No. 07-9995

In the Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF FLORIDA, ALABAMA, ARIZONA, COLORADO, DELAWARE, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

BILL MCCOLLUM
Attorney General of Florida
Scott D. Makar*
Solicitor General
Courtney Brewer
Craig D. Feiser
Deputy Solicitors General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for Amici Curiae
**Counsel of Record*

Troy King
Attorney General
Office of the Alabama Attorney
General
500 Dexter Avenue
Montgomery, Alabama 36130

Terry Goddard
Arizona Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

John W. Suthers
Attorney General
State of Colorado
1525 Sherman St., Seventh Floor
Denver, Colorado 80203

Richard S. Gebelein
Chief Deputy Attorney General
State of Delaware
820 N. French Street
Wilmington, Delaware 19801

Mark J. Bennett
Hawaii Attorney General
425 Queen Street
Honolulu, Hawaii 96813

Steve Six
Attorney General
State of Kansas
120 SW 10th Ave
Topeka, Kansas 66612

Tom Miller
Attorney General
Iowa Attorney General's Office
2nd Floor Hoover Building
Des Moines, IA 50319

Lawrence G. Wasden
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Gregory F. Zoeller
Attorney General of Indiana
302 West Washington Street
Indiana Government Center
South, Fifth Floor
Indianapolis, IN 46204

Douglas F. Gansler
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

Michael A. Cox
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909

Chris Koster
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

Steve Bullock
Montana Attorney General
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401

Kelly A. Ayotte
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

Anne Milgram
Attorney General of New Jersey
Richard J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, NJ 08625

Gary K. King
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Roy Cooper
Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

Richard Cordray
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

W.A. Drew Edmondson
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105-4894

John R. Kroger
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, Oregon 97310

Thomas W. Corbett, Jr.
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Henry D. McMaster
Attorney General of South
Carolina
P. O. Box 11549
Columbia, South Carolina 29211

Lawrence E. Long
Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

Robert E. Cooper, Jr.
Attorney General and Reporter of
Tennessee
P.O. Box 20207
Nashville, TN 37202-0207

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Mark L. Shurtleff
Utah Attorney General
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114-2320

William Sorrell
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

Robert M. McKenna
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

J.B. Van Hollen
Attorney General
State of Wisconsin
WI Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

QUESTION PRESENTED

Whether a state trial court's good faith error in denying a criminal defendant's peremptory challenge requires reversal of a subsequent conviction as a matter of federal law, when that error did not deprive the defendant of a fair trial by an impartial jury or otherwise violate any federally protected right?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CONSTITUTIONAL PROVISIONS, STATUTES, AND RELATED MATERIALS

MISCELLANEOUS

STATEMENT OF AMICI INTEREST

The Amici States have an interest in this case because their laws create the peremptory challenge rights that are implicated herein. They agree with the Illinois Supreme Court that the denial of peremptory strikes is not structural error subject to per se reversal. Instead, a state should remain free to apply its own harmless error analysis when an error violates its statute, which provides the proper balance between trial errors and due process concerns. An automatic reversal rule, which imposes the costs associated with retrials without this balancing process, creates an incentive for state legislatures to avoid the potential for such costs by eliminating peremptory challenges altogether. Thus, assigning constitutional weight to errors in administering peremptory challenges could have the unintended consequence of reducing the laudable uses of peremptory challenges in state trials.

SUMMARY OF ARGUMENT

The improper denial of a peremptory challenge does not amount to structural error. A holding to the contrary would be a dramatic departure from this Court's jurisprudence, and its practical consequences weigh against such a decision. Peremptory challenges are firmly a part of state jury trials, and states have wide discretion in administering their jury selection systems. Because peremptory challenges are unnecessary to meet the Sixth Amendment requirement of an impartial jury, states may generally restrict peremptory challenge rights without implicating constitutional concerns. A constitutionally-compelled automatic reversal rule, resulting in costly retrials even in cases where the error is harmless, could prompt states to consider limiting or even eliminating peremptory challenges. Defendants' rights to peremptory challenges thereby would be diminished by a per se reversal rule. Such a rule could also jeopardize the application of harmless error analysis to other routine issues arising under state peremptory challenge laws. This Court should avoid these potential unintended consequences and affirm the Illinois Supreme Court's decision below.

ARGUMENT

I. This Court's Precedents and the Practical Impact of an Automatic Reversal Rule on State Peremptory Challenge Laws Weigh Heavily Against a Finding of Structural Error.

State law dictates the parameters of state peremptory challenges. Every state has designed and implemented systems that permit peremptory challenges.[1] Indeed, peremptory challenges are considered a key component of trial strategy, enabling trial participants to eliminate potential jurors for practically any reason subject to specific constitutional constraints. Although they are a well-established component of jury trials in the state court systems, they are not required under the federal constitution. *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) ("unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension.").

