No. 07-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the erroneous denial of a criminal defendant's peremptory challenge that resulted in the challenged juror being seated requires automatic reversal of a conviction because it undermines the trial structure for preserving the constitutional right to due process and an impartial jury.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Rivera respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois in this case.

OPINIONS BELOW

The decision of the Illinois Supreme Court sought to be reviewed, Appendix ("App.") 1a-17a, is reported at *People* v. *Rivera*, 879 N.E.2d 876 (Ill. 2007). The previous decision of the Illinois Supreme Court, App. 18a-39a, is reported at 852 N.E.2d 771 (Ill. 2006). The opinion of the Illinois Appellate Court, App. 40a-56a, is reported at 810 N.E.2d 129 (Ill. App. Ct. 2004).

The judgment of the Circuit Court of Cook County, App. 57a, is unreported.

JURISDICTION

The opinion and judgment of the Illinois Supreme Court was entered on November 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Michael Rivera was tried before a jury in the Circuit Court of Cook County and convicted of first-degree murder in the shooting death of Marcus Lee. This petition concerns the trial court's decision to seat as a juror Delores Gomez even though defense counsel exercised a peremptory challenge (to which the prosecutor did not object) to strike Ms. Gomez from the jury.

This case presents a mature and deep split of authority on an issue of substantial importance: whether a court's error in denying a peremptory challenge that results in the seating of an objectionable juror (i.e., a juror who should have been excused) requires automatic reversal of a conviction, or whether such an error can and should be examined under the harmless-error standard. The issue frequently arises in two different circumstances.

A trial court may preclude a defendant from exercising a peremptory challenge as to a particular juror because the court erroneously concludes that the challenge was based on racial or gender discrimination—in short, the misapplication of the reverse-*Batson* rule. See *Georgia* v. *McCullom*, 505 U.S. 42, 57 (1992). In such cases, the error puts an individual on the jury who would not have sat but for the error.

The same issue can also arise when a judge errs in rejecting a defendant's for-cause challenge, and so the defendant must waste a peremptory challenge to dismiss the juror that the judge should have dismissed for cause. Such errors sometimes, but not always, result in an individual sitting on the jury who would not have sat but for the error. See *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000). In

some cases, defense counsel uses *all* of his or her allotted peremptory challenges, and indicates that he or she would have exercised a peremptory challenge as to a later juror in the venire but could not because he or she had to waste one on a juror who the judge should have dismissed for cause. In such cases, just as in those where the court has misapplied the reverse *Batson* rule, an individual sits on the jury who would not have sat but for trial court's error.

The courts have split seven to two in cases like this case where the automatic reversal question arises out of the erroneous application of the reverse-*Batson* rule. Seven courts have held that automatic reversal is appropriate. *United States* v. *Blanding*, 250 F.3d 858, 861 (4th Cir. 2001); *United States* v. *McFerron*, 163 F.3d 952, 955 (6th Cir. 1998); *United States* v. *Annigoni*, 96 F.3d 1132, 1141-47 (9th Cir. 1996) (en banc); *Angus* v. *State*, 695 N.W.2d 109, 118 (Minn. 2005); *Holder* v. *State*, 124 S.W.3d 439, 452 (Ark. 2003); *Parker* v. *State*, 778 A.2d 1096, 1102-03 (Md. 2001); *State* v. *Vreen*, 26 P.3d 236, 238-40 (Wash. 2001) (en banc). Only the Michigan Supreme Court, *People* v. *Bell*, 702 N.W.2d 128, 138-41 (Mich. 2005), *amended on other grounds*, 704 N.W.2d 69 (Mich. 2005), along with the Illinois Supreme Court in this case have held that harmless-error analysis applies.[1]

The courts have split nineteen to twelve when the same issue arises out of the erroneous denial of a for-

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[1] The Supreme Court of Connecticut held that a reverse-*Batson* error regarding an alternate juror was subject to harmless-error analysis, but its ruling was largely based on the juror's status as an alternate. *State* v. *Latour*, 886 A.2d 404, 414-15 (Conn. 2005). The court in *Latour* expressed no opinion as to whether an error resulting in an objectionable juror sitting on the petit jury would similarly be subject to harmless error review. *Id.* at 415.

