IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

No. S-1-SC-40404
A-1-CA-41075

CARLOS MENDEZ,

Defendant-Petitioner.

STATE OF NEW MEXICO'S ANSWER BRIEF

On Certiorari to the New Mexico Court of Appeals

Twelfth Judicial District Court
Otero County, New Mexico
D-1215-CR-2020-00492
The Honorable Steven Blankinship

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INTRODUCTION

Defendant was convicted of aggravated driving while intoxicated (.16 or above), fourth offense, on truly overwhelming evidence. Defendant argues in this proceeding that the district court erred when it denied his for-cause challenge to a specific juror and that the Court of Appeals improperly failed to consider all of the juror's statements.

The district court properly denied Defendant's for-cause challenge to the subject juror. However, even if the court erred, Defendant suffered no ultimate prejudice despite his having used a peremptory challenge to remove the potential juror. Any presumption of prejudice under *Fuson* is rebutted by the overwhelming evidence in this case, under which any reasonable jury would have convicted Defendant.

Accordingly, the State requests that this Court affirm the conviction in all respects. In the alternative, the State respectfully requests that this Court quash the writ of certiorari in this matter.

SUMMARY OF PROCEEDINGS

In October 2020, a Tularosa police officer observed Defendant in a parked vehicle at a stop sign on a public road midday. **[St. Ex. 1 (lapel camera video); 12-7-22 CD 11:37:55-11:38:19, 11:41:26-11:43:40]** Defendant, the sole occupant of the idling vehicle, was asleep in the driver's seat. **[St. Ex. 1 1:30-2:30; 12-7-22 CD**

11:43:20-11:48:25, 11:52:27-39] The officer woke Defendant and, during the ensuing interaction, detected the odor of alcohol as Defendant spoke. **[12-7-22 CD 11:48:23-11:49:00, 11:53:30-50]** Defendant admitted to drinking alcohol. **[St. Ex. 1 7:25-7:42; 12-7-22 CD 11:53:50-11:54:10]** After police arrested Defendant, he was subject to a breathalyzer test resulting in breath alcohol concentrations of .24 and .22, substantially above the legal limit. **[12-7-22 CD 11:55:43-11:56:22, 1:48:45-1:55:10; St. Ex. 3]** Defendant was charged with aggravated DWI (.16 or above), fourth offense. **[RP 1-2]** *See* NMSA 1978, § 66-8-102(D)(1) (2016).

During voir dire, one of Defendant's attorneys asked if any juror walked in and, upon seeing Defendant, assumed that he must have done "something" for there to be a case that proceeded to that stage. **[12-7-22 CD 10:04:07-36]** Many jurors expressed the idea—apparently under the impression that the case was initiated by an officer's attention being drawn to Defendant due to observing an apparent moving violation—that something occurred, apart from whether Defendant was innocent or not, because otherwise all the participants would not be there for a trial. **[*Id.* 10:04:37-10:13:00]** For example, Juror 25 stated that they would not be sitting there unless someone, essentially, observed Defendant appear to do something. **[*Id.* 10:04:37-52]** When defense counsel attempted to characterize the juror's apparent views as being that Defendant is not "entirely innocent in your mind," Juror 25 clarified that it was not that she viewed Defendant as not innocent, but rather that

there must be "something" that caused the case to be initiated, although they needed to determine his guilt or innocence. **[*Id.* 10:04:53-10:05:13]**

Towards the end of that discussion, Juror 6 stated that there must have been some reason to "pull [Defendant] over." **[*Id.* 10:13:10-25]** Upon further questioning by defense counsel, Juror 6 stated that he assumed Defendant had done "something." **[*Id.* 10:13:25-45]** As to the weight aspect, Defendant's counsel asked if some potential jurors would give greater weight to law enforcement, due to their training and experience, if they had a "conflicting story" with another witness, to which a juror indicated they would do so, noting an officer's training. **[*Id.* 10:20:35-10:21:13]** Several other jurors, including Juror 6, agreed with that sentiment. **[*Id.* 10:21:00-27]**

Defendant asked that Juror 6 be removed for cause, expressly referring to concern with his giving more weight to law enforcement testimony, but the district court denied that request after the State objected, asserting that the potential juror's statement was in the context of referring to an officer's training and experience and did not rise to the level justifying an excusal for cause. **[*Id.* 10:44:32-59]** Juror 6 does not appear to have stated, and Defendant does not claim otherwise, that he could not be fair or open to hearing the evidence as it was received. Ultimately, Defendant used a peremptory challenge to prevent Juror 6 from serving on the panel. **[*Id.***