Here, the Illinois Supreme Court concluded that if the erroneous denial of a peremptory challenge even implicates constitutional concerns (and it does not), such an error is subject to harmless error review. *People v. Rivera*, 879 N.E.2d 876, 887

---

[1] *See* Appendix (chart of 50 states' and District of Columbia's laws or rules providing for number of peremptory challenges in criminal trials). Congress sets the number of peremptory challenges available in federal trials. Fed. R. Crim. P. 24(b).

(Ill. 2007) ("we do not see the error as one fitting within the Supreme Court's framework of 'structural errors.'"). In reaching its decision, the court noted that peremptory challenges lack a federal constitutional dimension. *Id.* at 885 ("…the Supreme Court no longer considers peremptory challenges indispensable to a fair trial or their erroneous denial a matter necessarily requiring reversal.").

A rejection of this approach is likely to have significant negative implications for existing peremptory challenge laws and trial strategy. An automatic reversal rule could potentially turn peremptory challenges from useful tools that increase the likelihood of a fair trial into tactical tools that unnecessarily burden the state court systems. Under an automatic reversal rule, state legislatures are more likely to view peremptory challenges as expensive and burdensome rather than as an important part of the jury trial tradition, particularly if the rule essentially federalizes the administration of peremptory challenge laws. Based on deference to the role of the states in fashioning their own peremptory challenge laws, the Illinois Supreme Court's decision should be affirmed to ensure that states retain the independence and motivation to preserve peremptory challenges.

A. Peremptory challenges are statutory privileges that are unnecessary to meet the Sixth Amendment impartial jury requirement.

This Court has long held that the peremptory challenge is not a federal constitutionally-guaranteed right. *Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases…"). While states have given them their due importance in the trial process, this Court has refused to elevate them to either constitutional or fundamental rights. *Martinez-Salazar*, 528 U.S. at 311 (recognizing that "[t]he peremptory challenge is part of our common law heritage," but it is "auxiliary"). Instead, peremptory challenges are a privilege that a state may eliminate entirely without violating the constitution. *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948) (noting that the peremptory challenge is "a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of 'an impartial jury' and a fair trial."). Moreover, the Sixth Amendment guarantees defendants in criminal trials the right to an impartial jury, which peremptory challenges may facilitate; but the Constitution does not establish any right for defendants to choose their jury. U.S. Const. amend. VI; *see also Stilson*, 250 U.S. at 586 ("…trial by an impartial jury is all that is secured.").

As a means of facilitating impartial juries, peremptory challenges form an important part of federal and state statutory law to which this Court has traditionally given much discretion. *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) ("Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise.") (citations omitted). As a result, Congress and the state legislatures have designed their own unique systems for jury selection, including the number of peremptory strikes available to each side and the manner in which those strikes may be exercised.

In cases dealing with possible misuse of peremptory challenges, this Court has avoided per se reversal rules. For example, in *Martinez-Salazar*, this Court held that a criminal defendant's federal right to peremptory challenges was not violated when the defendant peremptorily struck a juror whom the trial judge should have excused for cause. 528 U.S. at 315. Similarly, in *Ross v. Oklahoma*, this Court rejected the argument that mandatory reversal is required where "the failure to remove [a prospective juror] may have resulted in a jury panel different from that which would otherwise have decided the case[.]" 487 U.S. at 87.

This Court's restraint is appropriate here because peremptory strikes — including their improper denial by a trial court — do not meet the exceptional standard required to establish structural error. This type of error mandates reversal because it

is so closely woven into the framework of the trial process that it is presumed to affect the outcome. *Arizona v. Fulminate*, 499 U.S. 279, 309-10 (1991). Peremptory challenges, as a statutory privilege that a state need not even allow, do not fit this definition. As argued by respondent, "[t]he loss of a peremptory challenge does not implicate the fundamental interests for which structural error is reserved." Resp. Br. at 8. Moreover, this Court reiterated last year that characterizing errors as structural errors is the exception, and not the rule. *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008). The structural error definition is so narrow, "if the defendant had counsel and was tried by an *impartial* adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579 (1986) (emphasis added).[2]

This Court's jurisprudence reflects the principle that the intricacies of peremptory strike

---

[2] The Supreme Court of Arizona adopted a two-part test to assist in determining whether an error is amenable to harmless error analysis and therefore not structural error: "(1) is the error the kind of error that will likely affect the reliability of the truth-finding process?; and (2) is the truth finding impact of the error incapable of rational assessment?" *State v. Hickman*, 68 P.3d 418, 425 (Ariz. 2003) (citation omitted). Applying Arizona's test to this case, the improper denial of a peremptory challenge should not be deemed structural error. The impact of one juror's presence is, admittedly, impossible to estimate. But the reliability of the entire trial as a truth-finding process should not be legitimately in issue when a jury is composed of jurors different from that which the defendant would have selected, absent the argument that the seated juror was not impartial (and therefore should have been excused for cause).

laws are left to the states, and that errors in their administration at trial are generally not of federal constitutional significance. Only when a peremptory challenge implicates the Sixth and Fourteenth Amendment rights of defendants or jurors has the Court limited the states' control over their peremptory challenge systems with constitutional requirements. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that peremptory challenges may not be based on the sex of the juror); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that criminal defendants may not base a peremptory challenge on juror's race); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the state may not base its peremptory challenges on the race of jurors).