cause challenge. Nineteen courts have concluded that, in such cases, harmless-error analysis applies. *United States* v. *Sanchez-Hernandez*, 507 F.3d 826, 829-31 (5th Cir. 2007); *United States* v. *Johnson*, 495 F.3d 951, 974-75 (8th Cir. 2007); *Watley* v. *Williams*, 218 F.3d 1156, 1160 (10th Cir. 2000); *United States* v. *Polichemi*, 219 F.3d 698, 710-11 (7th Cir. 2000); *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994); *State* v. *Ackward*, 128 P.3d 382, 400 (Kan. 2006); *Blake* v. *State*, 121 P.3d 567, 578 (Nev. 2005), *cert. denied*, 126 S. Ct. 2030 (2006); *Busby* v. *State*, 894 So. 2d 88, 92 (Fla. 2004) (per curiam) (but automatically reversing based on state constitutional protections); *Klahn* v. *State*, 96 P.3d 472, 480-84 (Wyo. 2004); *State* v. *Hickman*, 68 P.3d 418, 424 (Ariz. 2003); *State* v. *Wach*, 24 P.3d 948, 954-57 (Utah 2001); *State* v. *Fire*, 34 P.3d 1218, 1222, 1225 (Wash. 2001) (en banc); *State* v. *Lindell*, 629 N.W.2d 223 (Wis. 2001); *Ferguson* v. *State*, 33 S.W.3d 115, 125 (Ark. 2000); *State* v. *Mann*, 959 S.W.2d 503, 533-34 (Tenn. 1997); *State* v. *Thompson*, 552 N.W.2d 386, 390 (N.D. 1996); *Grandison* v. *State*, 670 A.2d 398, 417-19 (Md. 1995); *State* v. *DiFrisco*, 645 A.2d 734, 751-54 (N.J. 1994); *State* v. *Neuendorf*, 509 N.W.2d 743, 746-47 (Iowa 1993).

By contrast, twelve courts have held that the erroneous denial of a for-cause challenge requires automatic reversal. *Kirk* v. *Raymark Indus., Inc.,* 61 F.3d 147, 158-60 (3d Cir. 1995); *Dunlap* v. *People*, 173 P.3d 1054, 1091 (Colo. 2007), *cert. denied*, 128 S. Ct. 882 (2008); *Kirkland* v. *State*, 560 S.E.2d 6, 8 (Ga. 2002); *State* v. *Kauhi*, 948 P.2d 1036, 1041 (Haw. 1997); *Commonwealth* v. *Leahy*, 838 N.E.2d 1220, 1233 (Mass. 2005); *Fuson* v. *State*, 735 P.2d 1138, 1139-40 (N.M. 1987); *State* v. *Group*, 781 N.E.2d 980, 991 (Ohio 2002); *Golden* v. *State*, 127 P.3d 1150, 1154

(Okla. Crim. App.), *cert. denied,* 126 S. Ct. 2971 (2006); *State* v. *Barnville*, 445 A.2d 298, 301 (R.I. 1982); *State* v. *Verhoef*, 627 N.W.2d 437, 440-43 (S.D. 2001); *Saldano* v. *State*, 232 S.W.3d 77, 93 (Tex. Crim. App. 2007), *cert. denied,* 2008 WL 782063 (U.S. Feb. 25, 2008) (No. 07-7815); *State* v. *Lambert*, 830 A.2d 9, 13 (Vt. 2003).

All told, 18 courts have concluded that harmless-error analysis applies to the wrongful denial of a peremptory challenge that results in an objectionable juror being seated while 16 courts have concluded that such an error requires automatic reversal. Highlighting the confusion surrounding this question, three state courts of last resort—Washington, Arkansas, and Maryland—have concluded that harmless-error analysis applies when the juror is seated because of the misapplication of the for-cause rule, while the misapplication of the reverse-*Batson* rule requires automatic reversal. Compare *Fire*, 34 P.3d at 1222, with *Vreen*, 26 P.3d at 240; compare *Holder*, 124 S.W.3d at 452, with *Ferguson*, 33 S.W.3d at 125; compare *Parker*, 778 A.2d at 1102-03, with *Grandison*, 670 A.2d at 418-19.

This Court has never squarely ruled on the question, yet its comments in *dicta* demonstrate that the split is unlikely to be resolved without this Court's further intervention. In *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), *overruled by Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court stated unequivocally that automatic reversal was required when a defendant's right to peremptory challenges was impaired or denied. But more recently in *Martinez-Salazar*, 528 U.S. 304 at 317 n.4, this Court emphasized that the assertion of the automatic-reversal rule in *Swain* was *dicta* and offered at a time prior to the modern adoption of a general preference

for harmless-error analysis. As Justice Souter observed, in *Martinez-Salazar*, this Court has yet to determine whether a court's error in denying a peremptory challenge causing the challenged venire member to sit on the jury warrants automatic reversal. *Id.* at 317-18 (Souter, J., concurring).