10:56:11-17] Defendant elected not to testify[1] at his one day trial and was convicted of the charged offense. **[*Id.* 2:33:18-25; RP 224, 237]** Defendant was sentenced to eighteen months, nine months of which was suspended. **[RP 237]** The remaining nine months was ordered to be served in the Otero County Detention Center. **[*Id.*]** Defendant then appealed. **[RP 244-50]**

The Court of Appeals rejected Defendant's claims that his right to a speedy trial was violated and that the district court erred in denying his for-cause challenge to Juror 6. *State v. Mendez*, A-1-CA-41075, mem. op. ¶¶ 1, 16, 24 (N.M. Ct. App. Apr. 23, 2024) (nonprecedential). Accordingly, the Court of Appeals affirmed in all pertinent respects but vacated the one year parole term, *id.* ¶¶ 27-28, a ruling which is not challenged by the State. As to the for-cause challenge, the Court of Appeals noted a preservation issue, specifically observing that in the district court, Defendant's motion to strike Juror 6 was based on his statement that he would give more weight to law enforcement testimony than the testimony of another. *Id.* ¶ 21. However, on appeal, Defendant argued that Juror 6 should have been struck for cause due to additional statements he made that were not mentioned in the motion to strike.

[1] Defendant also chose not to call any witnesses, as was his right just as it was his right to not testify. **[12-7-22 CD 2:32:02-2:34:00] (proceeding to discuss jury instructions immediately after denial of Defendant's motion for directed verdict and Defendant's counsel's noting that Defendant would not testify)]**

Id. ¶ 21 n. 1. The Court of Appeals found that the argument regarding those additional statements was unpreserved. *Id.* ¶ 22.

Defendant sought review in this Court. Petition for Writ of Certiorari, *State v. Mendez*, S-1-SC-40404 (N.M. May 1, 2024). This Court granted the petition only as to Issues I and II, intertwined issues concerning Defendant's claims regarding the refusal to strike Juror 6. Order, *State v. Mendez*, S-1-SC-40404 (N.M. Jun. 27, 2024). Despite the phrasing in the petition describing the issue as involving two related but semi-discrete issues, the State has chosen to combine the argument below into one issue, as Defendant has done in his Brief-in-Chief.

ARGUMENT

I. THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO STRIKE JUROR 6.

Defendant contends that Juror 6 should have been excused for cause. **[BIC 13-15]** A trial court's ruling on a request to dismiss a juror for cause will not be disturbed absent an abuse of discretion. *State v. Johnson*, 2010-NMSC-016, ¶ 31, 148 N.M. 50. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *State v. Alberico*, 1993-NMSC-047, ¶ 63, 116 N.M. 156. "Actual bias is elicited by an unequivocal statement by the potential juror that he or she cannot be fair and impartial." *State v. Romero*, 2023-NMSC-014, ¶ 10. Additionally, New Mexico courts presume "that a jury selected from a fair cross section of the community is

impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Id.* ¶ 7 (internal quotation marks and citation omitted).

In this matter, Juror 6 did not say anything that would require the district court to strike him for cause. The mere fact that Juror 6 agreed with another juror that he would likely give law enforcement testimony more weight if there was a conflict in testimony does not show bias such that, as a matter of law, he should have been excused for cause, because it fails to demonstrate that he cannot be fair and impartial. *Id*; *see also State v. Pierce*, 1990-NMSC-027, ¶ 47, 109 N.M. 596 (Ransom, Justice, specially concurring) (jurors may bring to bear "somewhat eccentric" beliefs without those beliefs "necessarily amounting to bias" that would violate the right to an impartial jury). At bottom, Juror 6 never expressed that he would disregard the actual evidence to be presented at trial, and Defendant does not appear to claim otherwise.

Defendant cites numerous cases from other states concerning jurors who expressed that they would give law enforcement testimony more weight or expressed similar sentiments. **[BIC 17-18]** However, Defendant fails to cite a New Mexico case that suggests that the possibility of giving more weight to law enforcement, **if** there is a conflict in testimony, is alone sufficient to warrant the striking of a juror

for cause. Moreover, as noted above, in this case there was no other or "conflicting" testimony against which to weigh such law enforcement testimony.