B. An automatic reversal rule is ill-advised given the uniqueness of peremptory challenge systems among the states.

A per se reversal rule would fail to account for the many differences and nuances among the states. Each state has adopted its own unique system for administering peremptory strikes. As an example, states vary on the number of strikes each party is allotted in a trial. In Connecticut capital trials, both the state and the defendant receive 25 peremptory strikes. Conn. Gen. Stat. § 54-82g (2008). For a misdemeanor, each side receives three. *Id.* In New Jersey felony trials, by contrast, the state receives 12 peremptory challenges, compared to the defendant's 20. N.J. Stat. § 2B:23-13 (2008). For all other trials, each side receives ten challenges. *Id.* In Virginia, capital and felony defendants as well as the state

receive only four peremptory challenges, just one more than that allotted to each side in misdemeanor trials. Va. Code Ann. § 19.2-262 (2008). *See* Appendix for complete state information on the number of peremptory challenges in criminal trials of a single defendant.

The uniqueness of state systems are apparent in other aspects of juror selection, such as the number of peremptory challenges allotted to parties in cases of juror alternates, the presence of multiple defendants in a single trial, and civil trials.[3] So too do states have different methods for the actual jury selection and procedure by which peremptory challenges may be asserted.[4] The validity of these

---

[3] For example, in Florida civil litigants are each entitled to three peremptory challenges. Fla. R. Civ. P. 1.431(d). In Vermont, each civil party receives six challenges, the same number parties in all trials receive. Vt. Stat. Ann. tit. 12, § 1941 (2008). Most states allot one peremptory challenge per alternate juror. *See, e.g.,* Cal. Code Civ. P. § 234. But this is not always the case. In Maryland, for example, parties are allotted one peremptory challenge per three alternate jurors at a civil trial. Md. Rule 2-512(e)(2). In criminal trials, the state is permitted one and a defendant two additional peremptory challenges per alternate juror. Md. Rule 4-313(a)(4).

[4] Jury selection methods not only vary from state to state, statutes often specifically leave to the individual trial judge's discretion the particulars of jury selection. *See, e.g.,* Alaska R. Crim. P. 24(e); Ill. Sup. Ct. R. 434(a); N.Y. Crim. Proc. Law § 270.15(2); Okla. Stat. tit. 22, § 575.1. Although most statutes provide for alternating strikes beginning with the state, *see, e.g.,* Cal. Code Civ. P. § 231(d), that is not always the case. *See* Del. Super. Ct. Crim. P.R. 24 (b)(3) (defendant makes the first peremptory strike); *see also* N.C. Gen. Stat. § 15A-1214(d-e) (prosecutor must make all peremptory challenges to a panel of (Continued…)

unique features and the differences they create in jury selection processes from state to state would be in question were this Court to place constitutional weight on the peremptory challenge right.

Equally unique are the methods developed by state courts for assessing trial court errors in peremptory challenges and challenges for cause under state law frameworks. For example, some state courts, even after this Court's decision in

---

12 before that panel is tendered to the defense to make its challenges). Some states require that challenges be made at a sidebar conference, La. C. Crim. Proc. art. 795(B)(2), others require that the challenges be done by "secret ballot," Or. Rev. Stat. § 136.230(2), and still others make no mention in either rule or statute of where or how the challenges are to be made.

The two most commonly noted categories of methods for using peremptory challenges are the "jury box" and "struck jury" systems. *See United States v. Blouin*, 666 F.2d 796, 796-97, 797 n.1 (2d Cir. 1981) (detailing both methods). The key difference in these methods is that when a prospective juror is struck in the jury box method, it is not necessarily known who will replace the stricken juror. *Id.* at 796. In the struck jury method, the size of the selection array is equal to the number of jurors and alternates required at trial plus all possible peremptory challenges, so the parties may anticipate who will take the place of a juror they strike. *Id.* at 796-97. While "the struck jury system has long been criticized for allowing the racial engineering of jurors," *United States v. Esparza-Gonzalez*, 422 F.3d 896, 902-903 (9th Cir. 2005), "[p]roponents of the struck panel system have argued that it makes jury selection more intelligent." Leonard B. Sand, *From the Bench:* Batson *and Jury Selection Revisited*, 22 Litig. 3, 4 (1996). Regardless of the criticism leveled against the struck jury system, it has not been deemed a violation of the Sixth Amendment, and its use continues. *Esparza-Gonzalez*, 422 F.3d at 902-903.