The depth of the split of authority also demonstrates both that the issue is recurring and important. The use of peremptory challenges reflects a venerable tradition through which the parties participate in generating a fair and impartial jury. The power the parties have over the composition of the jury through peremptory challenges has long been recognized as substantial. If, as happened here, one side is 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, then the critical fact-finding structure of the trial becomes distorted. Much like trial before a biased tribunal and other errors that affect how the evidence presented at trial is evaluated, which this Court has clearly indicated warrant automatic reversal, an error that so distorts the fact-finding process is not amenable to harmless-error analysis. The Illinois Supreme Court's ruling to the contrary warrants this Court's review.

1. When Delores Gomez was seated in the jury venire, petitioner's trial counsel questioned her. Ms. Gomez was a "business office supervisor at Cook County Hospital's outpatient orthopedic clinic." Pet. App. 5a, 21a. Counsel elicited from Ms. Gomez that she has contact with the victims of violent crime, including gunshot wounds, which Cook County Hospital sees unusually often. *Id.* Ms. Gomez indicated that her experiences would not prevent her from judging the evidence fairly.

At the completion of the questioning, counsel for petitioner announced his intention to use a peremptory challenge to strike Ms. Gomez from the jury. Counsel for respondent did not object. Both respondent and petitioner had been given the opportunity to exercise seven peremptory challenges during the process of jury selection. Had it been allowed, Ms. Gomez would have been the fourth venire member that counsel for petitioner struck pursuant to that right.

Instead of allowing the challenge, the trial court, *sua sponte*, ordered counsel for both sides to chambers and asked Ms. Gomez to remain in the jury box until they returned. Pet. App. 5a, 21a. The trial court then asked petitioner's counsel to articulate the reason why he was choosing to strike Ms. Gomez from the jury. After defense counsel objected that he had no obligation to offer an explanation, the trial court indicated that it was raising, on Ms. Gomez's behalf, a reverse-*Batson* challenge to the peremptory challenge. Defense counsel then explained that he was "'pulled in two different'" directions by this potential juror because on the one hand she has an Hispanic surname (like petitioner) but on the other hand she works in a setting that could expose her far more than others to the victims of violent crime and gunshot wounds. *Id.* The trial court interrupted to point out that Ms. Gomez "appears" to be African-American and then asked to hear from respondent, who had, as yet, said nothing. *Id.* At that point, counsel for respondent indicated that the explanation from petitioner's counsel was insufficient. *Id.*

The trial court determined that counsel for petitioner had not provided an adequate explanation, and concluded that the attempt to excuse Ms. Gomez from the jury was discriminatory. Pet. App. 6a, 22a.

The trial court allowed counsel for petitioner to continue questioning Ms. Gomez in chambers, who continued to express her view that she could fairly evaluate the evidence. Counsel for petitioner thereafter repeated his request to strike Ms. Gomez. The trial court again denied the request. *Id.* at 6a, 22a-23a.

Ms. Gomez was seated as a juror with full knowledge that petitioner's counsel had attempted to strike her. She was selected the foreperson of the jury. The jury found petitioner guilty, and the trial court sentenced him to 85 years in prison.

2a. The Illinois Appellate Court affirmed Rivera's conviction and sentence, rejecting Rivera's contention that the trial judge erred in denying his peremptory challenge to Ms. Gomez. Pet App. 49a. The Illinois Supreme Court, however, did not affirm in its initial review. Instead, it remanded the case back to the trial court. Based on the record before it at that time, the Illinois Supreme Court could not discern from the trial court's decision whether there was a sufficient prima facie case of discrimination, or even what the alleged basis of discrimination was (race or gender or something else) to warrant rejecting counsel for petitioner's peremptory challenge to Ms. Gomez. *Id* at 38a.

On remand, the trial judge attempted to articulate the grounds for its conclusion that a prima facie case of unlawful discrimination had been established at the time the court had required counsel for petitioner to explain why he was attempting to excuse Ms. Gomez from the jury. The trial court on remand expressed the view that he had denied the peremptory challenge because he concluded that defense counsel's true reason for striking Gomez was her gender. Pet. App. 8a.

