ *Rivera v. Illinois*, 556 U.S. 148, 160–61, 129 S. Ct. 1446, 1455, 173 L. Ed. 2d 320 (2009).

This Court’s order refers to this language in *Bell* as “arguable dictum.” But it is not.⁴⁶ Alternative grounds for disposition of a case, such as that no error occurred, but even if it did, the error is harmless, are not dicta (if so, one could argue that it is the *substantive* ruling of error that is dicta, given the holding as to harmlessness).⁴⁷ As the Ninth Circuit has said, “The finding in the state court . . . is not truly dicta. Instead, it is an alternative holding—the state appellate court rested its decision to affirm the trial court both on the basis that it did not err . . . and on the basis that, even had the trial court erred, that error would be harmless an alternative holding is not wholly irrelevant to a court’s disposition; rather, it provides one of two independent bases for supporting that disposition.”⁴⁸ One article also has said that “alternative holdings are prevalent and widely accepted,”⁴⁹ and state courts have held that “[w]here a decision rests on two or more grounds equally valid, none

⁴⁶ Indeed, in detailing the conflict in state courts, the United States Supreme Court in *Rivera v. Illinois*, 129 S. Ct. at 1452–53 referred to *Bell* and Michigan as “rejecting [the] automatic reversal rule.”

⁴⁷ *Bank of Italy Nat. Tr. & Sav. Ass’n v. Bentley*, 20 P.2d 940, 942 (CA, 1933) (“It is well settled that, where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court, and each is of equal validity”). See also *People v. Chandler*, 503 Mich. 1029 (2019) (McCormack, C.J., concurring in the denial of leave) (“I agree with the Court of Appeals’ *alternative holding* that any error was harmless in light of the ‘abundant other evidence’ from which the jury could infer identity”) (emphasis supplied).

⁴⁸ *Zamora v. Hart*, 958 F.2d 380 (CA 9, 1992) (unpublished decision).

⁴⁹ Thomas Healy, “The Rise of Unnecessary Constitutional Rulings,” 83 N.C. L. Rev. 847, 919 (2005).

may be relegated to the inferior status of obiter dictum.”⁵⁰ The Supreme Court has said on more than one occasion that “where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.”⁵¹ And only very recently this Court in *Jerome v. Crum*⁵² summarily affirmed the Court of Appeals after hearing oral argument, where the Court of Appeals had affirmed the trial court on alternative grounds.⁵³ The plaintiff applied for leave only on the collateral-estoppel issue, and this Court said that in this circumstance “even if we were to conclude that collateral estoppel did not bar Mr. Jerome’s claim, he has failed to place the Court of Appeals’ *alternative and independent ground* for affirming the trial court’s grant of summary disposition before this Court.”⁵⁴

⁵⁰ *Commonwealth v. Markman*, 916 A.2d 586, 606 (Pa., 2007); *Cummings v. State*, 341 A.2d 294, 309 (Md. Ct. Spec. App., 1975) (saying, after finding no error, but that any error would be harmless beyond a reasonable doubt, “This is no passing dictum, but a considered and deliberate judgment by the Court, by way of alternative holding, after a thorough review of all of the evidence”).

⁵¹ *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S. Ct. 1235, 1237, 93 L. Ed. 1524 (1949). See also Bryan A. Garner et al., *The Law of Judicial Precedent* 122-129 (2016)

⁵² *Jerome v. Crum*, No. 159093, 2020 WL 2790487 (May 29, 2020).

⁵³ “The Court of Appeals agreed with the trial court’s collateral-estoppel analysis. . . . Second, as an alternative ground for affirming the grant of summary disposition, the Court of Appeals stated: ‘Moreover, assuming that collateral estoppel was not applicable ..., summary disposition would be appropriate under MCR 2.116(C)(10) for lack of a genuine issue of material fact.’” *Id.*, at 1.

⁵⁴ *Id.*, at 2.

Bell is precedential, and the question then is whether the Court should overrule it. Under principles of stare decisis, it should not (principally because *Bell* was correctly decided).

B. Nonconstitutional error is not structural, and the decisions of several other jurisdictions provide no basis for avoidance of MCL § 768.29 and Michigan’s harmless error jurisprudence

This Court has asked whether it should treat the nonconstitutional error of erroneous denial of a peremptory challenge as structural error, requiring automatic reversal, something not even required of some structural constitutional errors, including the right to a public trial,⁵⁵ in short, whether it should overrule *Bell*. But a structural nonconstitutional error is a non sequitur.

