NO. 07-9995

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

MICHAEL RIVERA,

Petitioner,

v.

ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN,
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Attorney for Respondent

RICHARD A. DEVINE,
State's Attorney
Cook County, Illinois
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496
JAMES E. FITZGERALD,
ALAN J. SPELLBERG,*
JUDY L. DeANGELIS,
Assistant State's Attorneys,
Of Counsel.
*Attorney of Record

QUESTIONS PRESENTED FOR REVIEW

1. Whether federal jurisdiction exists to review the Illinois court's finding that the denial of a defendant's statutory right to a peremptory challenge, as provided by Illinois law (725 ILCS 5/115-4(e)), was harmless error, given that there is no federal constitutional right to peremptory challenges.

2. Whether an error that was not of constitutional magnitude – a trial court's erroneous denial of a criminal defendant's right to a peremptory challenge (so-called "reverse-Batson error"), which this Court has held is not a constitutional right – is a structural error that always mandates a new trial, or whether such error may be harmless, particularly in a case where the defendant did not use all of his peremptory challenges, and where the mistakenly-seated juror possessed no indicia of inappropriate discriminatory bias.

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BRIEF IN OPPOSITION

Respondent, the State of Illinois, respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the Supreme Court of Illinois, which affirmed petitioner's judgment of conviction for first degree murder.

STATEMENT OF THE CASE

Petitioner, Michael Rivera, was charged with two counts of first-degree murder. (C.L. 9-10) After a jury trial, petitioner was convicted of first-degree murder and was sentenced to 85 years in the Illinois Department of Corrections. (R. D145, J26) Petitioner appealed his conviction and sentence to the Illinois Appellate Court, First District, claiming, among other things, that the trial court committed reversible error in raising a reverse-Batson challenge sua sponte, and then refusing petitioner the use of a peremptory challenge against a certain juror. The appellate court held that the trial court had the right to raise the Batson issue sua sponte and that the trial court's finding of purposeful discrimination in petitioner's use of a peremptory challenge was not "manifestly erroneous." People v. Rivera, 348 Ill. App. 3d 168, 179 (1st Dist. 2004). Petitioner filed a Petition for Leave to Appeal to the Illinois Supreme Court, and that court remanded the matter for a limited hearing "to allow the trial judge an opportunity to articulate the bases for his Batson rulings." People v. Rivera, 221 Ill. 2d 481, 515-16 (2006). Following this limited hearing, the Illinois Supreme Court found that the trial court erroneously determined that a prima facie case of gender discrimination had been

established but that such error was not structural and was harmless beyond a reasonable doubt given the overwhelming evidence of petitioner's guilt.

As the trial record reveals, each party was given seven peremptory challenges against prospective jurors. (R. A3) During voir dire of the first panel, petitioner exercised a peremptory challenge against Elizabeth Alexander, and the court excused her without comment. (R.A73) Voir dire of the first panel resulted in seating Jo Ellen Ek, Cathleen McKendrick, Elizabeth Cheswick and Marianne Vock. (R.A83-84)

Voir dire of the second panel resulted in the seating of Thomas Coyle, Myra Elms-Starks, Jacqueline Garza and Alyssa Maffia-Kupka. (R.A155) The court excused certain veniremembers for cause, including Evangelina Guzman. (R.A102, R.A158-59, A.120, A142, A147) Petitioner objected to the release of Guzman, who did not comprehend much English. (R.A146) Petitioner exercised peremptory challenges against Rosalee Huizenga and Thomas Hickey. (R.A128, A1389) After the People exercised their only peremptory challenge against Teresa Charo, petitioner sought to make a record based on that prospective juror being Hispanic as was petitioner. While petitioner did not raise a Batson challenge, the court nonetheless found no prima facie case existed and noted that it was aware that the petitioner had challenged Ms. Alexander, but stated that the People had not made a "reverse-Batson" motion as to that challenge. (R.A110)

Voir dire of the third panel resulted in the seating of Deloris Gomez, Robert Bollacker, A.J. Rao and Norma Gonzalez. (R.A227)) As the record shows, Ms. Gomez stated during voir dire that she had lived at her present address with her family for 26 years, had been employed for 22 years working at the business office of the Cook County

Hospital, and was now a supervisor there. (R.A168-69) She had two adult children, both of whom worked. She had been a juror a few years earlier in a civil case. (R.A169) She stated that nothing about her prior experience would affect her ability to be fair and she did not know any of the litigants or lawyers in the case. (R.A170) No member of her family had been a victim of crime, nor was she associated with law enforcement. She never had a member of her family or close friend who had been arrested or who had been associated with a criminal case as either a victim or witness. (R.A171) She indicated that neither gun nor gang evidence would prevent her from being fair. (R.A172) She read newspapers in her leisure time and could think of nothing that would prevent her from being fair to both sides if she sat as a juror. (R.A172)

Defense counsel asked Ms. Gomez ten additional questions, including whether she had any contact with patients at the hospital. (R. A207) She stated that as part of her job as a supervisor of the clerical staff, she had contact with the patients as they checked in. (A207) She told defense counsel that being an employee of the out-patient clinic would not "set [her] off one way or another against [petitioner]." (R.A208)

Defense counsel then attempted to use a peremptory challenge against Ms. Gomez, but the trial court asked Ms. Gomez to remain in her seat and called the parties to chambers. (R. A210) The court asked defense counsel, sua sponte, to "articulate a basis" for his use of a peremptory challenge against Ms. Gomez. (R. A210) Defense counsel explained that Ms. Gomez had a "connection to a hospital that on a daily basis probably sees more gunshot victims than any other hospital in the world probably….(and that) even though she's not a rehabilitive (sic) nurse, she on a daily basis sees those

victims who are victims of violent crimes." (R. A211) Defense counsel explained that he was "constrained" and that he was "pulled in two different ways[]" in using a peremptory challenge against Ms. Gomez because of her Hispanic name, however, she saw victims of violent crimes on a daily basis. (R.A211) The court then noted that Ms. Gomez "appears to be an African-American female." (R.A211) When asked by the trial court to give his position on the matter, the prosecutor stated that this was not a case of the victim laying in the street for two hours and that the victim's treatment was not an issue in the case. (R. A211) Thus, the prosecutor asserted that defense counsel provided an insufficient reason for excusing Ms. Gomez. (R.A211)

