



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Appellee,

vs.

S-1-SC-40404
A-1-CA-41075

CARLOS MIGUEL MENDEZ,

Defendant/Appellant.

APPEAL FROM THE TWELFTH JUDICIAL DISTRICT COURT
OTERO COUNTY, NEW MEXICO
THE HONORABLE STEVEN E. BLANKINSHIP PRESIDING

DEFENDANT/APPELLANT'S REPLY BRIEF

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TRANSCRIPT OF PROCEEDINGS

Citations to the Record Proper are set forth as **[RP page]**. In citing to the transcripts of the district court proceedings, undersigned counsel has listened using ForTheRecord software and cites them as: **[Month/Day/Year CD hour:minute:second]**

Citations to the exhibits are set forth by exhibit number and, where appropriate, time-stamp in the following format: **[Ex. 1, 1:10-30]**

STATEMENT OF COMPLIANCE

The body of the attached reply brief exceeds the page limits set forth in Rule 12-318(F)(2) NMRA because counsel used Times New Roman, a proportionally-spaced type face.

As required by Rule 12-318(F)(3)-(G) NMRA, I certify that this opening brief is proportionally spaced and the body of the brief contains 4,386 words (not to exceed 4,400 for a reply brief). This brief was prepared using Microsoft Word, version 2016.

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REPLY ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING DEFENSE COUNSEL’S FOR-CAUSE CHALLENGE TO JUROR 6.

A. Preservation.

The State argues that the Court of Appeals correctly refused to consider all of Juror 6’s statements because defense counsel did not discuss every one of them in moving to strike Juror 6. [AB 12-13] However, “our rules do not require the preservation of arguments, only issues.” *Soon v. Kammann*, 2024-NMSC-018, ¶ 13, 557 P.3d 104. Moreover, as discussed in the Brief in Chief, a reviewing court determines bias based on *all* of the juror’s comments not only on a select few. [BIC 9-13] Finally, preservation of an issue for appeal does not require that each argument in support of that issue have been detailed below. *Cf. State v. Gomez*, 1997-NMSC-006, ¶ 31, 122 N.M. 777 (recognizing “arguments a trial lawyer reasonably can be expected to articulate on an issue arising in the heat of trial are far different from what an appellate lawyer may develop after reflection, research, and substantial briefing.”). Because defense counsel sought to strike Juror 6 for cause due to bias in favor of law enforcement, the issue of Juror 6’s partiality was put before the district court. The issue of Juror 6’s partiality is preserved for appeal.

B. The court erred in failing to strike Juror 6.

The State argues that the district court did not err in failing to excuse Juror 6 because “Juror 6 did not say anything that would require the district court to strike

him for cause.” **[AB 6]** According to the State, Juror 6’s statement that he would favor law enforcement testimony in case of conflicting testimony does not show bias because it did not demonstrate that Juror 6 could not be fair and impartial. **[AB 6]** However, as the State acknowledges, the Brief in Chief relied on extensive authority establishing that categorical belief of certain witnesses over other types of witnesses is clear bias. *See* **[BIC 17-18]** Without addressing this fundamental principal, the State complains that there is no NM case directly addressing bias in favor of law enforcement. **[AB 6]** *but see State v. Sims*, 1947-NMSC-071, ¶ 3, 51 N.M. 467 (bias established where juror said he would decide against defendant if the evidence were close, based on the charges); *State v. Romero*, 2023-NMSC-014, ¶ 11, 533 P.3d 735 (actual bias inferable where juror discloses fact that poses a “sufficiently significant” risk of partiality). Had Juror 6 indicated he would categorically give law enforcement testimony *less* weight because they work for the State, there is little question of actual bias against law enforcement.¹ That the juror’s bias favored the State’s main witness in the case does not make it less problematic.

The State then suggests that Juror 6’s bias was harmless because (1) it was conditioned on “a conflict in testimony” and (2) “there was no other or ‘conflicting’

¹Indeed, it appears Juror 33 was excused for cause because Juror 33 believed law enforcement officers *less* than others and assumed that they were there because law enforcement was probably persecuting Mr. Mendez. *See* **[12/7/22 CD 9:43:11-47:20, 10:43:41-43:51]**

testimony” presented. **[AB 6-7]** At the time of jury selection, however, the defendant still had the right to testify and the decision to testify might well turn on the make-up of the jury. In addition, the State’s argument conflates prejudice from the failure with a defendant’s right to have a biased juror excused for cause in the first place. These are and should be distinct considerations; the State’s effort to conflate whether error occurred during jury selection with the impact of that error later on at trial simply illustrate flaws in the State’s proposed approach.²