Accordingly, the district court did not abuse its discretion in refusing to excuse Juror 6 for cause on the basis of the statement, as argued to the district court, that he would give more weight to a law enforcement witness. *Johnson*, 2010-NMSC-016, ¶ 31. That juror did not make an unequivocal statement that he could not be fair and impartial. *Romero*, 2023-NMSC-014, ¶ 10; *see also Fuson v. State*, 1987-NMSC-034, ¶¶ 13-15, 105 N.M. 632 (Ransom, Justice, dissenting) (disagreeing with the majority's conclusion that district court had improperly failed to excuse a juror for cause, and rhetorically asking "[i]s not partiality always a 'possibility'" and "[s]hould not the trial judge take the measure of the" potential juror).

Defendant's other argument, that some jurors including Juror 6 were biased because they thought "something" had occurred, was unpreserved, as the Court of Appeals properly noted. *Id.* ¶¶ 21-22. But worse yet, even putting aside preservation, this further illustrates the weakness of Defendant's entire jury selection argument on appeal. Those other unpreserved statements are misleading as an alleged basis for striking Juror 6 because they are taken out of context given the particulars of this case. The voir dire process had already established that the case involved a charge of aggravated DWI. **[12-7-22 CD 9:17:45-9:18:08, 9:25:00-9:26:15]** However, the jurors had **no reason to know during voir dire** that this case did **not** involve the

prototypical situation of a moving vehicle that was subject to a traditional traffic stop that eventually led to a DWI charge. Certainly, they did not know during voir dire that it was undisputed that Defendant was found sitting, and in fact sleeping, in an idling vehicle on a public road at a stop sign. As a result, that some jurors suspected "something" happened in order for there to be a trial simply indicated their reasonable assumption, as a matter of life experience, that there was some nominal reason—whether speeding, changing lanes abruptly, hitting a curb, or some other visible, apparent traffic offense—that drew the officer's attention resulting in Defendant being stopped and, eventually, prosecuted. Such statements alone in no way indicate that the jurors intended to disregard the presumption of innocence. For example, Juror 28 stated it was very unlikely that the person was wrongfully "pulled over." **[*Id.* 10:07:09-42]** Although the evidence demonstrated that Defendant was not in fact "pulled over," Juror 28's reasonable assumption that Defendant had been stopped in a traditional manner provides context for why some jurors expressed that "something" must have happened.

It is apparent that the jurors' various statements about something happening were not about Defendant's innocence or guilt but rather their reasonable, default belief that Defendant was the subject of a traffic stop. The jurors had no other knowledge about the case because they only knew that the case involved a charge of DWI. Their statements occurred before hearing undisputed evidence that Defendant

was found sleeping in an idling vehicle in the middle of the day, that he admitted consuming alcohol, and that the breathalyzer tests showed levels far above the legal limit. Against that context, it is not indicative of bias that Juror 6 stated that there must have been some reason to "pull [Defendant] over" or that he believed, or even assumed, that Defendant had done "something." **[*Id.* 10:13:10-45]** That view is simply consistent with the unobjectionable, common sense idea, prior to hearing evidence of the glaring particulars of this case, that a person likely did something (even if later proved lawful) to draw the officer's attention such as to cause a traffic stop in the first place. *See, e.g., State v. Mann*, 2002-NMSC-001, 131 N.M. 459, ¶ 27 (noting that jurors are generally knowledgeable in many areas and are entitled to use their common or acquired sense). Therefore, even apart from the fact that the other basis upon which Defendant attempted to rely was unpreserved, that argument fails on the merits to constitute bias that would warrant the excusal of Juror 6. Even had those other statements been brought to the attention of the district court, the court would not have abused its discretion in refusing to strike Juror 6 on the basis of those statements. Despite Defendant's assertions, the various statements made by Juror 6 are not equivalent to a person stating that they believed the subject person to be guilty of the charged offense or affirmatively stating that they will refuse to abide by instructions concerning burdens of proof or refuse to consider the evidence as the

trial progresses. Even collectively, they fail to demonstrate actual bias as discussed in *Romero*.

Defendant also contends that the Court of Appeals misapplied *State v. Holtsoi*, 2024-NMCA-042. **[BIC 9-11]** Specifically, Defendant contends that the Court of Appeals "refused" to consider all statements made by Juror 6 and suggests that the Court of Appeals decision in this matter is in conflict with *Holtsoi*, despite that the Court of Appeals expressly referenced *Holtsoi* which had been decided two months previously. **[*Id.* 9]** Some examination of *Holtsoi* is warranted before discussing how it was correctly applied by the Court of Appeals in this matter.