Defense counsel countered that he had already accepted a black female juror, but the court noted that it was "quite frankly very much concerned" because juror Gomez was the second African-American female that defense counsel had sought to exclude. (R.A212-13) The trial court further stated that Ms. Gomez worked in a clinical division of the hospital, that "she works in a business office[,]" and was concerned about petitioner's use of a peremptory challenge against her. (R. A212) The trial court then asked for any comments from the People, and the prosecutor requested that Ms. Gomez be impaneled as a juror. (R. A213) The trial court commented that it:

> "was concerned about the right of Ms. Gomez to be a juror and participate.
>
> If the State in fact had done this, I certainly would have found they would have established a prima facie case by the very reason – what I'm going to do is allow Ms.

> Gomez – allow her to be seated, not excuse her on the basis of your peremptory.
>
> I feel under these circumstances the reasons given by you, [defense counsel], do not satisfy this Court. As far as I'm concerned, it's more than a prima facie case of discrimination against Ms. Gomez. I'm not going to allow her to be excused. She will be seated as a juror over objection." (R. A213)

Defense counsel then sought to question Ms. Gomez further, the court agreed, and brought Ms. Gomez back into chambers. (R. A213-14) Although defense counsel acknowledged that the victim in this case was not treated at Cook County Hospital, he, again, asked Ms. Gomez whether she would have any prejudice as a result of the gun violence in the case. (R. A215) Specifically, he stated, "does the fact that you see this on a daily basis, unfortunate, innocent victims of gun violence, is that going to cause you to have any degree, any degree, of prejudgments or prejudices against my client because he's accused of causing [sic] another victim of a violent crime[.]" (R. A215) Ms. Gomez clarified that she worked in an out-patient section of Cook County Hospital, "the clinical part," the orthopedic section of the clinic. (R. A215) She specifically told him that she was "not where gun – the shot wounds and things come in which is the medical ER, [she was] in the out-patient clinic." (R. A215) In her clinic, there were mainly appointments and people picking up medications. (R.A215-16) Thus, in response to defense counsel's question as to whether she would be prejudiced against petitioner because some of the

patients picking up medications could have been victims of gun violence, she responded, "No, it does not. It does not affect me in that way." (R. A216) She reiterated that she would be able to fairly view the evidence and follow the instructions on the law. (R.A217)

After Ms. Gomez was excused from the room, the trial court noted that he had just given defense counsel "additional leeway to make an inquiry of this juror" and asked defense counsel if he wished to say anything further. (R. 217-18) Defense counsel responded that he felt the same way and that he was "trying to modify the composition of this panel," indicating that he still wished to excuse juror Gomez, not because of her race, but because he "could also factor in the fact that . . . the jury is predominantly women, I'm trying to also get some impact from possibly other men in the case." (R.A218)

After listening to defense counsel's comments, and after asking the prosecution if it had any further comments, the trial court stated that it

> "…had the opportunity to question Deloris Gomez who I find is a very intelligent lady. I considered her statements very carefully, her testimony very carefully, and I again feel that she shall sit as a juror. I shall not excuse her, and I will override your preeemptory (sic) challenge as to Ms. Gomez, and I find no basis for cause. So Ms. Gomez shall sit as a juror." (R. A219)

As to the evidence presented at trial, the Illinois Supreme Court found that the

following facts supported petitioner's guilty verdict:

> Susan Shelton testified that she was with the defendant on the night of the murder. That evening, Shelton attended a party where defendant and several other members of the Insane Deuces were also in attendance. At some point in the evening, defendant, Shelton, Carlos Sanchez (also a gang member), and three others left the party in Sanchez's van, with Sanchez driving. While they were driving around defendant saw two persons walking down the street. Defendant identified those individuals as members of a rival gang. Defendant directed Sanchez to stop the van. Defendant then produced a gun and exited the van, but returned a few seconds later, instructing Sanchez to chase the two persons they had just seen. Shelton testified that they never saw those two individuals again that night, but defendant later noticed another individual on the street, and announced, "There go [*sic*] that pussy ass Stone from earlier." Shelton knew that the Insane Deuces and the Stones were rival gangs.
>
> Defendant pointed his gun at Sanchez and ordered him to "stop the fucking van." When the van stopped, defendant exited the van, still holding the gun. Two other

occupants followed. Defendant ran around the side of the van, and out of Shelton's sight. Shelton then heard gunshots. Defendant and the others returned to the van, with defendant still holding the gun. The two other individuals with defendant were yelling gang slogans until defendant told them to "shut the fuck up," advising them that he still had “one bullet left.” Defendant was the only person Shelton saw armed with a weapon that evening. After the shooting, defendant continued to direct the van’s movements. At one point, defendant ordered Sanchez to stop in an alley. Defendant unloaded the gun and handed the shell casings to Shelton. Defendant got out of the van with the gun and later returned without it. Shelton gave the shell casings to Sanchez, and he apparently disposed of them. Sanchez then took defendant and three other individuals back to the party. Shelton testified that she believed defendant to be the “chief enforcer” of the Insane Deuces, a gang position below the chief, or “jefe,” and above the foot soldiers.