This Court’s order refers to the decisions of several other states which hold as a matter of state law that this nonconstitutional error is automatically reversible,⁵⁶ essentially on the ground that if the jurors that sat were impartial, so that defendant received that which the constitution guarantees, the defendant is not prejudiced, and so the error will always be harmless, but, because every error demands a remedy, reversal must be automatic. This is remarkable. Amicus begins with the Minnesota decision of *Angus v. State*.⁵⁷ The case was not decided on

⁵⁵ *People v. Vaughn*, 491 Mich. 642 (2012).

⁵⁶ Of course, though states may not fashion a rule under the United States Constitution in conflict with that established by the United States Supreme Court, they may as a matter of state law do so. See *Rivera*, 129 S. Ct. at 1456.

⁵⁷ *Angus v. State*, 695 N.W.2d 109 (Minn., 2005).

state law grounds, and was thus abrogated by *Rivera*.⁵⁸ The Washington decision of *State v. Vreen*⁵⁹ was also cited in *Rivera* as being on the “automatic reversal” required by due process side of the state split,⁶⁰ and is thus abrogated by *Rivera*.⁶¹

People v. Hecker,⁶² a New York case, is a post-*Rivera* decision. The majority said little other than that “peremptory challenges are a mainstay in a litigant’s strategic arsenal,” and cited pre-*Rivera* cases that had reversed for such an error.⁶³ The dissent cogently noted that “[t]he majority offers no reasoned justification for this holding [of automatic reversal], merely relying on pre-*Rivera* precedents,” and that the rule of automatic reversal is unwise, as it “load[s] the dice against the People,” for a “defendant, who need not fear an appeal by the People, can and

⁵⁸ *Angus* was cited by the United States Supreme Court as one of the jurisdictions requiring automatic reversal as a matter of federal law for the erroneous denial of a defense peremptory challenge. See *Rivera*, 129 S. Ct. at 1452, All that *Angus* said in creating an automatic reversal rule was that “the error undermines the basic ‘structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.’” *Angus*, at 118.

⁵⁹ *State v. Vreen*, 26 P.3d 236 (2001).

⁶⁰ “We granted certiorari . . . to resolve an apparent conflict among state high courts over whether the erroneous denial of a peremptory challenge requires automatic reversal of a defendant’s conviction *as a matter of federal law*. Compare *Angus v. State*, 695 N.W.2d 109, 118 (Minn.2005) (applying automatic reversal rule); *State v. Vreen*, 143 Wash.2d 923, 927–932, 26 P.3d 236, 238–240 (2001) (same) . . .” *Rivera*, 129 S. Ct. at 1452.

⁶¹ The case relied heavily on *United States v. Annigoni*, 96 F.3d 1132, 1144 (CA 9, 1996) (en banc), which, after *Rivera*, as of course abrogated. See *United States v. Lindsey*, 634 F.3d 541, 544 (CA 9, 2011).

⁶² *People v. Hecker*, 942 N.E.2d 248, 272–73 (2010).

⁶³ *Id.*, at 271–72.

generally will vigorously contest any prosecution use of a peremptory challenge that might raise *Batson* problems,” while “the People will be reluctant to do the same thing, lest they lead the trial judge into an error that would upset a conviction,” something the Supreme Court had itself noted (automatic reversal would “likely discourage trial courts and prosecutors from policing a criminal defendant’s discriminatory use of peremptory challenges”).⁶⁴

In the Iowa decision of *State v. Mootz*⁶⁵ the court also found automatic reversal required because a defendant tried by an impartial jury cannot show prejudice from the loss of a peremptory challenge.⁶⁶ And in the Massachusetts case of *Commonwealth v. Hampton*⁶⁷ the Court “continued to adhere” to its pre-*Rivera* precedent that “the erroneous denial of a peremptory challenge requires automatic reversal, without a showing of prejudice.”⁶⁸ That prior precedent conflated the right to an impartial jury with the exercise of peremptory challenges, saying that “the right to be tried by an impartial jury is so basic to a fair trial that an infraction can never be treated as harmless error. Thus, . . . the

⁶⁴ *Id.*, at 667-67 (Smith, J., dissenting) (citing *Rivera*, 129 S.Ct. at 1455).