In *Holtsoi*, a defendant who had admittedly used unlawful drugs (heroin and methamphetamine) was charged with aggravated battery after striking two persons while driving her vehicle recklessly in a parking lot. *Id.* ¶¶ 2-3, 8. Several jurors expressed concern that their possible bias against persons engaged in drug use might affect their impartiality. *Id.* ¶ 4. The defendant in that case appealed the district court's denial of her motion to strike those potential jurors for cause. *Id.* The Court of Appeals concluded that one such juror exhibited sufficient bias to warrant excusal because that juror (23) "repeatedly and unequivocally" indicated that he could **not** separate his bias regarding drug use from the facts of the case. *Id.* ¶ 7. The subject juror even stated that he just "[couldn't] be a fair juror." *Id. Holtsoi* simply concluded that based on numerous statements the juror made, he exhibited "actual bias" and

his statements demonstrated that he could not serve as an impartial juror. *Id.* ¶¶ 8-9. The defendant in *Holtsoi* used a peremptory strike to remove that juror. *Id.* ¶ 12. The jury verdict in *Holtsoi* was nevertheless overturned despite that the biased juror did not deliberate, because, as the Court explained, it was bound by the rule (to be discussed later in this brief) in *Fuson*, 1987-NMSC-034. *Holtsoi*, 2024-NMCA-042, ¶ 12.

Despite Defendant's implication, *Holtsoi* did not materially alter the law in this area, nor did it eliminate default, background requirements including a party's duty of preservation for later appellate review. *Holtsoi*, which was decided consistent with controlling decisions of this Court, merely attempted to reiterate some basic principles to help guide trial lawyers but cannot be fairly described as having substantively changed the law in this area. *Id.* ¶ 11 (reiterating principles to "more firmly establish" when a member of the venire demonstrates prejudice sufficient to require excusal for cause). Further, Defendant's argument that this Court should examine the "totality" of Juror 6's statements ignores the preservation requirement which was **not** affected by *Holtsoi*. **[BIC 10, 18]** Defendant also relies on New Mexico cases which are distinguishable. **[*Id.*]** *See Alvarez v. State*, 1978-NMSC-042, ¶¶ 3-6, 13, 92 N.M. 44 (finding trial court erred by refusing to excuse jurors who previously served on a drug trafficking case involving same key prosecution witness who would be called in present case, when that witness's

credibility was a large factor); *State v. Sims*, 1947-NMSC-071, ¶¶ 2, 10, 51 N.M. 467 (holding juror should have been excused when he expressed that if he had any doubt, it would be "against the defendant" and admitted that if it was a very close case, he would be inclined to find against the defendant). Juror 6 never indicated that he would be against Defendant or that he would ignore the presumption of innocence or fail to abide by jury instructions.

In this matter, the Court of Appeals acknowledged *Holtsoi*, which had been decided a few months previously, including for the proposition that the district courts have a great deal of discretion in the decision whether to dismiss a juror for cause. *State v. Mendez*, A-1-CA-41075, ¶¶ 18-19. The Court observed that Defendant's argument, made for the first time on appeal, was "materially different" than that raised in district court because it involved other statements made by Juror 6 which were **not** mentioned in his motion to strike. *Id.* ¶ 21. The Court concluded that Defendant's argument regarding those other, "additional" statements was unpreserved, and properly declined to address the merits of his argument concerning those other statements. *Id.* ¶ 22.

Specifically, the Court correctly observed that Defendant's argument in district court was that Juror 6 should be stricken because he would give more weight to law enforcement than the testimony of another. *Id.* ¶ 21. The Court properly concluded that Juror 6's agreement with another potential juror who stated that they

would give more weight to the testimony of law enforcement, if there was "conflicting" testimony as Defendant's trial counsel phrased it, did not rise to the level requiring excusal for cause. *Id.* ¶¶ 23-24. However, ultimately that was never even an issue in this trial, because of the lack of any defense case, as previously noted.[2] In the end, there was no testimony (whether law enforcement or otherwise) that was in conflict with another witness, completely undermining Defendant's inflated concern that a juror would give more "weight" to law enforcement testimony. The Court properly concluded that Juror 6's statement did not rise to the level of actual bias. *Id.* ¶¶ 23-24. The Court relied upon *Romero*, 2023-NMSC-014, ¶ 10, noting that Juror 6 did not unequivocally state that he could not be fair and impartial. *State v. Mendez*, A-1-CA-41075, ¶ 24.