Miguel Rodriguez testified that he was a member of the Insane Deuces on January 9, 1998, and several members of the gang--including defendant--were at his

home that evening. Between 8:30 and 9 p.m. that night, the group was notified that there were some "Stones" in a park near Rodriguez's home. The group, including defendant and a person named "Nelson," went to the park, where they saw some individuals playing basketball. Defendant began to "throw" gang signs, indicating his allegiance to the gang. When those playing basketball did not respond, the group returned to Rodriguez's home. Back at Rodriguez's home, defendant referred to the individuals in the park as "pussies" because they were afraid to fight. Later that night, Rodriguez observed defendant in possession of two chrome revolvers. Thereafter, defendant began asking other gang members if they wanted to go with him to the projects. Defendant and other members of the gang left Rodriguez's home between 12:30 and 1 a.m. When Rodriguez next saw defendant it was approximately 3 a.m. At that time, defendant announced to Rodriguez that he was a "Stone killer," and he indicated he had shot someone that evening. Rodriguez identified Nelson as a "chief" of the gang, and defendant as the "chief enforcer." He explained that the role of the chief enforcer was to enforce the chief's decisions.

Charles Oberlin testified that he was a member of the Insane Deuces in January of 1998, and he knew defendant as the "chief enforcer" of that gang. Around 3 or 4 a.m. on January 10, 1998, Oberlin saw defendant in possession of a chrome gun, and defendant indicated that he had fired the weapon. Oberlin described his own position in the gang hierarchy at the time as that of an "old-G," or elder. Oberlin explained that his position was above that of "foot soldiers," but below the chief enforcers, the chief and the vice-president.

After the State rested, defendant proceeded by stipulation. It was stipulated that on January 15, 1998, Oberlin had testified before the grand jury that the last time he saw defendant with a gun was at a laundromat on Belmont on January 8, 1998. Further, it was stipulated that Rodriguez had testified before the grand jury that he did not see an individual named Masina give defendant the handguns, but only saw defendant with the handguns. Further, it was stipulated that Rodriquez gave grand jury testimony indicating that when defendant was explaining how he shot the victim, defendant stated that the victim grabbed his chest, screamed, fell, and never got back up.

> Finally, it was stipulated that Susan Shelton had testified before the grand jury on January 12, 1998. Shelton testified that, when she was in the van on the evening in question, she heard a gunshot and she then put her head down and closed her eyes, whereafter she heard four more gunshots.
>
> The defense rested without presenting any witnesses.
>
> People v. Rivera, 227 Ill. 2d. 1, 25 (2007).

The jury found petitioner guilty of first-degree murder. Petitioner was sentenced to eighty-five years in the Illinois Department of Corrections.

On appeal to the Illinois Supreme Court, petitioner argued error with regard to jury selection during trial (reverse-Batson), and the state high court determined that the prima facie question was not moot because the defense was denied its right to exercise a peremptory challenge against Ms. Gomez. People v. Rivera, 221 Ill. 2d 481, 515-516 (2006). That court explained that before a trial court may raise a Batson claim sua sponte, there must be a "clear" indication of a prima facie case and the trial court "must make an adequate record, consisting of all relevant facts, factual findings, and articulated legal bases for both its finding of a prima facie case and for its ultimate determination at the third stage of the Batson procedure." Id. at 515-16. The state high court then remanded for a limited hearing, stating that the trial court had failed to "see to it that adequate facts are preserved in the record to support its ruling," and directed the trial court to make an adequate record for its finding of a prima facie case and for its ultimate determination at

the third-stage of the hearing. Id. at 516.

During the limited remand hearing, the trial court explained that although defense counsel raised Ms. Gomez's employment and the exposure "she may have had" to victims of violence as the reason for his peremptory challenge, that Ms. Gomez testified that she was employed as a supervisor in a building separate and apart from Cook County Hospital and that she could be "fair and impartial and would follow the instructions on the law by this court." (Supp. R 4) The trial court further commented that it had given defense counsel an additional opportunity to question Ms. Gomez but that the additional questioning "did not establish any neutral basis as to why she should be withdrawn." (Supp. R 4) The trial court further noted that because a "majority of the jury consisted of women," it believed that petitioner

> "was seeking to excuse Ms. Gomez because she in fact was a woman. That he wanted input he said for the record for (sic) male jurors. The women comprised a majority of the jury selected and that he attempted to `balance' the jury by trying to get more men on the jury." (Supp. R 4)

Based on defense counsel's remarks and the nature of his questioning of Ms. Gomez, the trial court believed that a prima facie case of gender discrimination had been established. (Supp. R 4) He then immediately proceeded to stages 2 and 3 of the Batson process as "[t]here was no reason to have any delay." (Supp. R 5) Upon examining the "totality" of the circumstances, the trial court found no basis to exclude Ms. Gomez, and

> "it appeared very obviously [sic] to me by observing

> counsel and considering his admission as to why he wants to excuse women as jurors, I felt that her 14th Amendment right to be a juror would in fact be violated if she was so excused." (Supp. R 6)

The Illinois Supreme Court held that the trial court erred when it found that a prima facie case of gender discrimination had been established, but that any error was harmless beyond a reasonable doubt given the overwhelming evidence of petitioner's guilt. People v. Rivera, 227 Ill. 2d 1, 26 (2007). The state high court specifically relied upon United States v. Martinez-Salazar, 528 U.S. 304 (2000), as clarifying that the erroneous denial or impairment of the right to exercise a peremptory challenge no longer requires automatic reversal, as stated as dictum in Swain v. Alabama, 380 U.S. 202, 219 (1965), in the age of "harmless-error review." Rivera, 227 Ill. 2d at 19. It determined that the erroneous denial of a peremptory challenge does not qualify as structural error, as it has never been included in the recognized, short list of structural errors as determined by this Court, then found that any error was harmless beyond a reasonable doubt upon reviewing the evidence presented against petitioner at trial and determining that no rational jury - or juror - would have acquitted petitioner of the offense given the overwhelming evidence of petitioner's guilt. Id. at 26.