⁶⁵ *State v. Mootz*, 808 N.W.2d 207 (Iowa 2012).

⁶⁶ *Id.*, at 225 (“we [cannot] conceive of[] any situation in which a defendant could ever show prejudice arising out of the wrongful denial of a peremptory challenge where, as is the case here, the juror was not also removable by a challenge for cause. A defendant could only show prejudice by showing that the juror he sought to remove was biased. However, if the juror were biased, then the juror would be removable for cause, and the question regarding the peremptory challenge would become moot”).

⁶⁷ *Commonwealth v. Hampton*, 928 N.E.2d 917 (Mass., 2010).

⁶⁸ *Id.*, at 927.

erroneous denial of the right to exercise a proper peremptory challenge is reversible error without a showing of prejudice,”⁶⁹ and citing a portion of *Swain v. Alabama*⁷⁰ that the Court in *Hampton* recognized was repudiated in *Rivera*.⁷¹

These decisions do not stand alone on the issue; a number of state courts have rejected them, more rigorously applying principles of constitutional and structural error. Observing that “[p]eremptory strikes do not implicate any constitutional right,” the Wyoming Supreme Court in *Matter of LDB*⁷² applied its harmless-error rule that “Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”⁷³ The court concluded that it “simply does not make any sense to require a new trial where a verdict is constitutionally sound,” noting that it examined “error for harmful effect in other situations, including those where the claim of error is statutorily or constitutionally

⁶⁹ *Commonwealth v. Wood*, 451 N.E.2d 714, 721 (Mass., 1983).

⁷⁰ *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965).

⁷¹ “The United States Supreme Court has disavowed the statement in *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), on which is based the holding in *Commonwealth v. Wood*, 389 Mass. 552, 564, 451 N.E.2d 714 (1983). See *Rivera v. Illinois*. . .” *Hampton*, at 927 (FN 10).

Hardison v. State, 94 So. 3d 1092, 1101–02 (Miss. 2012), noted in this Court’s order, essentially follows the lead of these states, and says that “the question is whether the erroneous denial of a peremptory challenge can ever be harmless when the objectionable juror actually sits on the panel that convicts the defendant. We hold that it cannot,” though that the juror is not “objectionable” in the constitutional sense of being biased or partial.

⁷² *Matter of LDB*, 454 P.3d 908, 918 (Wyo. 2019).

⁷³ W.R.Cr.P. 52(a).

based.”⁷⁴ Under harmless error review, said the court, the defendant must show that from the erroneous loss of a peremptory challenge “there is a reasonable possibility that the verdict might have been more favorable to the defendant,” and to “make that showing. . . the defendant must demonstrate ‘that the jury was not impartial and that he was denied a fair trial.’”⁷⁵

Colorado also rejects any rule of automatic reversal from the loss of peremptory challenge, looking to developments in the harmless error doctrine, and also the “more recent Supreme Court jurisprudence finding a lack of any constitutional underpinning whatsoever for peremptory challenges.”⁷⁶ The court said that its prior rule of automatic reversal “could therefore survive only if the erroneous impairment of a defendant’s ability to shape the jury through peremptory challenges were to fall within that limited class of error now designated structural error. . . . As we have often acknowledged, this limited class of error now comprehends only those defects affecting the framework within which the trial proceeds—errors that infect the entire trial process and *necessarily render a trial fundamentally unfair*—rather than simply errors in the trial process itself.”⁷⁷ The court concluded that “allowing a defendant fewer peremptory challenges than authorized . . . does not, in and of itself, amount to structural error,” so that automatic reversal is inappropriate.⁷⁸

⁷⁴ *LDB*, at 918.

⁷⁵ *Id.*, at 919.

⁷⁶ *Vigil v. People*, 455 P.3d 332, 337 (Colo., 2019).

⁷⁷ *People v. Novotny*, 320 P.3d 1194, 1201 (Colo., 2014).

⁷⁸ *Id.*, at 1203.