[2] *See* note 1 above. The State is not asserting that an actual error in jury selection is retroactively cured because a defendant possibly alters his trial strategy as a result of such an error, such as by choosing not to testify. After all, numerous factors influence a defendant's decision to testify or not. Instead, the State is merely observing that there was a complete lack of any "conflict" between any defense evidence and a law enforcement officer's testimony in this simple case, because Defendant offered no contrary or "conflicting" evidence whatsoever. *Cf. State v. Sanchez*, 1995-NMSC-053, ¶ 19, 120 N.M. 247 (observing that prosecutor's comment, noting that defense offered no evidence corroborating the defense alibi theory, did not improperly shift burden of proof). As a result, no juror was presented with a situation in which they had to decide whether to give "more" weight to a law enforcement officer's testimony over allegedly "conflicting" testimony by any other witness. Given the overwhelming evidence in this case, it is virtually impossible that any voir dire strategy would have made any difference.

Despite Defendant's characterization, there is no conflict between the Court of Appeals decision in this matter and its decision in *Holtsoi* or any of this Court's decisions. Simply put, the statements of the subject juror in *Holtsoi* regarding bias concerning drug use are a far cry from the expressions of Juror 6 in this matter. The district court did not err in failing to exclude Juror 6 for cause in this matter and the Court of Appeals did not misapply any precedent in affirming the district court's refusal to strike Juror 6 for cause.[3]

However, even if this Court finds that Juror 6 should have been excused for cause, the use of a peremptory challenge to excuse that juror is not the reversible error that Defendant contends it is. Specifically, Defendant asserts that prejudice must be presumed because he was essentially forced to use a peremptory challenge in lieu of his for-cause challenge being granted, citing *Fuson*, 1987-NMSC-034, ¶ 11. **[BIC 19-20]** However, *Fuson* does not require reversal as Defendant argues. *Fuson* concluded that prejudice was presumed from a defendant's resort to a peremptory challenge to excuse a juror that the defendant asserted should have been

[3] Defendant makes a nominal argument that Juror 22 should also have been excused for cause. **[BIC 20]** Defendant, based on that predicate, asserts he was further prejudiced because he was unable to use a peremptory strike against that juror because he had no such strikes left. ***[Id.]*** Defendant fails to adequately develop his argument about Juror 22, and ultimately, if his argument about Juror 6 fails, then any apparently similar argument Defendant could have otherwise asserted about Juror 22 also fails. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70 (appellate courts will not review unclear or undeveloped arguments because of the strain on judicial resources and the substantial risk of error).

excused for cause, resulting in a new trial. *Id.* ¶¶ 9-10. However, *Fuson* noted, albeit in passing, that the deemed or assumed prejudice was "not rebutted" in that particular case, not that any presumption of prejudice was irrebuttable as a matter of law regardless of the circumstances. *Id.* ¶ 10. Accordingly, *Fuson* established a rebuttable presumption, **not** an irrebuttable one.

Here, the record rebuts any putative presumption of prejudice, and a new trial is not warranted. It is virtually impossible to show prejudice in this matter in which, by any objective measure, the evidence was overwhelming, if not beyond overwhelming, that Defendant committed DWI. Defendant was the sole occupant found sleeping in his idling vehicle, in the middle of a public road next to a stop sign in the middle of the day. Defendant essentially concedes that his vehicle had been stationary for a substantial amount of time, possibly thirty to forty minutes. **[BIC 2 (agreeing that the record supports that Defendant's truck had been parked at a stop sign "for some time")]** Defendant admitted to drinking alcohol and his two breath alcohol test results were each well over .20, markedly higher than the legal limit. Defendant notably does not challenge the accuracy of the test results nor the sufficiency of the evidence.

Any possible error in jury selection was harmless. *See, e.g., State v. Finnell*, 1984-NMSC-064, ¶¶ 24-25, 101 N.M. 732 (even assuming defendant's statement was inadmissible under *Miranda*, the evidence of his guilt was overwhelming and

the statement contributed nothing to his conviction; accordingly, any error was harmless). This Court's decision in *State v. Tollardo*, 2012-NMSC-008, ¶ 40, clarified that whether there is overwhelming evidence of guilt should not serve as the "main determinant" when analyzing whether an error was harmless. However, while evidence of a defendant's guilt cannot be the "singular focus," *id.* ¶ 43, it remains relevant to the central inquiry, which is whether there is a reasonable possibility that the erroneous evidence might have affected the verdict. *See id.* ¶¶ 32, 40, 42 (noting that even if error implicates constitutional rights, standard is whether there is a reasonable "possibility" the alleged error affected the verdict). *See also, e.g., Matter of LDB*, 454 P.3d 908, ¶ 41 (Wyo. 2019) (concluding that there was no reversible error despite resort to using a peremptory, relying in part on a review of the record which found the evidence to be "overwhelming").