REASONS FOR DENYING THE PETITION

_____

Petitioner's primary argument for certiorari is that the issue presented directly implicates a 7-2 split, and indirectly implicates a 19-12 split in cases involving the denial of for-cause challenges. (Pet. at 4-5). This Court should deny certiorari for three reasons. First, because it lacks subject-matter jurisdiction: peremptory challenges are a state statutory right, not a right afforded by the Federal Constitution. Thus, each state is free to choose to apply harmless error analysis in these types of cases.

Second, certiorari should be denied because the alleged splits are either illusory or not implicated by the case at bar. The alleged 7-2 split is manufactured. In fact, just one early outlier court has disagreed with Illinois's approach, but a number of courts have taken a consistent approach. The 19-12 split that petitioner identifies arises from trial court error in denying a for-cause challenge to seating a juror, but, as discussed below, that is not present here, and therefore this case is a poor vehicle to resolve that split. Finally, the Illinois Supreme Court's decision was correct on the merits.

I.

THIS COURT LACKS JURISDICTION WHERE NO FEDERAL QUESTION HAS BEEN PRESENTED SINCE THE PETITIONER'S RIGHT TO PEREMPTORY CHALLENGES IS A STATE STATUTORY RIGHT AND DOES NOT IMPAIR THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY.

As this Court has made very clear, peremptory challenges are not of constitutional dimension but are, rather, matters of State law, meaning that a State may determine their number, their purpose, and the manner of their exercise. Ross v. Oklahoma, 487 U.S. 81 (1988).[1] The loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury. Ross, 487 U.S. at 88. Rather, peremptory challenges are a means to achieve the end of an impartial jury. Id. This is distinct from a Batson error that occurs when a juror is actually dismissed on the basis of race or gender; it is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal. See Johnson v. United States, 520 U.S. 461, 468-469 (1997); J. E. B. v. Alabama ex rel T. B., 511 U.S. 127, 142 (1994). But the denial of a peremptory challenge on other grounds amounts to the denial of a state statutory or court-rule-based right to exclude a certain number of jurors. An improper denial of such a peremptory challenge is not of constitutional dimension. United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000); Ross, 487 U.S. at 88 (1988).

Neither the Sixth Amendment right to an impartial jury, nor the right to due

[1] Illinois permits peremptory challenges in non-capital criminal cases. See Ill. S. Ct. R. 434(d); 725 ILCS 5/115-4(e).

process of law guaranteed under the Fourteenth Amendment was infringed here where this Court has repeatedly stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial. See Frazier v. United States, 335 U.S. 497, 505 n. 11 (1948); United States v. Wood, 299 U.S. 123, 145 (1936); Stilson v. United States, 250 U.S. 583, 586 (1919) and Georgia v. McCollum, 505 U.S. 42, 57 (1992)(because peremptory challenges are "state created means to the constitutional end of an impartial jury and fair trial . . . the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial"). Moreover, a defendant's due process rights regarding peremptory challenges are not denied or impaired if the defendant receives that which state law provides. Ross, 487 U.S. at 89. State law provides for the free exercise of peremptory challenges constitutionally constrained only by equal protection concerns as defined in Batson and its progeny. The only constitutional limitation on the statutory right of a peremptory challenge is the prohibition from exercising peremptory challenges on the basis of gender, ethnic origin, or race, which **is** violative of the Equal Protection Clause. See Martinez-Salazar, 528 U.S. at 315, citing J.E.B, 511 U.S. at 142 (gender); Hernandez v. New York, 500 U.S. 352 (1991)(ethnic origin); and Batson v. Kentucky, 476 U.S. 79 (1986)(race).

Thus, as the foregoing demonstrates, Batson, and its progeny, are clearly founded on the premise that discrimination in jury selection is an independent wrong that must have its own redress. Thus, this Court has explained:

Discrimination in jury selection, whether based on race or

> on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders. J.E.B., 511 U.S. at 140 (internal citation omitted).

Where a defendant is disallowed a peremptory challenge, by contrast, none of the harms implicated by Batson are at issue because no discrimination has occurred. This should be the same even if the disallowance was based on a trial court's incorrect assessment of whether a prima facie case was established or a defense counsel's reasoning for exercising the peremptory challenge. The only harm is that the litigant has been mistakenly deprived of a peremptory challenge; a state-created trial tool.

This Honorable Court has continually stated that when a state court has decided a question on independent and adequate state grounds, the Court lacks jurisdiction to review that decision on Certiorari. Wainwright v. Sykes, 433 U.S. 72 (1977). As this Court noted in Henry v. Mississippi:

> It is, of course, a familiar principle that this Court will

> decline to review state court judgments which rest on adequate and independent state grounds, even when those judgments also decide federal questions. The principle applies not only to cases involving state substantive grounds, but also to cases involving state procedural grounds. Henry, 397 U.S. 433, 436 (1965).

In the instant case, the Illinois Supreme Court was reviewing the denial of peremptory challenges available purely as a matter of Illinois law. 725 ILCS 5/115-4(e); see also Ill. S. Ct. R. 434(d). Because there is no federal constitutional right to a peremptory challenge, this Court should decline to review the Illinois Supreme Court's denial of a defendant's statutory right to exercise a peremptory challenge. Although petitioner argues that "this case provides precisely the vehicle that this Court has been lacking: A specific juror was seated at petitioner's trial who, were it not for the misapplication of the reverse-Batson rule that deprived petitioner of the use of his peremptory challenge, would have been dismissed," (Pet. at 16), this statement is precisely why this Court should **not** grant the petition where petitioner readily admits that this matter merely involves the loss of the use of a peremptory challenge which is not a constitutional violation and cannot result in petitioner receiving relief in the form of a new trial.

II.