The State next asserts that Juror 6’s belief that “something” had occurred cannot be considered to determine bias because it was not preserved **[AB 7-8]**, before arguing that Juror 6’s expressed belief that something had occurred, like the beliefs of those around Juror 6, are not reflective of bias because, at that point, the underlying facts of the case were unknown. **[AB 8-9]**

However, the assumptions that jurors make going into a case still reflect individual biases. *Cf. State v. DeVore*, 292 Mont. 325, 334, 972 P.2d 816, 822 (Mont. 1998) (recognizing that “frequently, jurors are reluctant to admit actual bias, and ... biased attitudes must be revealed by circumstantial evidence”). In fact, spontaneous statements of a person’s beliefs are often most reflective of that person’s views. *See*

² In a footnote, the State argues that it is not claiming an error in jury selection can be retroactively cured by what happens at trial, but that is in fact what the State is asserting in arguing that there was no error because the defendant did not go on to testify. *See* **[AB 13, fn 2]**

e.g., *Sims*, 1947-NMSC-071, ¶ 5 (“Where a juror admits bias, his subsequent statement that he can consider the evidence impartially should be received with caution.” (quoted authority omitted)); *Overton v. State*, 801 So.2d 877, 891-92 (Fla. 2001) (similar); *State v. Freshment*, 43 P.3d 968, 973-74 (Mont. 2002) (characterizing a potential juror’s spontaneous statements as the “most reliable and honest” representations of their beliefs). Had Juror 6, like Juror 33, assumed wrongdoing by police, this would still be considered reflective of his views on police and his potential prejudices against them. The fact that Juror 6 assumed the opposite—that the police had acted properly and Mr. Mendez had done something wrong—is similarly a reflection of his biased views favoring law enforcement.

[12/7/2022 CD 10:13:07-50]

Moreover, the context surrounding the statements illustrates Juror 6’s bias. After a couple jurors indicated that Mr. Mendez was there because he just wanted to get the charges taken care of or that he was there for a reason, but it might not involve his guilt, **[12/7/2022 CD 10:11:37-13:07]** Juror 6 spoke up and said he disagreed. Juror 6 said that Lieutenant Blanton “obviously has a reason to pull [Mr. Mendez] over and we wouldn’t be here if they didn’t have enough evidence that’s proof,” before remarking that he believed Mr. Mendez had done something. **[12/7/2022 CD 10:13:07-50]** Juror 6 indicated that his belief was something that would weigh on him during deliberations. **[12/7/2022 CD 10:13:35-50]** Finally, Juror 6 cemented

these views by indicating that he would give greater weight to law enforcement officers than other witnesses. [12/7/2022 CD 10:21:00-21:47]

When the totality of Juror 6's statements are considered, as they were in *State v. Holtsoi*, 2024-NMCA-042, 547 P.3d 770, *cert. denied*, *State v. Holtsoi*, 2024-NMCERT-004, 548 P.3d 1232, it is clear that Juror 6 was biased in favor of law enforcement and should have been struck for cause.

C. Mr. Mendez was prejudiced under *Fuson*, which does not apply harmless error analysis.

The State next argues that even if there was error, Mr. Mendez is unable to show prejudice from the error because *Fuson v. State*, 1987-NMSC-034, 105 N.M. 632, only creates a rebuttable presumption of bias. Without citation to authority, the State maintains that this presumption can be overcome by a harmless error test which, according to the State's brief in the Court of Appeals turned exclusively on the strength of the State's case, but according to its brief before this Court, turns on the analysis under *State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. Compare [Ct. App. AB 14-16] with [AB 15]

But *Fuson* did not describe the presumption of prejudice as being "rebuttable" and did not use a harmless error test at all. In fact, *Fuson* departed from past precedent that used a harmless error analysis and adopted a per se approach. See *Fuson*, 1987-NMSC-034, ¶¶ 6, 9.

Nor does the State cite any New Mexico case that has applied or interpreted *Fuson* in the manner suggested by the State on appeal. *State v. Godoy*, 2012-NMCA-084, ¶ 5, 284 P.3d 410 (“Where a party cites no authority to support an argument, we may assume no such authority exists”). On the contrary, *Fuson* has been treated as applying a per se reversal rule. *See Holtsoi*, 2024-NMCA-042, ¶ 12.