An appellate court reviewing an issue for harmless error must proceed on a case-by-case basis, assessing the facts and circumstances of the particular case. *Tollardo*, 2012-NMSC-008, ¶ 44. Here, there was no reasonable possibility that the jury selection issue affected the verdict. Defendant received a fair trial and the evidence was such that it would have been astonishing if he had not been found guilty. *See State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482 (remarking that a fair trial is not necessarily a perfect one); *see also State v. Hickman*, 68 P.3d 418, ¶¶ 32-36 (Ariz. 2003) (observing that a harmless error analysis is proper in this

context involving peremptory challenges); *Matter of LDB*, 454 P.3d 908, ¶ 38 (observing that a defendant complaining of having to use a peremptory challenge to cure an improper denial of a challenge for cause must demonstrate that the jury was not impartial and that he was denied a fair trial). Further, there is nothing unique about the asserted loss of a peremptory challenge which places it outside of a harmless error analysis. No reasonable jury, regardless of the exact composition, would have found Defendant not guilty in light of the weighty evidence. For Defendant to assert otherwise is to assert implausible, fantasy-like propositions. Underlying Defendant's claim is an implicit theme that he was entitled to the exact jury of his choosing but the reality is that one is entitled only to a fair and impartial jury, not to a custom jury tilted in favor of one's self-interest. *State v. Wiberg*, 1988-NMCA-022, ¶ 21, 107 N.M. 152.

However, even if this Court views *Fuson* as having established an irrebuttable presumption of prejudice when a criminal defendant exhausts his or her peremptory challenges to remove a biased juror, then the State requests that this Court consider overruling *Fuson*. That argument for overruling *Fuson* was not asserted by the State below because the Court of Appeals cannot overrule this Court's decision in *Fuson*. Because of the principle of stare decisis, before overturning precedent, this Court recognizes that a number of factors should be considered, specifically:

> (1) whether the precedent is so unworkable as to be intolerable; (2) whether parties justifiably relied on the precedent so that reversing it

> would create an undue hardship; (3) whether the principles of law have developed to such an extent as to leave the old rule no more than a remnant of abandoned doctrine; and (4) whether the facts have changed in the interval from the old rule to reconsideration so as to have robbed the old rule of justification.

State v. Pieri, 2009-NMSC-019, 146 N.M. 155, ¶ 21 (internal citation omitted). The application of those factors supports overturning *Fuson* and replacing it with a rule that provides that a defendant's use of a peremptory challenge to strike a juror that should have been excused for cause cures any potential error from the district court's mistaken refusal to strike such a juror. Before applying those factors, some detail about *Fuson* is warranted here.[4]

In *Fuson*, 1987-NMSC-034, ¶ 1, the defendant argued "that the trial court abused its discretion in failing to excuse a particular prospective juror for cause, thereby compelling him to exercise a peremptory challenge, and thus violated his sixth amendment right to an impartial jury." The defendant did not allege that any juror who deliberated was biased or that he was unable to use a peremptory challenge to remove a juror who ultimately sat in the case if he had not been compelled to exercise it on the person at issue. *Id.* This Court agreed that the trial court abused its discretion by failing to excuse the prospective juror for cause. *Id.* ¶¶ 3-5. This Court next considered "what consequences follow from the error." *Id.* ¶ 2. It ultimately

[4] Much of the ensuing discussion in the next few pages is adapted from the State's Petition for Writ of Certiorari, filed March 15, 2024, in *State v. Holtsoi*, S-1-SC-40334.

discussed and overruled its earlier opinion in *State v. Martinez*, 1981-NMSC-005, 95 N.M. 445, filed six years prior, which required the defendant in this context to allege prejudice, such as that a biased or impartial juror deliberated or that the defendant was not able to use a peremptory challenge on a specific juror because he or she was forced to use one on the person at issue. *Fuson*, 1987-NMSC-034, ¶¶ 1, 9 (discussing *Martinez*).

This Court agreed with the defendant that *Martinez* was "at odds with federal cases which dictate that the right of peremptory challenge is a derivative of the [S]ixth [A]mendment right to an impartial jury and that impairment of the right is reversible error without a showing of prejudice." *Id.* ¶ 7. *Fuson* then relied on a statement made by the United States Supreme Court in its opinion in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), that "[t]he denial or impairment of the right is reversible error without a showing of prejudice," as well as "[a] host of federal cases that" applied that statement in *Swain* to this specific context. *Fuson*, 1987-NMSC-034, ¶¶ 7, 8 (text only). This Court accordingly held "that prejudice is presumed where, as here, a party is compelled to use peremptory challenges on persons who should be excused for cause and that party exercises all of his or her peremptory challenges before the court completes the venire." *Id.* ¶ 11.