On review of the supplemented record, the Illinois Supreme Court affirmed petitioner's conviction. However, it did not conclude that the trial court had properly refused to allow petitioner to exercise a peremptory challenge to excuse Ms. Gomez from the jury. To the contrary, the Illinois Supreme Court concluded that the trial court should have allowed petitioner's peremptory challenge. There was no prima facie case of either race or gender discrimination. Pet. App. 9a. The "record [on remand] fail[ed] to support a *prima facie* case of discrimination *of any kind*." *Id.* Ms. Gomez should never have sat on petitioner's jury.

2b. Nonetheless, the Illinois Supreme Court affirmed despite the fact that Ms. Gomez should not have served on the jury because it concluded that the wrongful denial of a peremptory challenge did not require automatic reversal. The court concluded that the error was subject to harmless-error review, and, further, that in this case the error was harmless.

As the Illinois Supreme Court observed, this Court has described the role of peremptory challenges as a "'necessary part of [a] trial by jury'" system, one with a "'venerable'" tradition. Pet. App. 10a (quoting *Holland* v. *Illinois*, 493 U.S. 474, 481, 484 (1990)). Indeed, the Illinois Supreme Court had itself previously observed in its initial review that the opportunity to use peremptory challenges is "one of the most important … rights secured to the accused." *Id.* (quoting *Pointer* v. *United States*, 151 U.S. 396, 408 (1894)) (internal quotation marks omitted).

Yet the Illinois Supreme Court viewed this Court's more recent cases as having discarded that tradition. The Illinois Supreme Court argued that this Court has rejected the view that the right to peremptory challenges is itself a component of the constitutional

right to an impartial jury. Pet. App. 10a (citing *Stilson* v. *United States*, 250 U.S. 583 (1919)).

The Illinois Supreme Court placed special emphasis on the footnote in *Martinez-Salazar* discussing whether the wrongful denial of a peremptory challenge is subject to harmless-erorr review. Pet. App. 11a. In *Swain*, 380 U.S. at 219, this Court had stated that the "denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." *Martinez-Salazar* called that unequivocal statement into question, characterizing the statement as "unnecessary to the decision" in *Swain* and based on cases decided before the Court adopted its modern approach to harmless-error review. 528 U.S. at 317 n.4.

The Illinois Supreme Court read the footnote in *Martinez-Salazar* as dispositive. It concluded that the law is now clear that the wrongful denial of a peremptory challenge does not require automatic reversal, but should be reviewed under the harmless-error standard. Pet. App. 11a (stating that *Swain* is "no longer good law" on the question). It concluded that the footnote makes "explicit" that automatic reversal for the wrongful denial of a peremptory challenge has been rejected. *Id.* at 12a.

The Illinois Supreme Court went on to conclude that the wrongful denial of a peremptory challenge is not "structural" error warranting automatic reversal because this Court has not included it in any list of such errors in the past. *Id.* While acknowledging that trial before a biased tribunal would warrant automatic reversal, the Illinois Supreme Court concluded that because Ms. Gomez did not need to be dismissed for cause, there was no basis for likening the error here to such a case. *Id.*

Finally, the Illinois Supreme Court concluded that harmless error analysis under the standard enunciated by this Court in *Neder* v. *United States*, 527 U.S. 1 (1999), was both possible and compelled a finding that the error was, in fact harmless. The Illinois Supreme Court read *Neder* as an invitation to review all the evidence adduced at trial and to opine whether any rational juror would have acquitted in light of that evidence. *Id.* at 12a-15a. Mimicking the rationale one might imagine being offered by a trier of fact, the Illinois Supreme Court declared that "[a]ny inconsistencies in the witnesses' grand jury testimony were insignificant" in light of the evidence of guilt that it deemed "overwhelming." *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

The Illinois Supreme Court's decision deepens an already substantial split of authority regarding whether a court's error in denying a peremptory challenge that results in the seating of an objectionable juror (i.e., one the court should have excused) warrants automatic reversal. Further, the Illinois Supreme Court's explanation for siding with harmless-error analysis erroneously treats this Court as having decided the matter, and ignores the substantial basis for treating such error as "structural" and hence warranting automatic reversal.

1. As noted above, courts have split seven to two in favor of automatic reversal when a defendant is erroneously denied a peremptory challenge by the misapplication of the reverse-*Batson* rule. The Fourth, Sixth and Ninth Circuits, along with the State Supreme Courts in Arkansas, Maryland, Minnesota and Washington, have all required automatic reversal in such circumstances. *Supra* at 4

(citing cases). Only the Michigan Supreme Court in *Bell*, 702 N.W.2d at 138-39, and the Illinois Supreme Court here have applied harmless-error analysis to such a case.