Martinez-Salazar, have found that wrongful denials of for cause challenges corrected by a party's use of a peremptory strike[5] not only impair the right to peremptory strikes, but also may be per se reversible error under state law analyses. *See Busby v. State*, 894 So. 2d 88, 100-102 (Fla. 2004) (holding that under Florida law, harm is shown when a juror was seated whom the defendant suspects is biased); *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2007) ("There is nothing in [this Court's precedents] that requires the states to adopt their reasoning as to the weight, or 'substantial' value a state may place on the exercise of peremptory strikes."); *Golden v. State*, 127 P.3d 1150, 1155 (Okla. Crim. App. 2006) (reversing verdict where defendant did not receive the peremptory challenges he was due under Oklahoma law).

Other state courts have treated peremptory challenge rights differently, finding no basis for automatic reversal when errors occur in their administration. In these states, infringements on peremptory challenge rights are subject to harmless error analyses. *People v. Bell*, 702 N.W.2d 128, 138 (Mich. 2005) (noting that had error been found in denying a peremptory challenge, court would have applied harmless error analysis before determining whether reversal was appropriate); *Commonwealth v. Carson*, 741 A.2d 686, 696 (Pa. 1999) (refusing to reverse conviction where no prejudice demonstrated

---

[5] As recognized by both the petitioner and respondent, "insofar as this kind of error may 'result in an individual sitting on the jury who would not have,' the issue is the 'same' as the question presented here." Resp. Br. at 48 n.5 (quoting Pet. at 3).

because appellant did not show that a particular seated juror he attempted to peremptorily strike was biased or incompetent); *Lyons v. United States*, 683 A.2d 1066, 1072 (D.C. 1996) (holding that violation of the right to a peremptory challenge is not a structural error).

These different layers of analysis reflect the individuality of the state courts and their state common law. Trials are unique from state to state, save for the consistent application of federal constitutional guarantees (e.g., the right to counsel, the right to examine witnesses). The right to peremptory challenges is not among these guarantees in the Constitution. For this reason, state law determines whether harmless error review applies. Indeed, a contrary rule would preempt state outcomes and create an environment in which peremptory challenges become disfavored as a tool for facilitating fair trials.

In the state cases described above, federal law was irrelevant to the question as to what standard of review should apply. If the Court here concludes that federal law governs, however, it should do no more than set a "floor" of harmless error review and allow states to provide greater protections. *See* Resp. Br. at 15 ("States always retain the 'power to impose higher standards … than required by the Federal Constitution,' '[a]nd when such state standards alone have been violated the State is free, without review by [this Court], to apply its own state harmless-error rule to such errors of state law.' *Cooper v. California*, 386 U.S. 58, 62 (1967).") (alterations in original).

C. An automatic reversal rule will cause states to consider limiting or even eliminating peremptory challenges, thereby impacting jury selection issues underlying *Batson*.

An automatic reversal rule is likely to work mischief by undermining the importance of states' control over the use of peremptory challenges and remedies for their misuse. A decision deeming peremptory challenge error a constitutional violation requiring automatic reversal creates incentives for state legislatures to limit or eliminate peremptory strikes. Automatic reversal means a new trial with all of its attendant costs to the state court system. To avoid the potential for these duplicative and wasteful costs, legislatures might impose a variety of restrictions on the use of peremptory challenges. Indeed, trial court errors arising from the denial of peremptory strikes can be eliminated altogether by eliminating peremptory challenges altogether.

As warned by Judge Kozinski, a decision that peremptory challenges are structural error subject to per se reversal "will make peremptory strikes too dear a luxury." *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (Kozinski, J., dissenting). Such a decision "turns every peremptory challenge error into a retrial [and] gives a strong incentive to federal and state legislators to cut down the number of peremptories — or eliminate them altogether." *Id.*

A legislature's inclination to restrict or eliminate peremptory strikes might be particularly heightened because trial court errors may be more

likely to occur in the fast-paced process of jury selection. Decisions to grant or deny peremptory strikes may involve unquantifiable feelings or observations on the part of the judge about the credibility or believability of the counsel attempting to make the challenges. Claims of errors during jury selection are accordingly among the most common of all grounds for criminal appeals. William T. Pizzi & Morris B. Hoffman, Jury Selection Errors on Appeal, 38 Am. Crim. L. Rev. 1391, 1391 (2001). Justice O'Connor noted in 1994, only eight years after the Court's decision in *Batson*, that "*Batson* minihearings are now routine in state and federal trial courts, and [that] *Batson* appeals have proliferated as well." *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127, 144 (1994) (O'Connor, J., concurring); *see also Annigoni*, 96 F.3d at 1150 (Kozinski, J., dissenting) ("rare is the trial where one side or the other does not rattle a *Batson* sabre"). Because *Batson* challenges are "routine" in trials, it necessarily follows that trial judges must routinely conduct *Batson* analyses. Turning each of these analyses into the opportunity for reversible error places an enormous burden on the states.

Trials are expensive. This Court gives weight to whether its decisions will "undermine[] the States' interest in finality." *Brecht v. Abramson*, 507 U.S. 619, 637 (1993). States, if faced with the possibility of mandatory new trials every time an error occurs in assessing the motive behind a peremptory challenge, will find alternatives to the use of peremptory challenges. One way of limiting the potential for retrials, as Judge Kozinski has argued, will be to limit the number of peremptory challenges

permitted.[6] As this Court has recognized, states would not violate the constitutional rights of litigants were they to flat out prohibit peremptory challenges. *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) ("This Court repeatedly has 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."); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948).

