No. 07-9995

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITIONER'S REPLY BRIEF

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July 2, 2008

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PETITIONER'S REPLY BRIEF

Respondent cannot and does not dispute that the petition presents a question over which a split of authority exists. Opp'n 19, 25 (conceding that *State* v. *Vreen*, 26 P.3d 236, 240 (Wash. 2001) (en banc), "directly conflicts" with decision under review). Its effort to minimize the split of authority depends on its failure to grasp the nature of the error that impacted petitioner's trial. Petitioner is not claiming that he was denied some *number* of peremptory challenges he was entitled under state law. Opp'n 30-31 (arguing that, because petitioner did not use full allotment of peremptory challenges, review here would not "resolve the allegedly more mature split that petitioner identifies"). Petitioner's claim, like all the cases discussed in the petition, see Pet. 3-6, is that the trial court's erroneous ruling resulted in the seating of a juror who petitioner had the right to

exclude. As in the cases making up the broad split of authority, here the erroneous denial of a peremptory challenge actually had an effect on the composition of the jury. As Justice Souter observed in *United States* v. *Martinez-Salazar*, 528 U.S. 304, 317-18 (2000) (Souter, J., concurring), the question whether harmless-error analysis or automatic reversal applies when that happens has never been decided by this Court. This case provides an ideal opportunity to do so.

Respondent's mischaracterization of the issue also underlays its principal argument for denying the petition: its view that the error did not violate any federal constitutional right. Opp'n 15-18. Contrary to respondent's suggestion, Opp'n 16, petitioner does not claim that the Constitution requires that he be given the right to exercise peremptory challenges. However, as this Court has observed, peremptory challenges play a significant role in "achiev[ing] the end of an impartial jury." *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988). Petitioner contends that, *if* a state grants the parties the right to exercise peremptory challenges, the erroneous denial of that right violates petitioner's constitutional rights to due process and an impartial jury when it results in the seating of a juror who should have been excused. Pet. 19-20, 23-24 (citing cases). This Court has jurisdiction to review the Illinois Supreme Court's ruling.

Respondent lastly suggests that this Court cannot reach the question presented—whether automatic reversal or harmless error analysis should apply—without first deciding whether the trial court's reverse-*Batson* ruling was, in fact, erroneous. This is simply wrong. Respondent makes no effort to explain why the Illinois Supreme Court's application of settled law on the reverse-*Batson* issue is worthy of

this Court's review. It is not, which explains why respondent did not file a conditional cross-petition for certiorari on the question. See Sup. Ct. R. 12.5. Thus, review of that ruling would at best be a matter of this Court's discretion. *United States* v. *Nobles*, 422 U.S. 225, 241-42 n.16 (1975). And there is no reason here to undertake review of such a fact-bound question.

In sum, respondent's efforts to distract from the admitted split of authority warranting this Court's review fail. The petition presents an ideal vehicle for reviewing a mature split of authority over an issue that members of this Court have acknowledged remains unanswered. The petition should be granted.

1. Respondent claims that petitioner has not asserted the violation of a federal constitutional right. Opp'n 15-18. Respondent is wrong.

Respondent emphasizes this Court's decisions holding that the constitution does not require states to grant litigants the right to peremptorily challenge jurors. Opp'n 16. But here the state did grant the litigants the right to exercise peremptory challenges and thereby influence the composition of the jury. It thus created a protectable interest which the state "may not constitutionally depriv[e] ... without appropriate procedural safeguards." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). This Court has applied this principle to state-created criminal-procedural rights like the right at issue here. See, *e.g.*, *Evitts* v. *Lucey*, 469 U.S. 387, 400-01 (1985) (when state establishes right to direct criminal appeal, such appeals cannot be withdrawn without due process); *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980) (when state commits sentencing to juries, defendants gain a liberty interest in exercise of jury's discretion that cannot be deprived arbitrarily).