The Kansas Supreme Court in *State v. Carr*⁷⁹ concluded that it was “persuaded that an error such as the one committed in this case [a reverse-*Batson* error] should be subject to harmless review.” Because the “peremptory challenge is simply a procedural vehicle for vindication of a defendant’s right to an impartial jury,” said the court, the “erroneous denial of a peremptory challenge does not require automatic reversal.”⁸⁰ The court held that applying harmless error review the court was consistent with its development of harmless error review in recent years, as well as the “legislature’s expressed preference for the same,” statute providing that “At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”⁸¹ Because the juror who was not removed by the peremptory was not subject to a challenge for cause, the court found no prejudice because there was no reasonable probability that the error affected the outcome of the trial.⁸²

⁷⁹ *State v. Carr*, 331 P.3d 544, rev’d and remanded on other grounds, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016).

⁸⁰ *Id.*, at 641.

⁸¹ *Id.*, quoting K.S.A. 60–261.

⁸² *Id.*

See also *State v. Sessions*, 342 P.3d 738, 748–49, 772 (Utah, 2014) (“the mere loss of a peremptory challenge is not a ‘structural error’ . . . to establish prejudice for the loss of his peremptories, Sessions would have to prove actual prejudice. And he would have to do so in the same manner described above in connection with his ineffective assistance claim—by establishing that an actually biased juror sat on the panel that convicted him. That he has failed to do, for reasons detailed above”); *State v. Letica*, 356 S.W.3d 157, 165–66 (Mo. 2011); *State v. Frausto*, 463 S.W.3d 469 (Tenn., 2015).

And at least one learned scholar, Professor LaFave, has said that “*The better rule* is that no substantial right is impaired so long as the jury that actually sits is impartial.”⁸³

This Court should thus adhere to *Bell* under principles of stare decisis, and because it was rightly decided. Nonconstitutional structural error is a non sequitur, and the Court’s obligation is to affirm unless the defendant demonstrates that it is more likely than not that a different result would have occurred without the error (if error there was here). That the error does not result in prejudice is not a basis for automatic reversal. The point was nicely stated by an illustrious panel of the Seventh Circuit in the pre-*Rivera* case of *United States v Patterson*.⁸⁴ Because of a complicated calculation error in the determination of the appropriate number of peremptory challenges, defendant was denied several peremptory challenges, receiving fewer than provided by statute. He claimed that this error required reversal without consideration of the question of prejudice. Writing for himself and Judges Posner and Wood, Judge Easterbrook disagreed:

- Defendants respond that an error concerning a peremptory challenge always affects a “substantial” right. *A right is “substantial” when it is one of the pillars of a fair trial.*
- Trial before an orangutan, or the grant of summary judgment against the accused in a criminal case, would deprive the defendant of a “substantial” right even if it were certain that a jury would convict.

⁸³ LaFave, 7 Crim. Proc. (4th ed.), § 27.6(b) (fn 23) (emphasis supplied).

⁸⁴ *United States v. Patterson*, 215 F.3d 776 (CA 7, 2000), vacated in part on other grounds, 531 U.S. 1033, 131 S. Ct. 621, 148 L. Ed 2d 531 (2000).

- For the same reason, a biased tribunal always deprives the accused of a substantial right....Deprivation of counsel likewise so undermines the ability to distinguish the guilty from the innocent that it always leads to reversal.
- But “if the defendant had counsel and *was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.*” *It is impossible to group an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge.*
- When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the *substantial* right. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants’ comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries.⁸⁵

This court should follow *Patterson*.

Also well-making the point, and presaging *Patterson*, is the discussion of Judge Easterbrook dissenting from the denial of rehearing

⁸⁵ *Id.*, at 781 (all but the final emphasis supplied, citations omitted). Note also that with regard to application of the statutory requirement that reversal not occur unless a substantial right was impaired the panel pointed to *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), where a juror’s failure to respond to a question on voir dire deprived a party of information that would have been useful in exercising a peremptory challenge and observed that “the Court concluded that reversal would not be justified unless a correct response by the juror ‘would have provided a valid basis for a challenge for cause.’ ... The Court recognized the importance of information to the intelligent exercise of peremptory challenges but concluded that ‘[t]he harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for ‘error’ and ignore errors that do not affect the essential fairness of the trial.’”