Applying the factors noted in *Pieri* above, *Fuson* (if interpreted to involve an irrebuttable presumption of prejudice) is largely unworkable and intolerable, as it

will too often have the practical effect of unnecessarily forcing a retrial of a case in which the evidence may be overwhelming, as it is in this case, and in which the subject biased juror was ultimately removed even if through use of a peremptory. It is an unduly "broad net" rule which fails to take into account the unique circumstances of each case, despite more recent harmless error caselaw noting that such analysis should be performed on a case-by-case basis. *Tollardo*, 2012-NMSC-008, ¶ 44; *see also Hickman*, 68 P.3d 418, ¶ 35 (noting that failure to conduct harmless error analysis in this context simply "forces trial courts to retry cases previously decided by fair juries" and generates "public cynicism and disrespect for the judicial system"). Second, while parties may have relied somewhat on the *Fuson* rule, a prospective change would not create an undue hardship, because this Court could, if so inclined, note that the *Fuson* rule is overturned for all trials beginning after a certain date, allowing parties sufficient time to plan voir dire around any new rule.

Third, *Fuson* was based exclusively on the application of federal case law, as noted above. *Fuson*, 1987-NMSC-034, ¶¶ 7-9. Accordingly, its holding should be re-examined in light of the subsequent rejection, over two decades ago, by the United States Supreme Court of any such rule of per se reversible error. *See United States v. Martinez-Salazar*, 528 U.S. 304, 316-17 (2000) (concluding that defendant's due process rights were not violated by resort to peremptories to remove juror which

district court erroneously refused to dismiss for cause). In *Martinez-Salazar*, the Supreme Court addressed the same "sequence of events" as in this case and *Fuson*: The trial judge erroneously refused to dismiss a potential juror for cause, which was followed by the defendant exercising a peremptory challenge to remove that potential juror. *Martinez-Salazar*, 528 U.S. at 307. The Ninth Circuit applied a rule of "automatic reversal," relying on the same statement from *Swain* that this Court relied upon in *Fuson*. *Martinez-Salazar*, 528 U.S. at 307, 319 n.4. The Supreme Court reversed the Ninth Circuit, holding "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 . . . constitutional right." *Martinez-Salazar*, 528 U.S. at 307.

The Supreme Court reasoned that the peremptory challenge is a right that is "auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension." *Id.* at 311. Instead, of having an independent constitutional dimension, a peremptory challenge is a device that "help[s] secure the constitutional guarantee of trial by an impartial jury." *Id.* at 316. By using a peremptory challenge on the juror that he correctly argued should have been dismissed for cause, the defendant made a choice that ensured that his Sixth Amendment right to an impartial jury was not infringed. *Id.* at 315. Therefore, where a defendant unsuccessfully challenges a member of the venire

for cause, a defendant has the option of allowing that potential juror to sit on the petit jury and make a Sixth Amendment challenge on appeal **OR** to elect to use a rule-based peremptory challenge to secure his or her right to an impartial jury. *Id.*

Martinez-Salazar makes clear: The sole doctrinal basis for *Fuson* was incorrect. Contrary to *Fuson*, the Sixth Amendment does not require a rule of presumed prejudice where a court erroneously fails to excuse a potential juror for cause but the defendant elects to use a peremptory challenge to prevent that potential juror from serving on the petit jury. Contrary to *Fuson*, federal cases no longer "dictate that . . . impairment of the [derivative] right [of peremptory challenge] is reversible error without a showing of prejudice." *Fuson*, 1987-NMSC-034, ¶ 7. The Sixth Amendment requires a showing that a biased or partial member of the venire deliberated on the petit jury. Accordingly, this Court should overrule *Fuson* and determine, consistent with *Martinez-Salazar*, that the Sixth Amendment does not require reversal of Defendant's convictions because no biased or partial juror deliberated on his petit jury. Defendant successfully protected his right to an impartial jury by exercising peremptory challenges, and he kept the allegedly biased member of the venire - Juror 6 - from serving on the petit jury.