The majority view is well reasoned. First, because there is no record of jury deliberations, "[i]t would be difficult if not impossible for a reviewing court to determine the degree of harm resulting" from the seating of the objectionable juror. *Annigoni*, 96 F.3d at 1145; see also *Vreen*, 26 P.3d at 239; *State* v. *Reiners*, 664 N.W.2d 826, 835 (Minn. 2003). Jury deliberations are, by design, secret; the influence of a particular juror is impossible to discern. And peremptory challenges are based on an often inarticulable sense that something in a particular juror's background or life experiences would lead him or her to be inclined against one's client in light of the facts likely to emerge at trial. *Annigoni*, 96 F.3d at 1144. There is, simply, no way to reconstruct how jury deliberations might have differed if a different juror had sat in place of the objectionable juror. By engaging in harmless error review, the reviewing court would itself undermine the venerable tradition of peremptory challenges articulated by authorities such as Blackstone and Justice Story, who noted that judges were barred at common law from requiring defendants to justify a strike. See *Lewis* v. *United States*, 146 U.S. 370, 376 (1892).

The error at issue here is unlike the typical "trial" error that is quintessentially subject to harmless-error analysis. Trial errors involve, for example, the erroneous introduction of evidence (such as an involuntary confession, *Arizona* v. *Fulminante*, 499 U.S. 279, 307-08 (1991) (Rehnquist, J., dissenting in part)), and do not go to the composition of the tribunal evaluating the evidence. "[U]nlike typical

trial errors [subject to harmless error analysis], this error did not 'occur[] during presentation of the case to the jury,'" and the consequence of the error is the ongoing presence of the objectionable juror throughout the trial. *Annigoni*, 96 F.3d at 1144 (quoting *Fulminante*, 499 U.S. at 307) (alteration in original).

Courts favoring automatic reversal have noted that this Court in *Swain* stated that "[t]he denial or impairment of the right [to peremptory challenges] is reversible error without a showing of prejudice." 380 U.S. at 219; see, *e.g.*, *Annigoni*, 96 F.3d at 1136-37; *Vreen*, 26 P.3d at 239-40. And while this Court in *Martinez-Salazar* has made clear that the statement in *Swain* is not binding authority, 528 U.S. at 317 n.4, those courts that have addressed the issue since *Martinez-Salazar* have observed that *Martinez-Salazar* did not hold that harmless-error analysis is required in such cases. After all, the defendant in *Martinez-Salazar* "was not denied the use of any of his peremptory challenges, and the offending juror did not sit on the jury," while the defendant in a reverse-*Batson* error case is denied the use of a peremptory strike against a particular objectionable juror, who thus sits on the jury. *Vreen*, 26 P.3d at 238.

The Illinois Supreme Court's rationale is directly contrary to those courts that have held that automatic reversal is warranted. Unlike other courts, the Illinois Supreme Court has concluded that *Martinez-Salazar* is decisive and requires the application of harmless-error analysis. Pet. App. 11a-12a; see also *Sanchez-Hernandez*, 507 F.3d at 829-30 (holding that *Martinez-Salazar* decided this issue); *Thompson*, 552 N.W.2d at 388 (holding that *Ross* governs the erroneous deprivation of a peremptory

challenge); *Lindell*, 629 N.W.2d at 236. Further, the Illinois Supreme Court concluded that the error was not "structural" simply because this Court has yet to say that the error is "structural" and without considering the fact that the error went to the composition of the jury itself. Pet. App. 12a.

If the question presented arose *only* in the context of the erroneous application of the reverse-*Batson* rule, this Court's review would be warranted in light of the depth of the seven to two split. But, in fact, this is not the only context in which the issue arises. Justice Souter's concurrence in *Martinez-Salazar* recognized that the issue can also arise when a for-cause challenge is erroneously denied, prompting a defendant curatively to exercise a peremptory challenge in order to strike the objectionable juror. In such cases, where the defendant exhausted his allotment of peremptory challenges and the record shows that he would have used the one he wasted to strike a venire member who was seated as a juror, a court must decide whether to apply harmless-error analysis or automatic reversal. See *Martinez-Salazar*, 528 U.S. at 317-18 (Souter, J., concurring).