The costs to the courts, as well as the impacts on all trial participants including victims and their families, are not the only negative implications of automatic retrials in these circumstances. A per se reversal rule "would be an exercise of form over substance," because peremptory challenges are not accorded the same weight as the right to a fair and impartial jury. *State v. Hickman*, 68 P.3d 418, 426 (Ariz. 2003) (applying harmless error analysis to improper denial of for cause challenge cured by defendant's use of a peremptory strike). "It simply does not make any sense to require a new trial where a verdict is constitutionally sound." *Klahn v. State*, 96 P.3d 472, 483 (Wyo. 2004) (holding that absent a showing of prejudice, the wrongful denial of a for cause challenge should not be reversed). And such

---

[6] Only two states, Connecticut and Louisiana, have constitutions that affirmatively establish peremptory challenge rights. Conn. Const. amend. art. IV ("In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law."); La. Const., art. I, § 17 ("The accused shall have a right … to challenge jurors peremptorily.").

costs would be needlessly imposed "because the Constitution simply does not require the result." *J.E.B.*, 511 U.S. at 156 (Rehnquist, C.J., dissenting).

The Wisconsin Supreme Court recognized the practical problems of an automatic reversal rule when it departed from its own precedent and held that when a peremptory strike is used to correct the improper denial of a for cause challenge, the error is subject to harmlessness review. *State v. Lindell*, 629 N.W.2d 223, 236, 247 (Wis. 2001) (noting that the court had "come to recognize some of the systemic problems" its earlier decision had created). First, "[t]he multitude of fact-intensive challenges involving shades of gray are bound to produce some trial court error. This error is not likely to be deterred by the sanction of a new trial because there is no intent by the circuit court to commit error." *Id.* at 247. Additionally, the court was troubled that the previous decision "requires a new trial in cases where the trial was nearly perfect and the verdict is unquestionably sound," while it examined other errors "both statutory and constitutional … for harmful effect." *Id.* at 249 (footnotes omitted). Such practical problems illuminated the effect of placing the peremptory right "on a pedestal above others, and [that] it is not worthy to be there." *Id.* at 250.

Additionally, many states have already interpreted the language in *Batson* as creating per se reversible error when a *Batson* challenge is improperly *denied*. *See, e.g.*, *Alex v. Rayne Concrete Serv.*, 951 So. 2d 138, 155 (La. 2007) ("Errors regarding discrimination in the composition of the grand jury or petit jury are not harmless."); *People v.*

Bell, 702 N.W.2d 128, 138 (Mich. 2005) ("A *Batson* error 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."); *State v. Lowe*, 677 N.W.2d 178, 188 (Neb. 2004) (holding that state's improper use of peremptory challenge in violation of equal protection was structural error); *Diomampo v. State*, 185 P.3d 1031, 1037 (Nev. 2008) ("Discriminatory jury selection in violation of *Batson* generally constitutes 'structural' error that mandates reversal."); *Commonwealth v. Basemore*, 744 A.2d 717, 734 (Pa. 2000) ("*Batson* violations fall within a limited and unique category of claims which, by the nature of their impact upon the fundamental fairness of a trial, are not subject to conventional harmless error or prejudice analysis."); *but see State v. Cantu*, 750 P.2d 591, 597 (Utah 1988) (remanding for further analysis and noting that if challenge violated *Batson*, a new trial should be ordered unless error was harmless beyond a reasonable doubt). Finding structural error in these cases arguably is supported by federal constitutional law, because the Fourteenth Amendment rights of a juror are at stake. *Bell*, 702 N.W.2d at 138 (recognizing distinction between a *Batson* error and the denial of a peremptory challenge); *see also* Resp. Br. at 23 ("reversal is required in such cases to deter discrimination and safeguard broader societal interests").

But if error is per se reversible when committed in *denying* a *Batson* challenge, and per se reversible when committed in *granting* a *Batson* challenge, then any time a *Batson* challenge is raised

the potential is created for automatic reversible errors. Limiting the opportunity for *Batson* error at all would become an attractive option to legislatures. Similarly, prosecutors might find themselves hesitant to assert the equal protection rights of jurors (which they have standing to do, *see McCollum*, 505 U.S. at 56), lest they risk opening the door to reversible error. Likewise, trial judges, such as the one in this case, may be less willing to sua sponte act when they spot potentially race- or sex-based strikes.