Respondent thus distracts from the issue when it emphasizes that peremptory challenges are a "state-created trial tool" that "may be withheld altogether." Opp'n 16-17. The state may, in a non-arbitrary fashion, deprive *both* the prosecution and a criminal defendant the right to exercise peremptory challenges without offending the Constitution. But it does not follow that, when a trial court misapplies reverse-*Batson* law and deprives the defendant of the effect of his right to a peremptory challenge resulting in a juror who should have been excused being seated, no constitutional right is implicated. The cases above and those cited in the petition, Pet. 19-20, 23-24, all demonstrate that the defendant's right to due process and an impartial jury were both infringed by the trial court's error.[1]

On respondent's flawed reasoning no constitutional right would be implicated even if the trial court erroneously rejected *every* peremptory challenge of the defense on reverse-*Batson* grounds (thus seating a jury made up *entirely* of jurors who should have been excluded pursuant to the defendant's exercise of his rights), but allowed the prosecution to exercise its challenges freely. To give the prosecution more power than the defense over the composition of the jury offends the Constitution. And, from the point of view

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[1] Respondent is also wrong when it argues that the Illinois Supreme Court decided this case on independent state law grounds that are adequate to support the judgment. Opp'n 17-18. The Illinois Supreme Court unambiguously based its analysis on this Court's decisions in reaching both of the holdings necessary to support its judgment: that the reverse-*Batson* error was subject to harmless-error review, and that the error was harmless. Pet. App. 9a-12a. When a state supreme court expressly bases its decision on its understanding of *federal* constitutional law, it is beyond question that this Court has the authority to review that ruling. 28 U.S.C. § 1257.

of whether a constitutional right is implicated, there is no difference between a single reverse-*Batson* error affecting the composition of the jury and repeated reverse-*Batson* errors doing so.

It is worth noting that the Illinois Supreme Court has recognized that the trial court's error was of federal constitutional significance. *People* v. *Daniels*, 665 N.E.2d 1221, 1226-28 (Ill. 1996), cited by respondent, held that the erroneous denial of a defendant's statutory right to peremptory challenges violated not only state law, but federal due process. The Illinois Supreme Court in *Daniels* understood precisely what respondent fails to appreciate: a defendant establishes a constitutional violation by showing that he was denied the *effect* of a peremptory challenge, *i.e.*, that, but for the erroneous denial of the peremptory challenge, the defendant would have been able to excuse a juror who, in fact, was seated. *Id.* at 1227-28.

The Illinois Supreme Court's ruling in this case implicitly recognized that a federal constitutional right had been violated. The court specifically considered whether the error at issue was "structural," and hence warranted automatic reversal. Pet. App. 12a. This court has consistently identified structural defects as a subset of *constitutional* errors; that is, only errors of constitutional significance can be structural. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) ("[t]he second class of constitutional error we called 'structural defects'"); *Neder* v. *United States*, 527 U.S. 1, 7 (1999) ("we have recognized a limited class of fundamental constitutional errors that defy analysis by harmless error standards" (internal quotation marks omitted)); *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (defining "category of constitutional

errors which are not subject to harmless error" as "structural defect[s]"). Had the Illinois Supreme Court thought the trial court's error implicated only state law, and no federal constitutional rights, then it would have simply said that the error could not be structural because it is not one of constitutional significance. But it said no such thing.[2] Pet. App. 12a.

In short, respondent's view that no constitutional right is at stake finds no support in either this Court's decisions or the reasoning of the Illinois Supreme Court. This Court's jurisdiction is secure.

2. The split of authority implicated by the petition is undeniable. Respondent makes various efforts to chip away at its breadth, all of which fail.

Respondent's failure to grasp the nature of the trial court's error causes it erroneously to conclude not only that this Court lacks jurisdiction, but also that this case does not present the very question that Justice Souter acknowledged awaits clarification from this Court, and that has frequently arisen in the context of erroneous denials of for-cause challenges. Opp'n 29-31. As detailed in the petition, the denial of the effect of a peremptory challenge can arise in two distinct ways: (1) where, as here, a juror is seated because the trial court erroneously applied the reverse-*Batson* rule to reject the defendant's peremptory challenge, and (2) when a defendant's for-cause challenge is erroneously rejected, causing the defendant to use a peremptory challenge to excuse the biased juror that the defendant establishes would

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[2] The same view is implicit in Justice Souter's concurrence in *Martinez-Salazar*, 528 U.S. at 317-18 (Souter, J., concurring), where Justice Souter specifically raised the automatic-reversal/harmless-error question.

have been used to excuse a later juror in the venire who was seated. Pet. 3-4. Justice Souter was specifically addressing the latter circumstance. But regardless of how the error arises, the fundamental failure is the same: the trial court's error caused the seating of a juror who should have been excused. *All* the cases discussing whether automatic reversal applies that are cited in the petition, Pet. 3-6, therefore, reflect the depth of the split of authority regarding the issue presented here.