The fact that the issue arises in multiple contexts makes this Court's review even more urgent because the question is likely to arise frequently, as a review of the caselaw confirms. Twelve courts have concluded that automatic reversal is required when an objectionable juror is seated due to an erroneous rejection of a defendant's for-cause challenge. The United States Court of Appeals for the Third Circuit, along with the state courts of last resort in Colorado, Georgia, Hawaii, Massachusetts, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, and Vermont have so held. *Supra* at 5-6 (citing cases). The alternate view, applying harmless-error analysis,

finds nineteen supporters in the context of an erroneous rejection of a defendant's for-cause challenge. The United States Courts of Appeals for the Fifth, Eighth, Seventh, Tenth and Second Circuits, as well as the state courts of last resort in Arizona, Arkansas, Florida, Iowa, Kansas, Maryland, Nevada, New Jersey, North Dakota, Tennessee, Utah, Washington, Wisconsin and Wyoming have so held. *Supra* at 5 (citing cases).[2]

The deep split of authority will not be resolved without further guidance from this Court. This Court has made clear in *Martinez-Salazar* that *Swain*'s clear preference for automatic reversal is not binding. 528 U.S. at 317 n.4. But *Martinez-Salazar* left the question open because it was not properly presented there. *Id.*; see *id.* at 317-18 (Souter, J., concurring). 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.

Because the lower courts are deeply divided, and this Court's decisions provide no binding resolution, this Court should review this case and clarify that

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[2] As noted above, three state courts of last resort, Washington, Maryland and Arkansas, have ruled in opposite directions depending on the context in which the wrongful denial of the peremptory challenge arose. *Supra* at 6 (citing cases). Further indicating the depth of confusion, none of those courts has even noted the contradiction or cited its earlier ruling in the later cases. *See Fire*, 34 P.3d at 1222, 1225 (failing to note court's precedent in *Vreen*, 26 P.3d 236); *Holder*, 124 S.W.3d at 452 (failing to note court's precedent in *Ferguson*, 33 S.W.3d 115); *Parker*, 778 A.2d at 1102-03 (failing to note court's precedent in *Grandison*, 670 A.2d 398).

automatic reversal is required when the wrongful denial of a peremptory challenge leads to the seating of a juror who the defendant would have had dismissed.

2. Resolution of this issue goes to the heart of a fair trial process. The reasons for concluding that harmless-error analysis applies in the circumstances presented here, including those presented by the Illinois Supreme Court below as well as other courts, have failed to properly consider how this Court determines whether an error is "structural" and hence warrants automatic reversal. A more thorough review of this Court's automatic reversal cases would both highlight the importance of the issue—which strikes at the heart of the very structure we use to determine guilt and innocence—and demonstrate the Illinois Supreme Court's error.

2a. This Court has recognized a distinction between "trial errors" and "structural defects." *Fulminante*, 499 U.S. 279 at 307-10 (Rehnquist, J., dissenting in part). Most types of errors are trial errors, which "'occur[] during presentation of the case to the jury' and may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'" *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2563-64 (2006) (quoting *Fulminante*, 499 U.S. at 307-08) (alteration in original).

Certain errors, by contrast, are structural defects. These errors "'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *Id.*, 126 S. Ct. at 2564 (quoting *Fulminante*, 499 U.S. at 309-10) (alteration in original). Structural defects include those errors resulting in total denial of counsel, *Gideon* v.

Wainwright, 372 U.S. 335, 344 (1963), trial in front of a biased judge, *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927), racial discrimination in the selection of a grand jury, *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986), denial of a defendant's right of self-representation, *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 (1984), denial of a public trial, *Waller* v. *Georgia*, 467 U.S. 39, 49 (1984), improper jury instructions on the reasonable doubt standard, *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-82 (1993), the erroneous denial of one's counsel of choice, *Gonzales-Lopez*, 126 S. Ct. 2557, and *Batson* errors, where a party uses a peremptory challenge to discriminate on the basis of an impermissible ground. *Batson* v. *Kentucky*, 476 U.S. 79, 99-100 (1986).