Applying a per se reversal rule to these errors also could lead to the constitutionalization of other issues of state law regarding peremptory challenges. *See* Resp. Br. at 25-28. Adopting petitioner's argument that "[s]trict adherence to propriety in the construction of the foundational components of a trial cannot be compromised by harmless-error review," Pet. Br. at 17, would essentially make every detail during jury selection, and the eventual composition of the jury, subject to per se reversal if erroneous. Therefore, clerical mix-ups of a jury selection panel, resulting in the presence of a juror that should not have been on the venire panel at all, could create automatically reversible error. Resp. Br. at 25-28. In states in which backstriking of jurors is permitted, the trial court improperly granting or denying a defendant permission to backstrike could also become an issue subject to automatic reversal. *State v. Shrader*, 881 So. 2d 147, 153 (La. Ct. App. 2004) (holding that erroneous denial of a backstrike is subject to harmless error review).

A decision from this Court reversing the Illinois Supreme Court could impact errors at trial that are not even attributable to the state or trial court. For instance, this Court has held that when jurors, either intentionally or unwittingly, fail to disclose information during voir dire, parties may not obtain new trials unless they can "show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (noting that an automatic reversal rule "is contrary to the practical necessities of judicial management."). Other jurisdictions have similarly subjected such errors to harmlessness review. *See Young v. United* States, 694 A.2d 891, 897 (D.C. 1997) (affirming denial of new trial because seating of ineligible, possibly biased, but not impartial juror who failed to disclose grounds for ineligibility during voir dire is not structural error); *Taylor v. Commonwealth*, 486 S.E.2d 108, 111 (Va. Ct. App. 1997) (affirming denial of mistrial because juror's "presence on the jury did not affect the essential fairness of the trial, notwithstanding the impairment to appellant's right of peremptory challenge."). Should the Court find grounds for automatic reversal in this case, it risks creating conflict with its previous reasoning that the interests of finality outweighed the importance of a perfect peremptory challenge process. *McDonough*, 464 U.S. at 555. If the impairment or denial of a defendant's peremptory challenge rights becomes structural error, would the circumstances in *McDonough*, though entirely outside of the control of the court system, also be subject to automatic reversal?

The number of peremptory challenges, a matter long left to the states' discretion, also could become a critical part of the right to an impartial jury. If the improper denial of peremptory challenges is structural error, would it also be structural error to misinterpret the statute so as to grant the wrong number of peremptory strikes allotted to each side? *See, e.g., Whitney v. State*, 857 A.2d 625, 633-35 (Md. Ct. Spec. App. 2004) (finding that trial judge's error in number of strikes allotted defendant would be per se reversible, but counsel's failure to object to trial court's error did not rise to prejudice required for reversal under ineffective counsel standard); *Praus v. Mack*, 626 N.W.2d 239, 249 (N.D. 2001) (holding that plaintiff failed to show prejudice or abuse of discretion resulting from trial court's decision to give defendants additional peremptory challenges); *Morales v. State*, 992 P.2d 252, 253 (Nev. 2000) ("The improper limitation of peremptory challenges is not subject to harmless error analysis…"). Should the number of peremptory strikes be limited at all if they are so critical to the truth-finding jury function as to be deemed structural error when they are improperly denied?

The constitutionalizing of the peremptory strike has the potential to lead to a variety of changes in long-standing, historically state-controlled procedures of jury selection. Elevation of the peremptory challenge right and certain jury compositions would require reversal of this Court's precedent and states would have to reconsider the design of their peremptory challenge systems based on that precedent. *Frazier*, 335 U.S. at 508 ("There is … no right to any particular composition or group

representation on the jury."). This Court should not now deviate from the path it has created. Such deviation could lead to the imposition of limitations on peremptory challenges, a facet of jury trials which, while not a fundamental right, are an important right of all trial participants and a strategic part of jury trials. Therefore, this Court should affirm the Illinois Supreme Court's decision below, find that the improper denial of a peremptory challenge is not a structural error, and leave to the states the authority to determine the reversibility of errors in administering peremptory challenges.

CONCLUSION

For all of the above reasons, this Court should affirm the Illinois Supreme Court's decision below.

Respectfully submitted,

BILL MCCOLLUM
Attorney General of Florida

Scott D. Makar*
Solicitor General of Florida
Courtney Brewer
Craig D. Feiser
Deputy Solicitors General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for Amici Curiae
*Counsel of Record

January 28, 2009

APPENDIX

Number of Peremptory Challenges
in Criminal Trials[a]

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Alabama	Ala. Code § 12-16-100(a)	12	12	6	6	3	3
Alaska	Alaska R. Crim. P. 24(d)	N/A		10	10	3	3
Arizona	Ariz. R. Crim. P. 18.4(c)	10	10	6	6	2	2
Arkansas	Ark. Code Ann. § 16-33-305	10	12	6	8	3	3
California	Cal. Civ. Proc. Code § 231	20	20	20/ 10[b]	20/ 10	10/ 6	10/ 6
Colorado	Colo. Rev. Stat. § 16-10-104	10	10	5	5	3	3
Connecticut	Conn. Gen. Stat. § 54-82g	25	25	15/ 6[c]	15/ 6	3	3
Delaware	Del. Super. Ct. Crim. R. 24(b)	12	20	6	6	6	6
D.C.	D.C. Code § 23-105	20	20	10	10	3	3
Florida	Fla. Stat. § 913.08	10	10	10/ 6[d]	10/ 6	3	3
Georgia	Ga. Code Ann. §§ 15-12-125; 15-12-165	15	15	9	9	3	3