Respondent's various efforts to undermine the 7-2 split of authority that has developed out of the reverse-*Batson* context also fail. Respondent concedes that the Washington Supreme Court would have applied automatic reversal in petitioner's case while the Illinois Supreme Court applied harmless error analysis. Opp'n 19, 25. Oddly, respondent argues that the Washington Supreme Court's decision in *Vreen* was an "early outlier ... that the Washington courts, themselves, are likely to remedy." Opp'n 25. But not only was *Vreen* decided by Washington State's highest court, it was also handed down *after* this Court's decision in *Martinez-Salazar*. Respondent does not and cannot explain what would compel the Washington Supreme Court to reverse itself.

Respondent urges the Court to ignore the various decisions that pre-date *Martinez-Salazar* because *Martinez-Salazar* supposedly clarified the law. Opp'n 19-21. Such a reading of the decision is indefensible. *Martinez-Salazar* expressly did *not* reach the very question that respondent claims it decided. *Martinez-Salazar* merely stated that the suggestion in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), *overruled on other grounds by Batson* v. *Kentucky*, 476 U.S. 79 (1986), that the erroneous denial of a peremptory challenge requires automatic reversal, was *dicta*.

Martinez-Salazar, 528 U.S. at 317 n.4. Whether to elevate *Swain*'s *dicta* to the status of holding was not decided because the defendant in *Martinez-Salazar*, unlike petitioner, was not denied the effect of a peremptory challenge. Justice Souter left no doubt that the question remained open in his concurrence, where he called attention to the fact that the issue was not squarely presented, but that it might arise in another case. *Id.* at 317-18 (Souter, J., concurring). Because *Martinez-Salazar* does not itself change the law, but merely clarifies that the question has yet to be decided by the Supreme Court, lower court rulings prior to *Martinez-Salazar* remain good law in their respective jurisdictions.

Indeed, some courts prior to *Martinez-Salazar* had already acknowledged that the view expressed in *Swain* was *dicta*, and yet concluded that automatic reversal was required anyway. *United States* v. *Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc); *United States* v. *McFerron*, 163 F.3d 952, 955-56 (6th Cir. 1998) (relying on *Annigoni*). Obviously, statements in *Martinez-Salazar* which confirm the premises of prior rulings would not cause any change in those rulings.

The same over-reading of *Martinez-Salazar* leads respondent to disregard the Minnesota Supreme Court's decision applying automatic reversal, simply because the Minnesota court did not cite *Martinez-Salazar*. Opp'n 22-23 (discussing *Angus* v. *State*, 695 N.W.2d 109 (Minn. 2005)). Because *Martinez-Salazar* left the question open, the failure of any lower court decision to cite *Martinez-Salazar* is a matter of insignificance.[3]

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[3] Further, *Angus* expressly relied on *Annigoni*, and so the Minnesota court would have been aware of the view that *Swain*

Respondent's effort to disregard three cases, *United States* v. *Blanding*, 250 F.3d 858 (4th Cir. 2001), *Holder* v. *State*, 124 S.W.3d 439 (Ark. 2003), and *Parker* v. *State*, 778 A.2d 1096 (Md. 2001), further belies its misconception that *Martinez-Salazar* held that harmless error analysis applies. See Opp'n 22. All three decisions post-date *Martinez-Salazar*. If *Martinez-Salazar* had made clear that harmless error analysis was appropriate, then none of the cases would have reversed the respective convictions *without conducting any harmless error analysis at all.* Respondent tries to waive these cases aside by noting that the respective courts never discussed whether automatic reversal was appropriate. Opp'n 22. But what those courts *did* is just as clear a statement that automatic reversal is required as expressly so stating: all three courts reversed automatically without any analysis or discussion.

Respondent's suggestion that petitioner failed to cite "several" cases agreeing with the decision below only serves to deepen the split, not to eliminate it. Opp'n 25. The Pennsylvania Supreme Court has, like the Illinois Supreme Court, concluded that harmless error analysis applies. *Commonwealth* v. *Carson*, 741 A.2d 686 (Pa. 1999), *abrogated on other grounds by Commonwealth* v. *Freeman*, 827 A.2d 385 (Pa. 2003). That means that what petitioner characterized as a 7-2 split in the reverse-*Batson* context is, in fact, a 7-3 split, and what he characterized as a 18-16 split overall is, in fact, a 19-16 split.