Structural defects are subject to automatic reversal because it is impossible to assess whether an error that deformed the very structure for determining guilt or innocence affected the outcome of a case. See *Gonzalez-Lopez*, 126 S. Ct. at 2564 n.4 ("we rest our conclusion of structural error upon the difficulty of assessing the effect of the error"); *Vasquez*, 474 U.S. at 263 ("when a petit jury has been selected upon improper criteria … we have required reversal of the conviction because the effect of the violation cannot be ascertained); *Waller*, 467 U.S. at 49 n.9 (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"). Structural errors thus transcend the evidence presented to the jury. Any effort to evaluate the evidence to determine guilt or innocence in light of a structural error amounts to ignoring the error, rather than ensuring that it did not distort the outcome. Cf. *Tumey*, 273 U.S. at 535 ("No matter

what the evidence was against [defendant], he had the right to have an impartial judge").

2b. The exercise of peremptory challenges is precisely the sort of error that transcends the evidence and frustrates harmless-error review. When the parties are provided the right to exercise peremptory challenges to potential jurors, that right has a profound effect on shaping the framework in which the trial proceeds. *Pointer* v. *United States*, 151 U.S. 396, 408 (1894) (calling peremptory challenges "one of the most important of the rights secured to the accused").

Peremptory challenges give counsel for litigants the opportunity to ensure that the composition of the jury excludes those whose background suggests the possibility of a bias against one's client, even if those suggestions fall short of the demanding standard of "for cause" dismissal. "[B]y enabling each side to exclude those jurors it believes will be most partial to the other side," peremptory challenges support "the selection of a qualified *and unbiased* jury." *Holland* v. *Illinois*, 493 U.S. 474, 484 (1990). The "function of the [peremptory] challenge is … to eliminate extremes of partiality on both sides." *Swain*, 380 U.S. at 219. Peremptory challenges thus play a significant role in ensuring a fair trial by giving the parties a role to play in ensuring that jurors are impartial. See *McCollum*, 505 U.S. at 57 (although not themselves a constitutional right, peremptory challenges are a "state-created means to the constitutional end of an impartial jury and a fair trial"); *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) (peremptory challenges "are a means to achieve the end of an impartial jury"); *Frazier* v. *United States*, 335 U.S. 497, 505 (1948) ("the right [of peremptory

challenges] is given in aid of the party's interest to secure a fair and impartial jury").

If this substantial power is to function properly, *both* sides must have equal opportunity to exercise it. If the defendant is deprived of the same opportunity as the prosecution to participate in evaluating the predilections of potential jurors, then the jury is likely to be more effectively free of potential biases that concern the prosecution than those that concern the defendant. The Due Process Clause requires a framework that does not tilt toward a "tribunal 'organized to convict.'" *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 (1968) (quoting *Fay* v. *New York*, 332 U.S. 261, 294 (1947)); See also *Ross*, 487 U.S. at 96 (Marshall, J., dissenting) ("[i]t cannot seriously be questioned that the loss of a peremptory challenge vis-à-vis the prosecution burdens the defense in pretrial proceedings").

Given the framework-defining role of peremptory challenges, the erroneous denial of a peremptory challenge is, like all structural defects, not amenable to harmless error review because its effect is impossible to assess. See *Gonzalez-Lopez*, 126 S. Ct. at 2564. The deleterious effect of a single objectionable juror on jury deliberations can never be ascertained by a simple review of the record. "Given the delicate dynamics of jury deliberations, it is simply impossible to know the effects [one] juror had on her fellow jurors." *McIlwain* v. *United States*, 464 U.S. 972, 975-76 (1983) (Marshall, J., dissenting from denial of certiorari); see also *United States* v. *Young*, 470 U.S. 1, 34-35 (1985) (Brennan, J., dissenting in part and concurring in part). In this case, the juror who should not have sat not only knew that the defendant had sought to remove her, but was even selected by her fellow jurors as foreperson. Yet, even

under these troubling circumstances, tracing the impact of this particular error is not a matter of "quantitatively assess[ing]" the evidence properly adduced at trial. *Fulminante*, 499 U.S. at 307-08 (Rehnquist, J., dissenting in part). The impact is pervasive and, because of the sanctity of jury deliberations, by design secret. *Annigoni*, 96 F.3d at 1145 ("[t]o subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation"); see also *State* v. *Vreen*, 994 P.2d 905, 910 (Wash. Ct. App. 2000) ("How can an appellate court determine the degree of harm resulting from the participation of any particular juror in the jury's deliberations? There is no record of jury deliberations."). Thus, like all structural errors, this error frustrates harmless-error analysis.[3]

The denial of the right to a peremptory challenge that results in the seating of an objectionable juror fits comfortably within a strand of this Court's decisions that recognizes that errors affecting how the facts at trial are evaluated require automatic reversal. *Gray* v. *Mississippi*, 481 U.S. 648 (1987) (improper exclusion of juror with scruples regarding