PETITIONER'S ALLEGED 7-2 SPLIT ON THE ISSUE PRESENTED BY THIS CASE IS NOT AS DESCRIBED – ABSENT ONE EARLY OUTLIER, COURTS HAVE AGREED WITH THE ILLINOIS SUPREME COURT THAT HARMLESS ERROR APPLIES TO THE IMPROPER DENIAL OF A PEREMPTORY CHALLENGE

Jurisdiction aside, the precise issue presented by the Illinois Supreme Court's decision below is whether harmless error analysis may apply to a trial court's improper denial of a defendant's peremptory challenge. (Pet. App. 11a; Pet 3) Here, the Supreme Court of Illinois held that harmless error analysis was proper given this Court's decision in United States v. Martinez-Salazar, 528 U.S. 304, 317 n.4 (2000). (Pet. App. 12a) As petitioner notes, the Supreme Court of Washington disagreed, in State v. Vreen, 26 P.3d 236, 240 (Wash. 2001), however, the remaining cases cited by petitioner do not directly conflict with Rivera, as discussed below. Moreover, a number of courts that petitioner fails to cite also agree with Rivera. In sum, Vreen was an outlier decision, rendered shortly after Martinez-Salazar was decided, and subsequent decisions from a number of courts agree with Rivera.

A.

Cases Decided Before Martinez-Salazar Do Not Conflict With Rivera.

Clearly ignoring this Court's pronouncement in Martinez-Salazar, 528 U.S. 304, 317 n. 4 (2000), petitioner claims that the rulings from other jurisdictions have caused a "mature and deep split of authority" that this Court must resolve. (Pet. at 3) But petitioner's attempt to create a split is illusory where petitioner lumps all lower court

decisions together, regardless of when they were decided, without acknowledging that cases decided before Martinez-Salazar do not conflict with the Illinois Supreme Court's decision in Rivera.

Swain v. Alabama, 380 U.S. 202, 219 (1965), noted the importance of a defendant's right to exercise peremptory challenges and stated, in dictum, that an improper denial of a peremptory challenge is "reversible error without a showing of prejudice." But United States v. Martinez-Salazar, 528 U.S. 304, 317 n. 4 (2000), subsequently clarified that "the oft-quoted language in Swain was not only unnecessary to the decision in that case -- because Swain did not address any claim that a defendant had been denied a peremptory challenge -- but was founded on a series of our early cases decided long before the adoption of harmless-error review." It further held that a "defendant's exercise of peremptory challenges … is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause." Id. at 317. Thus, because Martinez-Salazar clarified that the dictum in Swain was fundamentally flawed, lower court cases decided before Martinez-Salazar are inapposite.[2]

[2] See, also, United States v. Patterson, 215 F.3d 776, 781-782 (7th Cir. 2000)(vacated in part on other grounds, 531 U.S. 1033 (2000)), where this Court's observations in Martinez-Salazar caused the Seventh Circuit to reject the automatic reversal rule involving claims of error arising from the loss or impairment of peremptory challenges. ("Martinez-Salazar . . . pulls the plug on the Swain dictum and requires us to address the harmless-error question as an original matter"). Id. (citations omitted).

Despite this Court's clear pronouncement in the operative footnote in Martinez-Salazar, petitioner attempts to create a "split of authority" by citing to seven cases which he believes required automatic reversal following an erroneous ruling in a reverse-Batson matter; his attempt to do so is misguided and simply wrong. In United States v. McFerron, 163 F.3d 952 (6th Cir. 1998), the government objected when the defendant used seven of her ten peremptory challenges on white males. The Sixth Circuit held that the district court erred by not conducting a Batson third-step analysis. Id. at 955. McFerron rejected the government's argument that this was harmless error, holding that "[t]his type of error involves a `structural error,' which is not subject to harmless error analysis." Id. at 955-56.

McFerron in turn relied upon United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996)(en banc). Annigoni included a full discussion of whether harmless error analysis applied to the erroneous denial of a right to a peremptory challenge. Id. at 1142-43. In holding harmless error inapplicable, the court relied explicitly on this Court's dictum in Swain that such error is reversible without the need to show prejudice. Id. at 1143. Because Annigoni and McFerron were decided before Martinez-Salazar, they simply cannot be said to conflict with the Illinois Supreme Court's decision here, which, as petitioner concedes, relied expressly on Martinez-Salazar. (Pet. at 11). Annigoni, and, by extension, McFerron, relied on Swain, which this Court rejected in Martinez-Salazar. Accordingly, these two cases should not be included in petitioner's alleged split.

B.

Cases That Fail To Discuss Harmless Error Do Not Conflict With The Instant Illinois Supreme Court Decision.

Three of petitioner's authorities are of little relevance because the courts in those cases simply reversed the erroneous denial of a peremptory challenge without considering whether harmless error should apply. In United States v. Blanding, 250 F.3d 858 (4th Cir. 2001), the court found that the district court erred by denying a peremptory challenge that resulted in the seating of a possibly biased juror whose vehicle bore a bumper sticker of the confederate flag. The court did not discuss whether this error could be harmless or whether it was structural error. Indeed, the government did not even argue that it was harmless error. Thus, this issue was neither presented nor decided.

Similarly, the courts in Holder v. State, 124 S.W.3d 439 (Ark. 2003) and Parker v. State, 778 A.2d 1096 (Md. 2001), overturned the convictions without discussion of whether harmless error should apply. Both courts simply concluded that the trial court had erred and, in a sentence without citation, stated that the defendant should be given a new trial. Holder, 124 S.W.3d at 453; Parker, 778 A.2d at 1002. Thus, as with Blanding, these cases are not in conflict with Rivera.

C.

Cases That Fail To Discuss Martinez-Salazar Do Not Conflict With The Instant Illinois Supreme Court Decision.

Petitioner also relies on Angus v. State, 695 N.W.2d 109 (Minn. 2005), as

forming part of the split. While Angus held that the error was structural, and not amenable to harmless error review, it did so in an abbreviated discussion relying on Minnesota case law rooted in Annigoni and other pre-Martinez-Salazar decisions. Angus, 695 N.W.2d at 118 (citing State v. Reiners, 664 N.W.2d 826, 835 (Minn. 2003); State v. Logan, 535 N.W.2d 320, 324 (Minn. 1995)). In sum, Minnesota courts have continued to apply the Swain rule as a matter of state law without discussing, much less deciding, whether Martinez-Salazar changes their analysis.