The other cases respondent cites are irrelevant. *People* v. *Boyette*, 58 P.3d 391 (Cal. 2003), involved the erroneous denial of a defendant's for-cause

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had not held that automatic reversal was required, as *Martinez-Salazar* later made clear. Opp'n 23.

challenge prompting him to use a peremptory challenge. *Id.* at 415-19. Because the record did not indicate that the defendant would have used the challenge he wasted to strike a different juror, the case was governed by *Ross*, 487 U.S. 81.

The two Second Circuit decisions that respondent cites, *Frazier* v. *New York*, 156 F. App'x 423, 425 (2d Cir. 2005) and *Vega* v. *Portuondo*, 120 F. App'x 380, 383 (2d Cir. 2005) are habeas decisions, and underscore petitioner's view that the law remains unsettled. In both cases, the trial court had committed reverse-*Batson* error, and the Second Circuit affirmed the denial of habeas relief because the Supreme Court has not "clearly established" that such errors are subject to automatic reversal, as required by 28 U.S.C. § 2254(d)(1). *Frazier*, 156 F. App'x. at 425; *Vega*, 120 F. App'x at 383. Far from supporting respondent's view, these decisions confirm petitioner's point that the law remains unsettled, requiring this Court's review.

The 19-16 split of authority is real and fully implicated here. Its depth and persistence post-*Martinez-Salazar* belies respondent's contention that courts will achieve uniformity without this Court's intervention.

3. Respondent's final arrow in its quiver is a weakly reasoned suggestion that this case presents a poor vehicle because the Court would be required to review whether the Illinois Supreme Court's application of the reverse-*Batson* rule was correct. Opp'n 26-29. This Court need not and should not consider that question.

Respondent has not filed a conditional cross-petition for certiorari, see Sup. Ct. R. 12.5, which means that this Court may lack jurisdiction to

consider respondent's belated assertion of error below. See *Burks* v. *United States*, 437 U.S. 1, 5 (1978) (holding that government's failure to cross-petition closed off issue whether evidence was sufficient, even though review of such issue might have avoided need to decide double jeopardy claim, on which Court granted review). Even if the Court has jurisdiction to review the issue, it is clear that the Court is not *obliged* to do so. The decision to present an independent ground for affirmance is at best addressed to the discretion of the Court. And the Court exercises its discretion applying the same standards that it would if the issue were presented in a petition (or cross-petition) for certiorari. Respondent has made no effort to explain why the fact-bound, garden-variety application of reverse-*Batson* standards is worthy of this Court's review. Because it is not, this Court should treat the issue as finally decided and consider the question presented in the petition alone. See, *e.g.*, *Nobles*, 422 U.S. at 241 n.16.[4]

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[4] In any event, respondent does not deny that there was no prima facie case of gender discrimination here. Instead, respondent argues that, under this Court's decision in *Hernandez* v. *New York*, 500 U.S. 352 (1991), sufficient evidence of gender discrimination eventually emerged, and so the error is moot. Opp'n 27-28. Respondent over-reads *Hernandez*, which did not decide that an appellate court may uphold the denial, on reverse-*Batson* grounds, of a defendant's peremptory challenge without reviewing the trial court's finding of a prima facie case of discrimination. As the Eleventh Circuit has observed, this Court's repeated pronouncements that the prima facie case requirement is integral to the *Batson* analysis clearly indicate that the Illinois Supreme Court ruled correctly here. *United States* v. *Stewart*, 65 F.3d 918, 924 (11th Cir. 1995).

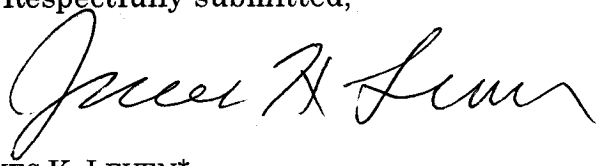
* * *

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. This case thus presents an ideal vehicle for resolving a deep split of authority on an important question affecting the structure of criminal trials that this Court acknowledged in *Martinez-Salazar* remains open.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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