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Hawaii	Haw. Rev. Stat. § 635-30	N/A		12/ 3[e]	12/ 3	3	3
Idaho	Idaho Code Ann. § 19-2016	10	10	10/ 6[f]	10/ 6	6	6
Illinois	Ill. Sup. Ct. R. 434(d)	14	14	7	7	5	5
Indiana	Ind. Code §§ 35-37-1-3; 35-37-1-4	20	20	10/ 5[g]	10/ 5	5	5
Iowa	Iowa R. Crim. P. 2.18(9)	N/A		10/ 6[h]	10/ 6	4	4
Kansas	Kan. Stat. Ann. § 22-3412(a)	12	12	12/ 8/6[i]	12/ 8/6	3	3
Kentucky	Ky. R. Crim. P. 9.40	8	8	8	8	3	3
Louisiana	La. Code Crim. Proc. art. 799	12	12	12/ 6[j]	12/ 6	6	6
Maine	Me. R. Crim. P. 24(c)	N/A		10/ 8[k]	10/ 8	4	4
Maryland	Md. Code Ann. Cts. & Jud. Proc. § 8.420	10	20	10/ 5/ 4[l]	20/ 10/ 4	4	4
Massachusetts	Mass. R. Crim. P. 20(c)	N/A		12/ 4[m]	12/ 4	4	4
Michigan	Mich. Comp. Laws §§ 768.12, 768.13	N/A		12/ 5[n]	12/ 5	5	5

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Minnesota	Minn. R. Crim. P. 26.02 subd. 6	N/A		9/ 3[o]	15/ 5	3	5
Mississippi	Miss. Code Ann. § 99-17-3	12	12	6	6	6	6
Missouri	Mo. Rev. Stat. § 494.480(2)	9	9	6	6	2	2
Montana	Mont. Code Ann. § 46-16-116	8	8	6/ 3[p]	6/3	6/3	6/3
Nebraska	Neb. Rev. Stat. § 29-2005	12	12	12/ 6/ 3[q]	12/ 6/ 3	3	3
Nevada	Nev. Rev. Stat. Ann. § 175.051	8	8	8/4[r]	8/4	4	4
New Hampshire	N.H. Rev. Stat. Ann. §§ 606:3, 606:4, 606:9	10	20	15/ 3[s]	15/ 3	2	2
New Jersey	N.J. Stat. Ann. § 2B:23-13	N/A		12/ 10[t]	20/ 10	10	10
New Mexico	N.M. Dist. Ct. R. Crim. P. 5-606(D)	16	24	8/ 3[u]	12/ 5	3	5
New York	N.Y. Crim. Proc. Law § 270.25	20	20	20/ 15/ 10[v]	20/ 15/ 10	10	10
North Carolina	N.C. Gen. Stat. § 15A-1217	14	14	6	6	6	6
North Dakota	N.D. R. Crim. P. 24(b)(1)	N/A		10/ 6/ 4[w]	10/ 6/ 4	6/4	6/4

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Ohio	Ohio Rev. Code Ann. § 2945.21	12	12	4	4	3	3
Oklahoma	Okla. Stat. tit. 22, § 655	9	9	9/5[x]	9/5	3	3
Oregon	Or. Rev. Stat. § 136.230	12	12	12/ 6/ 3[y]	12/ 6/ 3	3	3
Pennsylvania	Pa. R. Crim. P. 634	20	20	7	7	5	5
Rhode Island	R.I. Super. R. Crim. P. 24(b)	N/A		6	6	3	3
South Carolina	S.C. Code Ann. § 14-7-1110	5	10	5	10/ 5[z]	5	5
South Dakota	S.D. Codified Laws § 23A-20-20	20	20	20/ 10[aa]	20/ 10	3	3
Tennessee	Tenn. Code Ann. § 40-18-118	15	15	8	8	3	3
Texas	Tex. Code Crim. Proc. art. 35.15	15	15	10	10	5	5
Utah	Utah R. Crim. P. 18(d)	10	10	4	4	3	3
Vermont	Vt. Stat. Ann. tit. 12, § 1941	N/A		6	6	6	6
Virginia	Va. Code Ann. § 19.2-262	4	4	4	4	3	3

Jurisdiction	Statute or Rule	Number of Peremptory Challenges					
		Capital		Felony		Misd.	
		St	Def	S	D	S	D
Washington	Wash. Sup. Ct. Crim. R. 6.4(e)(1)	12	12	6	6	3	3
West Virginia	W. Va. Code § 62-3-3; W. Va. R. Crim. P. 24(b)(1)(B)	N/A		2	6	4	4
Wisconsin	Wis. Stat. § 972.03	N/A		6/ 4[bb]	6/ 4	4	4
Wyoming	Wyo. Stat. § 7-11-103	12	12	8	8	4	4

[a] In each state, the table entries reflect those peremptory challenges available in the highest trial court, if there is a difference in the number of challenges among a jurisdiction's courts. For instance, in Texas, the state and the defendant are entitled to 5 peremptory challenges in the district court for misdemeanors, but only 3 for misdemeanors tried at the county court. Tex. Code Crim. Proc. art. 35.15(c). The table reflects only the number for the district court level in Texas and similar levels in other states.