Finally, the *Fuson* court clearly adopted an approach to prejudice which is used elsewhere and which is not subject to harmless error because the approach is the mechanism by which defendants demonstrate error in this context. *See e.g., People v. Smith*, 217 A.D.3d 1580, 1581, 193 N.Y.S.3d 474, 476 (2023) (“After the court denied his challenges for cause, defendant used peremptory challenges to remove the two prospective jurors from the venire and, therefore, ‘[b]ecause defendant exhausted all of his peremptory challenges before the completion of jury selection, reversal is required.’”); *Commonwealth v. Penn*, 132 A.3d 498, 505 (Pa. 2016) (“Moreover, we must conclude that the error was not harmless: ‘[w]here, as here, a defendant is forced to use one of his peremptory challenges to excuse a prospective juror who should have been excused for cause, and then exhausts his peremptories before the jury is seated, a new trial will be granted.’”); *cf. State v. Good*, 2002 MT 113, 309 Mont. 113, 128, 43 P.3d 948 960 (2002) (overruling state precedent and finding structural error occurs requiring automatic reversal when a court abuses its discretion in denying a for cause challenge, the defendant uses a

peremptory to remove the disputed juror, and the defendant exhausts all of his or peremptory challenges).

In sum, the State's novel interpretation of *Fuson* as nonetheless applying harmless error analysis lacks support in case law either from this state or others. Under the test articulated in *Fuson*—which has been utilized in New Mexico for over 37 years without issue—prejudice is determined after a defendant sought dismissal for cause, the defendant then used a peremptory challenge against the challenged potential juror, and the defendant then exhausted peremptory challenges before the jury was selected. Since error occurred when the court failed to dismiss the challenged juror and these requirements were met here, reversal is required under *Fuson*.

D. *Fuson* should not be overruled.

(1) The State failed to preserve this issue and did not establish that fundamental error should apply.

The State did not argue in the district court that *Fuson* should be overruled, and it did not make this argument in the Court of Appeals. Indeed, in responding to the State's novel interpretation of *Fuson*, Mr. Mendez noted that the State did *not* make this argument below. **[Ct. App. Reply 6-7]** Thus, the State's argument seeking

to overturn *Fuson*, raised for the first time in its Answer Brief in this Court, is not preserved.³

While this Court could theoretically revisit *Fuson* as a matter of fundamental error, the State's Answer Brief did not establish fundamental error and consideration of it at this late stage of the litigation disadvantages Mr. Mendez in a variety of ways. First, Mr. Mendez is now forced to litigate a substantive state law matter in a Reply Brief with the attendant word and time limitations attached to such a pleading and without the benefit of having been able to develop an appropriate record below. *Cf. State v. Martinez*, 2005-NMSC-052, ¶ 7, 137 N.M. 432 (defendant's failure to advance argument in his brief in chief "deprive[d] the [s]tate of an effective rebuttal as contemplated by the rules"); *State v. Mares*, 2024-NMSC-002, 543 P.3d 1198 (declining to consider a state constitutional argument, even if it evokes novel questions of law, where it was not adequately preserved for appellate review). Given that there are a variety of approaches to the prejudice determination, if reconsideration of our long-standing approach is warranted, it should not be relegated to such slight discussion when it could have been raised previously. The

³ The State's double standard on preservation is telling: defendants have to preserve objection to each statement supporting a claim that a juror is biased to have the issue addressed on appeal, but the State is free to seek to overturn 37 years of precedent for the first time in an Answer Brief in this Court after failing to raise the issue in both the district court and Court of Appeals.

Court of Appeals even could have certified the question to this Court, allowing for full briefing of this issue.

In addition, because the State did not litigate this previously, Mr. Mendez was denied any chance to develop a record of prejudice under a new standard. If, for instance, defendants are now required to articulate which additional juror they would have struck, then Mr. Mendez was denied the opportunity to do so. Alternatively, had the standard been that Mr. Mendez had to demonstrate another juror who ended up on the jury was biased, more time could have been devoted to developing such a record (especially with respect to Juror 22), but since New Mexico's approach for 37 years has been otherwise, such arguments were not developed below.⁴

(2) *This Court should not overturn Fuson.*

The State asserts that if *Fuson* is applied as it has always been applied, then it should be overturned because it is unworkable and inconsistent with *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000). [AB 17-26] Although not acknowledged by the State, the Supreme Court has held that the determination of prejudice in this context is, like the decision to provide peremptory challenges at all, entirely a matter of state law. *See e.g., Rivera v. Illinois*, 556 U.S. 148, 152, 129 S.