In addition to the federal rejection of the rule in *Fuson*, numerous states are in accord with that trend. *See, e.g., Hickman*, 68 P.3d 418, ¶¶ 19-20, 35, 41 (affirming convictions because of the lack of prejudice, despite defendant's use of some, but

not all, peremptories to remove two prospective jurors which trial court should have removed for cause); *Matter of LDB*, 454 P.3d 908, ¶¶ 36-38 (noting that a harmless error standard is proper because peremptory strikes do not implicate constitutional rights, citing *Martinez-Salazar*); *State v. Fire*, 34 P.3d 1218, 1219-20, 1225 (Wash. 2001) (affirming conviction because, even if a juror should have been dismissed for cause, defendant was able to use a peremptory strike to remove that juror and he could not show that a biased juror sat on his panel). The rule expressed in *Fuson* appears to be a minority view that is increasingly rejected by other states, besides having been rejected by federal law as noted above.

Fourth, peremptories are not viewed in the way they may have been viewed, whether as a matter of trial practice or custom or otherwise, decades ago. That is, as alluded to above, there is nothing inherently magical or unique about peremptory challenges. There is an increasing view that peremptory challenges may not even be needed given the availability of challenges for cause. *See, e.g.*, Coburn R. Beck, *The Current State of the Peremptory Challenge*, 39 WM. AND MARY L. REV. 961, 964-65, 991 (1998) (asserting that due to availability of for cause challenges, the peremptory might be an "outdated relic"). There is also a growing acknowledgment that peremptory challenges lack constitutional grounding and are subject to abuse and manipulation. *See* Beck at 991-993 (noting arguments against peremptory challenges and that, despite the theoretical ideal of selecting an impartial jury,

litigants in reality seek "favorability" rather than impartiality (internal citation omitted)); *see also* Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 811-12, 858 (1997) (alluding to side litigation, exemplified by *Batson*, prompted by peremptories and noting that the use of peremptories denies the reality that "biased" jurors can set aside their biases in order to "judge impartially" during deliberation).

There is an increasing recognition that the use of peremptories can be properly limited and that they should not be accorded the heightened treatment which they were granted in *Fuson*. Because peremptory challenges are not constitutionally required, the fact that a party uses all their peremptories should not lead to an irrebuttable presumption of prejudice that escapes any possible harmless error analysis, particularly when a case involves overwhelming evidence. *Matter of LDB*, 454 P.3d 908, ¶¶ 36-38, 41. Accordingly, the State requests this Court to take the opportunity in this case, or if not here, then in a future case, to reexamine *Fuson's* rule, nearly forty years old and based on since overruled federal precedent, that a party may rely on a presumption of prejudice merely because that party used all peremptories as a result of having to use a peremptory to excuse a juror that should have been excused for cause.

Going forward, a defendant's use of a peremptory challenge to strike a juror that should have been excused for cause should be deemed to cure any potential error

from the district court's mistaken refusal to strike such a juror. Further, even if a juror uses all peremptory strikes as a result, any alleged error should be subject to a harmless error analysis as is the case with most alleged errors, with such analysis taking into account whether there was overwhelming evidence of guilt such that the error cannot be said to have affected the verdict. That is, when, as here, no biased juror sat on the panel, the mere use of a peremptory to remove a juror who should have been removed for cause should be of no consequence and certainly should not lead to any presumption of prejudice.

CONCLUSION

This Court should quash the writ of certiorari in this matter because Defendant has failed to show that the Court of Appeals decision is in conflict with any applicable New Mexico Supreme Court or Court of Appeals decision.

On the merits, as the Court of Appeals correctly concluded, the district court did **not** abuse its discretion or otherwise err in refusing to strike Juror 6 for cause. Further, even if this Court agrees with Defendant that Juror 6 should have been removed for cause, Defendant's use of a peremptory strike to remove that juror does not warrant reversal. The record rebuts any presumption of prejudice and a new trial is not warranted, because any putative finding of prejudice in this matter is objectively rebutted by the overwhelming evidence that Defendant committed the offense of aggravated DWI. Further, this Court should overrule *Fuson* and

determine, consistent with *Martinez-Salazar*, that the Sixth Amendment does not require reversal of Defendant's conviction given that no biased juror deliberated on the petit jury.

For the reasons set forth above, Defendant's conviction and sentence[5] should be affirmed in all respects, as stated in the Court of Appeals decision.

Respectfully submitted,

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Electronically Filed

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[5] As previously noted, the State does not challenge the Court of Appeals decision to remand for resentencing for vacating of the one year parole term.

CERTIFICATE OF SERVICE

I certify that, on November 25, 2024, I filed a true and correct copy of this *Answer Brief* electronically through the Odyssey E-File & Serve System, which caused opposing counsel of record to be served by electronic means at mary.barket@lopdnm.us.

/s/ Michael J. Thomas
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