D.

Cases That Agree With The Instant Illinois Supreme Court Decision.

Petitioner incorrectly asserts that only one court agrees with the instant Illinois Supreme Court decision: People v. Bell, 702 N.W.2d 128 (Mich. 2005). Not only have the state high courts in Illinois and Michigan embraced this Court's clear pronouncement that the loss of the use of a peremptory challenge is no longer grounds for automatic reversal, but other courts, despite petitioner's belief that there are only two, have embraced such notion as well. The Pennsylvania state high court, in Commonwealth v. Carson, 741 A.2d 686 (Pa. 1999), found that no prejudice resulted from seating a juror who the defendant attempted to have removed by use of a peremptory challenge. Id. at 696. Although the defendant argued that the trial court's seating of the juror infringed on his "right to select those people who he believed would grant him a fair trial," the Pennsylvania Supreme Court held that the Sixth Amendment guarantees the right of the criminal defendant to a "jury pool drawn from a fair cross section of the community but did not guarantee a criminal defendant the jury of his choice or of any particular

composition." Id. at 696. Because the defendant had failed to make a showing that the particular juror was biased or incompetent to serve as a juror, he was entitled to no relief. Id.

Numerous courts across the country have also rejected an automatic reversal rule. People v. Boyette, 58 P.3d 391(CA 2002) (in a reverse-Batson case, the reviewing court assessed the trial court's denial of the defendant's use of a peremptory challenge by determining whether the evidence presented at trial was so overwhelming that any resulting error was harmless); Frazier v. New York, 156 Fed.Appx. 423, 425 (2nd Cir. 2005)("[t]here is no Supreme Court precedent clearly establishing that the success of a prosecutor's Batson challenge works any constitutional harm in the absence of any showing that the seated juror was biased."); and Vega v. Portuondo, 120 Fed. Appx. 380, 383 (2d Cir. 2005) (federal habeas court could not hold that state trial court's refusal of defense peremptory challenge denied petitioner a constitutional right, given that this Court has declined to recognize a constitutional right to exercise peremptory challenge). Other federal habeas courts have similarly decided various matters dealing with a defendant's loss of the use of a peremptory challenge. See, Long v. Norris, 2007 U.S. Dist. LEXIS 49883 (E.D. Ark. July 10, 2007) ("the mere fact that the trial court disallowed petitioner two of his peremptory challenges to white males does not violate the Constitution[]"), Reyes v. Greiner, 340 F.Supp. 2d 245, 275 (E.D.N.Y. 2004)(where the court stated, in dictum, that reverse-Batson errors "do not even implicate the Equal Protection Clause."); and Haywood v. Portuando, 288 F.Supp. 2d 446, 461-62 (S.D.N.Y. 2003) (trial court's alleged error in denying the defendant the use of a

peremptory challenge was not an "egregious departure" from accepted standards of legal justice and, thus, did not result in the deprivation of due process).

Thus, the foregoing citations clearly prove that, following this Court's pronouncement in Martinez-Salazar, wherein this Court overruled Swain's dictum, there is no obvious split of authority but merely certain courts which have failed to properly analyze the issue. Regardless, if any "split of authority" exists with regard to a defendant's loss of the use of a peremptory challenge during voir dire, such "split" leans toward the reasoning as pronounced by this Court in Martinez-Salazar and properly utilized by the Illinois Supreme Court in its opinion below.

E.

In Sum, The Alleged Split Is Illusory.

A thorough review of the relevant cases, including several not cited by petitioner, reveals that the legal landscape is much different than the one described in the petition. Instead of a 7-2 split, with a majority of courts in direct conflict with the Illinois Supreme Court's decision, the opposite is true. In reality, only the Washington court, in Vreen, contains an analysis that directly conflicts with the Illinois Supreme Court's decision here. And as the Michigan court noted, Vreen is unpersuasive because its analysis was cursory and failed to recognize that Martinez-Salazar constituted a "significant shift" regarding the outcome of the erroneous denial of a peremptory challenge. Bell, 702 N.W.2d at 139 n. 18. In any event, Vreen was an early outlier, and certiorari need not be used to correct the Washington court's error that the Washington courts, themselves, are likely to remedy.

III.

THIS CASE IS A POOR VEHICLE FOR DECIDING THE ALLEGED SPLIT BECAUSE IT REQUIRES RESOLUTION OF WHETHER A PRIMA FACIE CASE WAS ESTABLISHED AT TRIAL.

Even if this Court were determined to correct the error in Vreen, this case is a poor vehicle for doing so because it requires resolution of an outstanding question whether a prima facie case was established at trial. Although the Illinois Supreme Court determined, following the Batson remand hearing, that the trial court had erroneously ruled that a prima facie case of gender discrimination had been established, the People disagree with the state high court's assessment. If certiorari were granted, this threshold issue would be relitigated before this Court.

The trial court correctly believed that petitioner's use of his peremptory challenges raised an inference of purposeful gender discrimination when defense counsel exercised his fourth peremptory challenge to exclude a third female. Given that petitioner's jury already included seven women at the time that defense counsel attempted to use a fourth peremptory challenge against Deloris Gomez, it was precisely the large number of women already impaneled on the jury which led the trial court to raise the Batson issue sua sponte. The court was convinced that petitioner's actions in using a third peremptory challenge against a female had raised the inference of a prima facie case despite the fact that there was a predominant number of women on the jury, where the court stated at the remand hearing,

> "I indicated I was raising a Baston (sic) issue because Ms.