⁴ In fact, when Mr. Mendez's Brief in Chief observed that Juror 22 might have been struck by the defense had the defense had further peremptory challenges available, giving rise to additional prejudice, the State complained that this argument was unpreserved. [AB 14, fn. 3]

Ct. 1446, 1450, 173 L. Ed. 2d 320 (2009) (“Just as state law controls the existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge”). Hence, as this Court itself acknowledged in *State v. Johnson*, 2010-NMSC-016, ¶¶ 31-32, 148 N.M. 50 (citing the prejudice standard from *Fuson* as our approach while acknowledging that under *Rivera*, this is not a matter of federal constitutional concern), the fact the federal standard has changed for federal purposes does not undermine New Mexico’s chosen approach or mean it conflicts with controlling precedent.⁵ As such, and because New Mexico adopted its approach prior to *Martinez-Salazar* and has, for the 24 years since that case was decided, continued using *Fuson*’s approach without issue, the State’s reasons and support for overturning *Fuson* should be particularly strong. However, as the discussion below makes clear, the State’s reasons for overturning *Fuson* are poorly developed and ill-considered.

Before overturning precedent, this Court “considers such common-sense factors as whether the precedent is ‘a remnant of abandoned doctrine,’ whether the precedent has proved to be unworkable, whether changing circumstances have deprived the precedent of its original justification, and the extent to which parties

⁵ Previously, where federal law evolved but New Mexico continued adhering to our own approach (even though it *was* in conflict with controlling precedent), this Court has not hesitated to stay the course and depart from federal law. See e.g., *State v. Leyva*, 2011-NMSC-009, ¶¶ 53-56, 149 N.M. 435; *State v. Yazzie*, 2019-NMSC-008, ¶¶ 43-48, 437 P.3d 182.

relying on the precedent would suffer hardship from its overruling.” *State v. Montoya*, 2013-NMSC-020, ¶ 40, 306 P.3d 426.

Citing nothing in support of its claim, the State briefly asserts that *Fuson* is unworkable because it results in unnecessary re-trials. [AB 19-20] Beyond the fact the State has utterly failed to substantiate that *Fuson* has caused any unnecessary re-trials, the analysis in *Fuson* has been applied repeatedly and has rarely resulted in reversal. *See e.g.*, *State v. Wiberg*, 1988-NMCA-022, ¶¶ 21-25, 107 N.M. 152 (affirming conviction under *Fuson*); *State v. Isiah*, 1989-NMSC-063, ¶¶ 28-30, 109 N.M. 21 (holding that when the defendant did not exercise all of his peremptory challenges, “he cannot claim prejudice for failure to dismiss prospective jurors”), *overruled on other grounds by State v. Lucero*, 1993-NMSC-064, 116 N.M. 450, 453-54, 863 P.2d 1071, 1074-75 (1993); *State v. Rackley*, 2000-NMCA-027, ¶¶ 8-13, 128 N.M. 761 (affirming conviction under *Fuson*); *Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 12, 141 N.M. 808 (requiring exhaustion of peremptory challenges under *Fuson*); *State v. Nez*, 2009 WL 6669512, at *5, A-1-CA-26811 (N.M. Ct. App. Apr. 20, 2009) (non-precedential) (same); *State v. Miller*, 2010 WL 3997932, at *2, A-1-CA-29568 (N.M. Ct. App. Feb. 8, 2010) (non-precedential) (same); *State v. Mendoza*, 2010 WL 4550717, at *4, A-1-CA-28286 (N.M. Ct. App. July 14, 2010) (non-precedential) (affirming under *Fuson*); *Johnson*, 2010-NMSC-016, ¶ 32 (same); *State v. Castillo*, 2011 WL 2028036, at *2-3, A-1-CA-30693 (N.M.

Ct. App. Feb. 25, 2011) (non-precedential) (same); *State v. Gallegos*, 2019 WL 1308257, at *9, S-1-SC-36110 (N.M. Mar. 21, 2019) (non-precedential) (same); *State v. Romero*, 2021 WL 4811931, at *3 (N.M. Ct. App. Oct. 15, 2021) (non-precedential) (same), aff'd *State v. Romero*, 2023-NMSC-014, ¶ 11; *State v. Holtsoi*, 2024-NMCA-042, 547 P.3d 770 (applying *Fuson* and reversing), *cert. denied*, *State v. Holtsoi*, 2024-NMCERT-004, 548 P.3d 1232. Moreover, because these cases were not litigated under a different approach, it is unclear if they would have been reversed had a different approach been utilized.