en banc in *United States v Underwood*,⁸⁶ a case recognized as of no force after *Martinez-Salazar*.⁸⁷ The panel reversed because of a confusion in the jury-selection process that prevented defense counsel from making “the most advantageous use of their peremptory challenges.”⁸⁸ The panel did not find that the error was prejudicial under the federal statute precluding relief unless the error affects a substantial right, but believed reversal required by the dicta in *Swain v Alabama*, since repudiated in *Martinez-Salazar*, as noted previously. Anticipating *Martinez-Salazar* by almost three years, Judge Easterbrook for himself and Judges Posner, Manion, and Evans, noted that “[p]erfection is elusive” and in review of trials for error “the quest for the perfect is the enemy of the good.”⁸⁹ The panel, said Judge Easterbrook, had no authority to reverse without applying FRCP 52(a), providing that “Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded,” for the rule (which in the federal system is passed by Congress and is thus in effect a statute) “does not except errors affecting peremptory challenges. Any error that does not affect substantial rights shall be disregarded.”⁹⁰

The remaining argument is that application of a harmless-error rule such as Rule 52(b) or MCL § 769.26 will simply always lead to the

⁸⁶ *United States v. Underwood*, 130 F.3d 1225 (CA 7, 1997).

⁸⁷ The panel decision is found at *United States v. Underwood*, 122 F.3d 389 (CA 7, 1997).

⁸⁸ *Underwood*, 130 F.3d at 1226.

⁸⁹ *Underwood*, 130 F.3d at 1227.

⁹⁰ *Id.*

conclusion that the erroneous preclusion of a peremptory challenge affects a substantial right, or works a miscarriage of justice.⁹¹ But one returns to Judge Easterbrook’s reasoning: the substantial right involved is the right to an impartial jury; “[a]fter *McCollum* and *Ross* it is impossible to ground an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge. If the jury that actually sits is impartial, the defendant has enjoyed the *substantial* right.”⁹² It simply cannot be said that the loss of a peremptory challenge “necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”⁹³ Were it otherwise even the legislature

⁹¹ There are many procedural errors that will always be harmless. For example, trial before an impartial jury that contains a juror unqualified by statute because of a prior felony conviction is harmless, see *People v. Miller*, 482 Mich. 540 (2008), as would be trial with an impartial juror who has been called as a juror though it has been less than a year since the juror’s previous service (see MCL 600.1307a(1)(d)).

⁹² *Id.*, at 1229. Judge Easterbrook in *Patterson* allowed that it was possible that a jury-selection process could become so confused as to affect a substantial right; in *United States v. Harbin*, 250 F.3d 532 (CA 7, 2001) the panel so found, because not only was the process confused, but the prosecution, and the prosecution alone, was permitted to exercise a peremptory challenge *during trial*. The panel concluded that allowing the prosecution unilaterally to use a “pre-trial jury selection tool to alter the composition of the jury mid-trial” affected substantial rights. Cf. *United States v. Wilson*, 355 F.3d 358 (CA 5, 2003), where no error was found under *Harbin* because both parties had this opportunity to exercise a peremptory challenge at the conclusion of trial.

⁹³ This case is a reverse-*Batson* case, but the error could be a simple miscount. See *People v. Barron*, No. 251402, 2006 WL 1235747, at 2 (2006) (unpublished, on remand to reconsider in light of *People v. Bell*) (“Preserved nonconstitutional error is presumed to be harmless and will not warrant reversal “unless ‘after an examination of the entire cause, it shall ‘affirmatively appear that it is more probable than not that the error was outcome determinative.’ . . . Defendant bears the burden of demonstrating that the error was outcome determinative. . . . On appeal defendant failed to identify how the loss of this peremptory challenge altered the outcome of the trial. Therefore, we

could not alter the number of peremptory challenges, or abolish them, which is to give them constitutional status though the law is clear that they are a statutory creation.

C. Conclusion

An accused has a substantial right –a constitutional right– to trial before an impartial jury. There is no constitutional right to excuse a juror who is not subject to a challenge for cause. “[P]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.”⁹⁴ Where it is possible, as it often is, for a procedural error to occur without working the violation of a substantial right, then a conviction should not be upset. Indeed, both in the federal system and in Michigan, statutes forbid the setting aside of a conviction in these circumstances.

Relief

WHEREFORE, the amicus submits that this Honorable Court should affirm the Court of Appeals.

Respectfully submitted,

WILLIAM J. VAILLIENCOURT, JR.

cannot conclude that this error warrants reversal”).

⁹⁴ *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body-text font is 12 point Century Schoolbook set to 150% line spacing. This document contains __9511____ countable words.

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