> Gomez was in fact the second (sic) woman peremptorily challenged by the Defendant. A majority of the jury consisted of women. And I felt that under these circumstances the Defendant was seeking to excuse Ms. Gomez because she in fact was a woman." (Supp. R at 4)

Thus, the trial court found that petitioner was attempting to exclude Ms. Gomez solely because she was a woman, and petitioner conceded as much. Defense counsel, in no uncertain terms, stated that it was his attempt to "get some impact from * * * men in the case." As this Court has made clear, it is irrelevant whether one woman or ten women sat on the jury; petitioner's exclusion of one woman on the basis of gender was unconstitutional. See, J.E.B., 511 U.S. at 140. Here, the trial court chose not to believe the defense attorney's explanations for striking Deloris Gomez and rightfully rejected his explanations, especially where one of the explanations was clearly discriminatory on its face. Yet, the state high court improperly failed to defer to the trial court's finding which turned on the evaluation of defense counsel's credibility. Batson, 476 U.S. at 98, n.21.

The state high court also erred when it held that the prima facie question was a moot point. The law from this Court is unquestionably clear: "Once a [party] has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [objector] had made a prima facie showing becomes moot." Hernandez, 500 U.S. at 359. In Hernandez, this Court, in reviewing a ruling on a defendant's Batson motion, held that the preliminary issue of whether the defendant has made a prima facie case becomes

moot where the trial court fails to determine whether such a showing has been made, the State voluntarily offers reasons for its challenges, and the trial court rules on the ultimate question of purposeful discrimination. Id. Here, the trial court determined that a prima facie issue had been established and defense counsel offered his reasons for excusing Deloris Gomez, but the trial court found those reasons discriminatory. Although the Illinois Supreme Court determined that when a party is ultimately denied its right to exercise a peremptory challenge, the "matters bearing upon the first stage of the Batson process is properly within the scope of appellate review and not moot," (Rivera, 221 Ill. 2d at 507), this reasoning conflicts with the prior holdings of this Court. As the law dictates, once the trial court below ruled on the ultimate question of petitioner's gender discrimination, the question of whether a prima facie case had been established became academic. Hernandez, 500 U.S. at 359 (1991).

Certainly, if the Illinois Supreme Court had properly held the prima facie issue to be a moot point, it would have then determined that defense counsel's reasoning for Ms. Gomez's removal was blatanly, and admittedly, gender-based. This, of course, would have resulted in there being no reason to address the "harmless error" argument as defense counsel admitted to his blatant gender discrimination by wanting more "men" on the jury. This Court must address this question before it can reach petitioner's claim. Because this case will necessarily involve a review of the threshold question of whether the trial court erred, this case is a poor vehicle to resolve the question presented. This Court should wait for a case where the propriety of the juror's dismissal under Batson is no longer a live, controverted issue preserved for further review in this Court, or at least

where the trial court's Batson ruling was not so patently correct.

IV.

THIS CASE IS NOT THE PROPER VEHICLE FOR ADDRESSING THE OTHER SPLIT THAT PETITIONER ALLEGES.

Petitioner presents a second "split of authority" argument premised on the situation at issue in United States v. Martinez-Salazar, 528 U.S. 304 (2000), where the defendant alleged that he was forced to use a peremptory challenge following the trial court's erroneous denial of a for-cause challenge. Id. at 309. But the situation implicated in Martinez-Salazar is not at issue here. Moreover, this Court definitively ruled in Martinez-Salazar that a defendant's use of a peremptory challenge in those circumstances did **not** result in a violation of his Fifth Amendment right to due process as he had a choice to make and "[a] hard choice is not the same as no choice." Id. at 317. According to this Court, a defendant who curatively uses a peremptory challenge to remove a particular juror following the trial judge's erroneous denial of a "for-cause" challenge is not deprived of any rule-based or constitutional right because the defendant was not denied the constitutional guarantee of an impartial jury. Id. at 315-317.

Although petitioner attempts to entice this Court to use this case as the vehicle to resolve a hypothetical scenario outlined in Justice Souter's concurrence in Martinez-Salazar (Pet. at 7 and 15), because this case does not involve a similar factual scenario, it is an improper vehicle to resolve that point of law. Justice Souter made clear that Martinez-Salazar:

> ….does not present the issue whether it is reversible error

> to refuse to afford a defendant a peremptory challenge beyond the maximum otherwise allowed, when he has used a peremptory challenge to cure an erroneous denial of a challenge for cause and when he shows that he would otherwise use his full complement of peremptory challenges for the noncurative purposes that are the focus of the peremptory right. Martinez-Salazasr did not show that, if he had not used his peremptory challenge curatively, he would have used it peremptorily against another juror. He did not ask for a make-up peremptory or object to any juror who sat. Martinez-Salazar simply made a choice to use his peremptory challenge curatively. Martinez-Salazar, 528 U.S. at 317-318. (Souter, J., concurrence)

Here, unlike either Martinez-Salazar, or the hypothetical presented by Justice Souter, petitioner was allotted seven peremptory challenges, but used only four. Thus, this is neither a denial of a "for-cause challenge" case, nor a situation in which a defendant has used his allotment of challenges and argues that he should have been given an additional challenge "for the noncurative purposes that are the focus of the peremptory right." In fact, petitioner both failed to use his full allotment of peremptory challenges and never sought to strike juror Deloris Gomez for cause. Thus, any alleged split of authority regarding the "for-cause" challenge fact scenario has already been addressed by this Court's clear pronouncement in Martinez-Salazar and need not be re-examined here,

particularly since this case did not involve an erroneous denial of a "for-cause" challenge. A judgment in this case therefore will not resolve the allegedly more mature split that petitioner identifies. Finally, petitioner's contention that the "for cause" issue is commonplace, (Pet. at 15) undermines the need to grant certiorari in a case like this one that fails even to present the issue.

V.

THE SUPREME COURT OF ILLINOIS CORRECTLY HELD THAT HARMLESS ERROR ANALYSIS APPLIES TO "REVERSE-BATSON" ISSUES AND THAT THE LOSS OF THE USE OF A PEREMPTORY CHALLENGE IS NOT A STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL.