The State then briefly, and again without support, asserts that the parties will not be prejudiced by a prospective change to an approach that has governed practice for 24 years. **[AB 20]** Mr. Mendez disagrees with the State's blanket assertion. First, if New Mexico adopts a different approach it will likely impact preservation of this issue and require further litigation for parties to figure out how to demonstrate prejudice and the nuances of doing so under a new approach. After all, if the new approach requires articulation of which juror would have been struck in a manner similar to the approach in *State v. Jonas*, 904 N.W.2d 566, 583 (Iowa 2017) or in *Busby v. State*, 894 So.2d 88, 96-97 (Fla. 2004), *as revised on denial of reh'g* (Feb. 3, 2005), then practitioners will need to demonstrate this below, but may litigate whether it could apply to prior jurors or only subsequent ones. Or, if our new approach requires a renewed request for the court to use a for cause strike this change

will likely take some time to be fully instituted. Finally, even if the approach simply defaults to the federal approach, then preservation could require that more juror forms be kept to establish that a biased juror was sitting, or the defense may need to request a special hearing to explore a juror's views more or to substantiate how the jurors' biased views impacted deliberations. In fact, the difficulty in applying the harmless error analysis to the type of error here is exactly why some courts have rejected it. *See e.g., Good*, 2002 MT 113, ¶ 65, 43 P.3d at 961 (explaining that the error is structural in nature, compromises the impartiality of the jury, and gives the State an “unmistakable tactical advantage”); *see also State v. McLean*, 2002 ME 171, ¶¶ 15-16, 815 A.2d 799, 804-05 (noting that the per se reversal rule “has had a long history and tradition under the common law,” involves error that undermines “the basic structural integrity of the criminal tribunal itself” making it less amenable to harmless-error review, and would be difficult to review under harmless error analysis); *U.S. v. Annigon*, 96 F.3d 1132, 1150 (9th Cir. 1996) (Kozinski, J., dissenting) (explaining such error “is not amenable to normal harmless error analysis, as we can never figure out what would have happened if one member of the jury had been struck and replaced by some other, unknown person.”).

Instead of resolving these points, the State spends the bulk of its argument on its assertion that *Fuson* was based “exclusively on the application of federal case law” and since federal law has changed, New Mexico law must also. **[AB 20-23]**

However, prior to adopting a remedy consistent with federal law at that time, *Fuson* itself noted that the right to an impartial jury was grounded in Article II, Section 14 of the New Mexico Constitution. *Fuson*, 1987-NMSC-034, ¶ 5. Thus, although the *Fuson* Court may have been persuaded by the federal approach in place at that time, it was plainly applying that approach in the context of assuring New Mexico’s right to an impartial jury. Relying on older or disfavored but more protective federal approaches is something New Mexico law has consistently done in carving out our own approach. See e.g., *State v. Leyva*, 2011-NMSC-009, ¶¶ 53-56, 149 N.M. 435; *State v. Yazzie*, 2019-NMSC-008, ¶¶ 43-48, 437 P.3d 182; *State v. Rodarte*, 2005-NMCA-141, ¶¶ 8, 15-16, 138 N.M. 668 (adopting analysis from the dissent in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), for Article II, Section 10 purposes).

Importantly, and notably absent from the State’s discussion, subsequent cases applying *Fuson* discussed above have also cited the New Mexico (as opposed to federal) Constitution. Indeed, in *Johnson*, this Court explicitly recognized that for-cause errors, while not of federal constitutional concern, were subject to our chosen approach in *Fuson*. *Johnson*, 2010-NMSC-016, ¶¶ 31-32. Consequently, while *Fuson* cited federal authority in support of its prejudice test, it was doing so in the context of upholding our state constitutional right to an impartial jury and our courts

have continued to apply it in this context. And, as the Brief in Chief indicated, New Mexico is in good company in doing so. *See* [BIC 19-20 (collecting cases)]

Finally, the State argues that peremptory challenges are increasingly disfavored, making them an outdated relic, because they are subject to abuse and manipulation. [AB 23-25] However, peremptory challenges are expressly provided for under New Mexico law and the State has *never* preserved or lodged an attack on them directly (in fact, the State relied on them in this case). Rule 5-606 NMRA; NMSA 1978, § 38-5-14 (1991). When a right is provided, it must be fairly administered and viable remedies for violations of it must exist. *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress”).

