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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES v. MARTINEZ-SALAZAR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 98–1255. Argued November 29, 1999— Decided January 19, 2000

Respondent Martinez-Salazar and a codefendant were charged with a variety of federal offenses. As the Federal Rules of Criminal Procedure instruct, the District Court allotted them 10 peremptory challenges exercisable jointly in the selection of 12 jurors, Rule 24(b), and another such challenge exercisable in the selection of an alternate juror, Rule 24(c). Because prospective juror Don Gilbert indicated several times that he would favor the prosecution, the codefendants challenged him for cause, but the District Court declined to excuse him. After twice objecting, unsuccessfully, to the for-cause ruling, Martinez-Salazar used a peremptory challenge to remove Gilbert. The codefendants subsequently exhausted all of their peremptory challenges. At the close of jury selection, the District Court read the names of the jurors to be seated and asked if the prosecutor or defense counsel had any objections to any of those jurors. Martinez-Salazar's counsel responded: "None from us." At the conclusion of the trial, Martinez-Salazar was convicted on all counts. On appeal, the Ninth Circuit agreed with him (and the Government here does not contest) that the District Court's refusal to strike Gilbert for cause was an abuse of discretion. This error, the Ninth Circuit held, did not violate the Sixth Amendment, because Gilbert was removed and the impartiality of the jury eventually seated was not challenged. But the Court of Appeals further concluded that the District Court's mistake resulted in a violation of Martinez-Salazar's Fifth Amendment due process rights because it forced him to use a peremptory challenge curatively, thereby impairing his right to the full complement of peremptory challenges to which federal law entitled him. Such an error, the Court of Appeals held, requires automatic reversal.

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Held: A defendant's exercise of peremptory challenges pursuant to Rule 24 is not denied or impaired when the defendant chooses to use such a challenge to remove a juror who should have been excused for cause. Pp. 5–12.

(a) Although the peremptory challenge plays an important role in reinforcing a defendant's constitutional right to trial by an impartial jury, see, e.g., *Swain v. Alabama*, 380 U. S. 202, 212–213, 218–219, this Court has long recognized that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension, see, e.g., *Ross v. Oklahoma*, 487 U. S. 81, 88. Peremptory challenges in federal criminal trials are governed by Rule 24 of the Federal Rules of Criminal Procedure. Rule 24(b) prescribes, *inter alia*, that for offenses “punishable by imprisonment for more than one year, . . . the defendant or defendants [are] jointly [entitled] to 10 peremptory challenges.” Rule 24(c) further provides that when, as in this case, an alternate juror is to be selected, each side is entitled to one peremptory challenge in selecting that juror. The question to which the Court turns is whether Martinez-Salazar was denied any right for which Rule 24 provides. Pp. 5–7.

(b) *Ross* dealt with a state-law question resembling the one presented here. This Court first rejected the *Ross* defendant's position that, without more, the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. 487 U. S., at 88. So long as the jury that sits is impartial, the Court held, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. *Ibid.* The Court then rejected the defendant's due process objection that forced use of a peremptory challenge to cure a trial court's error in denying a challenge for cause arbitrarily deprived him of the full complement of peremptory challenges allowed under Oklahoma law. *Id.*, at 89. An Oklahoma statute accorded the defendant nine such challenges. Oklahoma courts had read into that grant a requirement that a defendant who disagreed with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. *Ibid.* Even then, under state law, the error was grounds for reversal only if the defendant exhausted all peremptory challenges, and an incompetent juror therefore was forced upon him. *Ibid.* The defendant in *Ross*, the Court concluded, did not lose any state-law right when he used one of his nine challenges to remove a juror who should have been excused for cause; rather, he received all that state law allowed him, and the fair trial that the Federal Constitution guaranteed. *Id.*, at 90–91. Pp. 7–8.

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(c) This Court rejects the Government's contention that federal law, like the Oklahoma statute considered in *Ross*, should be read to require a defendant to use a peremptory challenge to strike a juror who should have been removed for cause, in order to preserve the claim that the for-cause ruling impaired the defendant's right to a fair trial. Although this Court has sanctioned various limitations on the exercise of peremptory challenges that could be viewed as effectively reducing the number of challenges available to a defendant, see, e.g., *Stilson v. United States*, 250 U. S. 583, 586, these cases address procedures under which such challenges are exercised. None of them demands that a defendant use or refrain from using a challenge on a particular basis or when a particular set of facts is present. To date this Court has recognized only one substantive control over a federal criminal defendant's choice of whom to challenge peremptorily. Under the Equal Protection Clause, a defendant may not exercise a challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race. See, e.g., *Batson v. Kentucky*, 476 U. S. 79. The Court declines to read into Rule 24, or otherwise impose, the further control advanced by the Government. Pp. 8–9.

(d) However, the Court agrees with the Government's narrower contention that Rule 24(b) was not violated in this case. The Ninth Circuit erred in concluding that the District Court's mistake compelled Martinez-Salazar to challenge Gilbert peremptorily, thereby reducing his allotment of peremptory challenges by one. A hard choice is not the same as no choice. Martinez-Salazar received and exercised 11 peremptory challenges. That is all he is entitled to under the Rule. After objecting to the District Court's denial of his for-cause challenge, he had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, he elected to use a challenge to remove Gilbert. In choosing to remove Gilbert rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury. See, e.g., *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 137, n. 8. Moreover, the immediate choice he confronted comports with the reality of the jury selection process. Challenges for cause and rulings upon them are fast paced, made on the spot and under pressure. Counsel as well as court in that process must be prepared promptly to decide, often between shades of gray. Pp. 9–11.

(e) Martinez-Salazar and his codefendant were accorded the exact number of peremptory challenges that federal law allowed; he cannot tenably assert any violation of his Fifth Amendment due process right. See *Ross*, 487 U. S., at 91. P. 12.

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146 F. 3d 653, reversed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, THOMAS, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY, J., joined.