In any event, the Illinois Supreme Court's decision below was correct. The Illinois Supreme Court properly held that any error involving petitioner's statutory state right to a peremptory challenge is not a structural error but is subject to harmless error review pursuant to Neder v. United States, 527 U.S. 1, 8 (1999). Neder held that errors requiring automatic reversal, i.e., "structural errors" apply to certain constitutional errors in a "limited class" of cases. Id. at 8 (1999) (stating "limited class" of cases which include Johnson v. United States, 520 U.S. 461, 468 (1997) (citing Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); and Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt

instruction). An additional class was added to this very short list last year. See, United States v. Gonzalez-Lopez, 126 S.Ct. 2557 (2006) (finding that the denial of counsel of choice was not amenable to harmless-error analysis because such error was not quantifiable). Petitioner's claim does not "fit comfortably" within structural error situations (Pet. at 21) outlined by these cases. The denial or impairment of a peremptory challenge has yet to fall under the "limited class of constitutional errors [that] are structural and subject to automatic reversal," Neder, 527 U.S. at 8, and petitioner provides this Court with no rationale to expand the "very limited class" of errors. The error at bar is unlike these errors this Court has defined as structural.

Certainly, despite petitioner's belief to the contrary, any error here did not "infect the entire trial process" or the "framework within which the trial" proceeded. (Pet. at 17) Indeed, although the petitioner consistently argues that Deloris Gomez was an "objectionable" juror, no record evidence demonstrates that Deloris Gomez was biased in any way, or that she precluded petitioner from receiving a fair trial. The fact that petitioner "objected" to Deloris Gomez sitting on the jury does not make her "objectionable." Significantly, defense counsel never sought to remove Ms. Gomez for cause or even claim that she was biased. Although petitioner now argues that one side was given a "greater ability to weed out those elements of the jury pool that it believes may tilt jurors in favor of the other side…," (Pet. at 7), nothing in the record supports this, particularly given that petitioner used four of seven peremptory challenges while the prosecution used only one. What the record establishes is that the trial court prevented the defense attorney from discriminating against a prospective juror on the basis of

gender.

Again, the loss of the use of a peremptory challenge is simply the loss of the use of a statutory right which clearly cannot affect the structural nature of a trial and does not, contrary to petitioner's claim, "transcend the evidence." (Pet. at 19) Here, a prospective juror said she could be fair, the defense attorney used a peremptory challenge but never challenged her for cause, and the trial court believed that gender discrimination was behind the challenge. Clearly, as this record demonstrates, the jury was not "organized to convict," (Pet. at 20) rather, the evidence was the supporting framework behind the conviction and not Ms. Gomez. As the Illinois Supreme Court found, "any rational trier of fact would have found defendant guilty of murder…" Rivera, 879 N.E.2d at 890. The state high court determined that the prosecution presented evidence which proved that petitioner "shot and killed 16-year-old Marcus Lee, erroneously believing that Lee was a member of a rival gang." Id.

Petitioner implies that he had the right **not** to have Deloris Gomez seated on his jury. But the Sixth Amendment to the United States Constitution, ensuring the right of a criminal defendant to an impartial jury of his peers, guarantees the right of the criminal defendant to a jury pool drawn from a fair cross section of the community, but it does not guarantee a criminal defendant the jury of his choice or of any particular composition. See, Taylor v. Louisiana, 419 U.S. 522, 538 (1975). Again, petitioner has made no showing that Ms. Gomez was biased or incompetent in any way to serve as a juror. The crux of petitioner's argument is that he was denied peace of mind that Ms. Gomez would not only be impartial, but also favorably disposed to his defense. However, as observed

by the Seventh Circuit Court of Appeals, "reduced peace of mind is a bad reason to retry complex cases decided by impartial juries." Patterson, 215 F.3d at 782. Petitioner suffered no prejudice as a result of the trial court seating Ms. Gomez based on the overwhelming evidence of his guilt as determined by the Illinois Supreme Court.

Certainly, the Illinois Supreme Court is keenly aware of its duty to prevent constitutional violations and it has determined, in other situations, that certain defendants have been deserving of relief based on violations which concern the denial of the proper number of peremptory strikes and that court has offered relief where it was required under the law. For instance, in People v. Daniels, 172 Ill. 2d 154 (1996) and People v. Webster, 362 Ill. 226 (1935), the defendants argued that they were denied a fair trial and due process of law because the trial court permitted them only half the peremptory challenges required under law and their requests to use additional challenges were denied. Daniels, 172 Ill. 2d at 158 (defense counsel was permitted to use 7 of 14 challenges); Webster, 362 Ill. at 226 (defense counsel permitted to use 10 of 20 challenges). In both cases, the Illinois Supreme Court held that the defendants were denied due process of law based on the trial court's denial of each defendant's exercise of the correct amount of peremptory challenges. In other words, where the statute or state supreme court rule gave those defendants the right to a certain number of peremptory challenges, the defendants had the right to exercise the full amount of peremptory challenges to which they were entitled. Daniels, 172 Ill. 2d at 166; Webster, 362 Ill. at 228. However, unlike Daniels and Webster, here, there is no claim by petitioner that he was denied the proper **amount** of peremptory challenges – he was merely denied the use of a peremptory

challenge against a particular juror because the trial court reasonably believed it was being used in a discriminatory manner. Thus, the Illinois Supreme Court was permitted, under the prevailing law, to find any resulting error harmless beyond a reasonable doubt. This challenge to the Illinois Supreme Court's decision is unworthy of certiorari review by this Court.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully prays that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

LISA MADIGAN,
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Attorney for Respondent

RICHARD A. DEVINE,
State's Attorney
Cook County, Illinois
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496
JAMES E. FITZGERALD,
ALAN J. SPELLBERG,*
JUDY L. DeANGELIS,
Assistant State's Attorneys,
Of Counsel.

*Attorney of Record