Furthermore, to the extent such challenges are subject to abuse, it is worth noting that peremptory challenges are often abused by prosecutors, *see e.g.*, *State v. Blanton*, 2023-NMCA-028, 528 P.3d 699, which abuse could well increase if defendants have little recourse when a court improperly denies defense for-cause challenges. *Cf. Good*, 2002 MT 113, ¶ 65, 43 P.3d at 961. And, if the practice is truly so problematic, it could be unilaterally rectified by prosecutors waiving their right to use peremptory challenges rather than hamstringing defendants’ ability to ensure an impartial jury. *See* Maureen A. Howard, *Taking the High Road: Why Prosecutors*

Should Voluntarily Waive Peremptory Challenges, 23 GEO. J. LEGAL ETHICS 369 (Spring 2010).

Should this Court decide to reach this issue, Mr. Mendez asks this Court to decline the State's invitation to overturn *Fuson* and to continue adhering to an approach that has been employed in this State without issue for over three decades.

(3) Harmless error analysis is unsuited to assessing juror impartiality, and should not be adopted in New Mexico.

Because *Fuson* was seeking to protect New Mexico's constitutional right to an impartial jury, it ostensibly was decided under New Mexico's constitution. However, even if it was not, New Mexico's constitution should provide greater protection and continue to follow *Fuson*. New Mexico departs from federal jurisprudence when the federal analysis is flawed, when structural differences exist, and when distinct state characteristics justify departure. *State v. Crane*, 2014-NMSC-026, ¶ 15, 329 P.3d 689.

As discussed, there are jurisdictions that depart because the federal approach is ill-suited to the type of error here and provides insufficient protection to defendants. See *McLean*, 2002 ME 171, ¶¶ 11, 15-16, 815 A.2d at 804-05 (explaining that peremptory challenges are "one state-created means to the constitutional end of an impartial jury and a fair trial"); *Good*, 2002 MT 113, ¶ 65, 43 P.3d at 961 (describing the error as structural); *Westcom v. Meunier*, 164 Vt. 536, 539, 674 A.2d 1267, 1269 (1996) (indicating an actual prejudice standard

undermines the “whole purpose of peremptory challenges” which is to allow parties to dismiss a certain number of jurors). Indeed, this is why similar errors involving the improper use of peremptory challenges result in automatic reversal once certain criteria are met and are not subject to harmless error review. *Cf. Blanton*, 2023-NMCA-028, ¶¶ 6, 18-19 (indicating that a *Batson* violation occurred under a three-prong test and reversing without resort to harmless error analysis).

Additionally, there are structural implications to switching to a different approach. New Mexico law explicitly allows for peremptory challenges for both sides. A standard that allows such requirements to be easily overcome against defendants is inconsistent with providing them the right in the first place. Furthermore, if defendants have to show that they were forced to keep on a biased juror, this will result in increased inquiry of the sitting juror or jurors the defendant was unable to challenge. *Westcom*, 164 Vt. at 539, 674 A.2d at 1269 (explaining that an actual prejudice standard would render errors unreviewable because “the focus of the appellate inquiry would not be on the court’s error, but on the qualifications of juror subject to the lost peremptory challenge”). Defendants may request to call such jurors back for additional questioning before selection is complete, request that their questionnaire be kept as part of the record, or ask for hearings to establish the impact of their views on proceedings—practices generally disfavored in New Mexico. *See e.g.*, Rule 5-606(E)-(F) (providing for the destruction or sealing of questionnaire’s);

Rule 11-606(B) NMRA (indicating parties are generally prohibited from discussing the deliberative process).

Thus, New Mexico not only provides for peremptory challenges, but it disfavors practices that might be necessary to establishing bias or prejudice under a more juror-centric approach. Because the approach in *Fuson* best protects the rights at stake and has *long* done so in this State, if this Court is inclined to reach this issue, it should continue to adhere to its holding in *Fuson*.

CONCLUSION

For the reasons set forth above, Defendant-Appellant Carlos Mendez respectfully requests that this Court vacate his conviction and order that he receive a new trial in accordance with *Fuson* and decline to reach or adopt the State's suggested approach.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was e-filed in the Tyler Technology/Odyssey file and serve system and thereby electronically served on Michael J. Thomas at the New Mexico Department of Justice this 5th day of December, 2024.

/s/ Mary Barkot

Law Offices of the Public Defender