[b] In California, each side is allotted 20 peremptory challenges in trials for offenses punishable by imprisonment in the state prison for life. If the offense charged is punishable with a maximum term of imprisonment of 90 days or less, each side is entitled to 6 peremptory challenges. For any other offense, each side is allotted 10 peremptory challenges.

[c] In Connecticut, each side receives 15 peremptory challenges at trials for felonies which are punishable by life imprisonment.

[d] In Florida, 10 peremptory challenges are allotted to each side at trials for offenses punishable by life imprisonment.

[e] In Hawaii, each side receives 12 peremptory challenges when the offense being tried is punishable by life imprisonment.

[f] In Idaho, if a crime is punishable by life imprisonment, each side receives 10 strikes.

[g] In Indiana, 10 peremptory challenges are allotted for each side when the crime charged is murder (and the prosecution is not seeking the death penalty), or a Class A, B, or C felony. All other offenses are allotted 5 strikes per side.

[h] In Iowa, if the offense is a Class A felony, each side receives 10 strikes. Parties in other felony cases receive 6 strikes.

[i] In Kansas, 12 peremptory challenges are available in the most severe felony trials, 8 in the next levels, and 6 in all other felony trials.

[j] In Louisiana, in trials for offenses punishable by death or "necessarily by imprisonment at hard labor," each side is allotted 12 peremptory challenges. In all other trials, 6 peremptory challenges are allotted.

[k] In Maine, if the crime charged is murder, the parties are allotted 10 strikes. Parties in trials of class A, B, and C crimes are allotted 8.

[l] In Maryland, the state is allotted 10 and the defendant is allotted 20 peremptory challenges for all crimes punishable by the death penalty or life imprisonment. When the potential sentence is at least 20 years, the state is allotted 5 and the defendant is allotted 10 peremptory challenges. In every other criminal trial, each party is allotted 4 peremptory challenges.

[m] In Massachusetts, in trials for offenses punishable by life imprisonment, the Commonwealth and each defendant are allotted 12 peremptory challenges.

[n] In Michigan, in trials for crimes punishable by life imprisonment each side receives 12 peremptory challenges.

[o] In Minnesota, at trials for offenses punishable by life imprisonment the defendant is allotted 15 and the state is allotted 9 peremptory challenges.

[p] In Montana, each side is allotted 6 peremptory challenges when the trial is by a 12-person jury; 3 peremptory challenges are allotted to each side when the trial is by a 6-person jury.

[q] In Nebraska, in a trial for any crime punishable with death, or imprisonment for life, each side receives 12 peremptory challenges; in trials for any offense that may be punishable by imprisonment for a term exceeding 18 months and less than life, each side receives 6 peremptory challenges; and in all other criminal trials, each side receives 3.

[r] In Nevada, each side receives 8 peremptory challenges in trials for crimes punishable by life imprisonment.

[s] In New Hampshire, 15 peremptory challenges are allotted for each side in trials for murder in the first degree.

[t] In New Jersey, in trials for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree, or perjury the defendant receives 20 and the state 12 peremptory challenges. In all other trials, each side receives 10 peremptory challenges.

[u] In New Mexico, if the offense is punishable by life imprisonment, the state receives 8 challenges and the defendant receives 12.

[v] In New York, each side receives 20 peremptory challenges if the highest crime charged is a class A felony, 15 if the highest crime charged is a class B or class C felony, and 10 in all other cases.

[w] In North Dakota, each side is entitled to 6 challenges when a 12-person jury is to serve, and 4 challenges when a 6-person jury is impaneled. Each side receives 10 peremptory challenges when the offense charged is an AA felony.

[x] In Oklahoma, parties receive 9 peremptory challenges in all first-degree murder trials.

[y] In Oregon, if the jury is comprised of more than 6 jurors, the parties are entitled to 6 peremptory challenges. In trials before 6 jurors, the parties are entitled to 3 challenges. If the trial is for an offense punishable by life imprisonment, the parties are entitled to 12 challenges.

[z] In South Carolina, defendants receive 10 peremptory challenges in trials for murder, manslaughter, burglary, arson, criminal sexual conduct, armed robbery, grand larceny, or breach of trust when it is punishable as grand larceny, perjury, or forgery.

[aa] In South Dakota, parties are entitled to 20 peremptory challenges in trials for Class A, B, or 1 felony offenses.

[bb] In Wisconsin, parties at trials for offenses punishable by life imprisonment receive 6 challenges.