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[3] Some courts have suggested that the wrongful denial of a peremptory challenge that results in the seating of an objectionable juror is not distinguishable from errors that are subject to harmless error review. *See Hickman*, 68 P.3d at 424-25 (listing examples of statutory and constitutional violations subject to harmless error review, such as the deprivation of the defendant's right to be present at jury selection, and the prosecution's improper comment on defendant's failure to testify (citing *Lindell*, 629 N.W.2d at 249 n.16)); *Klahn*, 96 P.3d at 483-84. For the reasons discussed in the text, that is wrong.

the death penalty from capital case); *Sullivan*, 508 U.S. at 281-82 (improper reasonable doubt instruction); *Tumey*, 273 U.S. at 535 (biased judge). Even when the jury that ultimately sits includes no jurors who have been shown to be biased, when, as here, the error relates to "the impartiality of the adjudicator," it concerns "the very integrity of the legal system" and thus "harmless-error analysis cannot apply." *Gray*, 481 U.S. at 668.

The Illinois Supreme Court rejected this view, concluding that harmless-error analysis was both possible to conduct, and led to a finding that the error was harmless. But it failed adequately to address the strong grounds for concluding that automatic reversal is appropriate. The bare fact that this Court has not yet authoritatively declared that the error is subject to automatic reversal means little. See Pet. App. 12a (arguing that this Court has not listed the wrongful denial of peremptory challenges as a "structural" error). This Court has not held that the category of structural errors requiring automatic reversal is closed. To the contrary, as recently as its decision in *Gonzales-Lopez*, this Court showed that it continues, in appropriate circumstances, to recognize errors as structural.

The Illinois Supreme Court also concluded that harmless-error analysis was not only possible, but that it could review the entire record to determine whether it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Pet. App. 12a-15a (citing *Neder*, 527 U.S. at 18). But the review the Illinois Supreme Court contemplates is actually a wholesale evaluation of *all* the evidence to determine whether there was any rational basis, in its view, for an acquittal. Such a reading of *Neder* destroys the concept of structural

error altogether. Such a review could be undertaken in response to numerous errors that this Court has determined require automatic reversal, including improper use of race in the selection of petit jurors (*Batson*) or grand jurors (*Vasquez*) or an improper instruction on reasonable doubt (*Sullivan*) or even a biased judge (*Tumey*). Whether *Neder* is to be stretched so far as to engulf several of this Court's automatic reversal decisions is a matter only this Court may authoritatively decide.

Other courts have offered additional reasons for choosing harmless-error analysis when a juror sits due to the erroneous denial of a peremptory challenge. None of those rationales withstand scrutiny.

For example, the Arizona Supreme Court reasoned that a statutory violation of the (non-Constitutional) right to peremptory challenges could not plausibly warrant per se reversal when violations of important constitutional rights are reviewed for harmless error. *Hickman*, 68 P.3d at 425. But the wrongful denial of a peremptory challenge is a matter of constitutional significance because the consequent distortion in the power to influence the composition of the jury is a violation of due process. *Aki-Khuam* v. *Davis*, 339 F.3d 521, 529 (7th Cir. 2003); *Lindell*, 629 N.W.2d at 244 ("if the defendant does not receive 'that which state law provides,' a viable due process claim" is created); see *Ross*, 487 U.S. at 91 (with respect to peremptory challenges, holding petitioner "received all that [state] law allowed him, and *therefore* his due process challenge fail[ed] (emphasis added)) (emphasis added); cf. *Wardius* v. *Oregon*, 412 U.S. 470, 474-75 (1973) (although the defendant has no constitutional right to discovery except as to material, exculpatory evidence, due process is violated when

the defendant was required to disclose pre-trial alibi information but the State had no comparable discovery obligation). Further, this Court has long recognized the importance of peremptory challenges in achieving the Sixth Amendment's guarantee of an impartial jury. *McCollum*, 505 U.S. at 57; *Ross*, 487 U.S. at 88; *Frazier*, 335 U.S. at 505-06 & n.11.

* * *

In the end, numerous factors favor this Court's review. This Court has recently indicated the need to clarify whether automatic reversal applies to the error at issue here. Lower courts are deeply split on the question. The issue is important because it goes to the heart of a fair trial process and the right to an impartial jury. The issue will continue to recur until this Court intervenes. And this case provides an ideal vehicle to address the issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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