No. 07-9995

In the Supreme Court of the United States

MICHAEL RIVERA, PETITIONER

v.

THE PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF AMICUS CURIAE OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a criminal defendant is erroneously denied a peremptory challenge to which he was entitled under state law, does the fact that the challenged juror was seated and participated in the trial constitute a "structural error" under the Due Process Clause that requires automatic reversal of the conviction?

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The position advanced by Petitioner would create a sweeping expansion of the category of "structural error" in criminal prosecutions. If this position were to be accepted, every violation of state law that impacts the makeup of a criminal jury would gain the status now reserved for the most fundamental violations of the U.S. Constitution—violations which, no matter how harmless, automatically require that the conviction be reversed. As the State's brief explains, this position has no basis in this Court's cases and, indeed, threatens to federalize rights that the States have created and should be allowed to define. The National District Attorneys Association, as amicus curiae,[1] submits this brief to alert the Court of the impact its decision may have on prosecutors, their efforts to prosecute defendants fairly and expeditiously, their ability to defend against defendants' misuse of peremptory challenges, and their ability to assert and protect the rights of jurors themselves.

The National District Attorneys Association ("NDAA") is a nonprofit corporation and the sole national membership organization representing local prosecuting attorneys in the United States. Since its founding in 1950, NDAA's programs of education and training, publications, and amicus activity have carried out its guiding purpose to serve as "the Voice of

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part. Further, no person other than Amicus, its members, and its counsel made any monetary contribution to further the preparation or submission of this brief.

America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People."

A ruling in Petitioner's favor would have serious practical implications for criminal prosecutions in courthouses across this nation. For the reasons described below, such a ruling would give criminal defendants a powerful incentive to assert peremptory challenges that are close to the line drawn in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and its progeny. By asserting a questionable peremptory challenge, a defendant could invite a close ruling based on *Batson* and thus set the stage for a finding of structural error on appeal.

Moreover, a decision in Petitioner's favor here would put prosecutors in an untenable position. When a criminal defendant asserts a discriminatory peremptory challenge, the responsibility falls to the prosecutor and the trial judge to assert and protect the juror's Fourteenth Amendment right to serve without discrimination. Indeed, this Court's cases have expressly recognized that both the defense and the prosecution have standing to assert *Batson* rights, even though such rights properly belong to the challenged jurors themselves. Before objecting to a peremptory challenge on *Batson* grounds, however, a prosecutor operating under Petitioner's rule would have to assess the strength of the argument in a new way, considering the risk of reversal by a later court on appeal. To protect the conviction, the prosecutor would have an incentive to reserve *Batson* objections for only the most obvious and overt instances of juror discrimination. The result will ultimately be *more* discrimination in the use of peremptory challenges—unless States choose to abandon the practice of peremptory challenges altogether.

NDAA urges this Court to decline to expand the category of structural error in the manner Petitioner seeks. Indeed, where no federal right is at stake, it is the state courts—not this Court—that should determine whether a particular trial court error is subject to review for harmlessness. That is what the Illinois Supreme Court did here, and its decision should be affirmed.

STATEMENT

Eight years ago, Petitioner was prosecuted for the murder of sixteen-year-old Marcus Lee. During jury selection, defense counsel exercised a peremptory challenge against prospective juror Delores Gomez. The trial court concluded that the peremptory challenge was discriminatory and improper under *Batson*, and it allowed Ms. Gomez to be seated as a juror. At the conclusion of Petitioner's trial, the jury found him guilty of first-degree murder, and the trial court sentenced him to 85 years in prison. The conviction was upheld on appeal.

Later, the Illinois Supreme Court concluded that the trial court had misapplied *Batson*. In other words, the court concluded that the peremptory challenge by the defendant presented no issue under *Batson* after all and that the defendant should have been allowed to excuse Ms. Gomez from the jury. Nevertheless, the court concluded that the error had been harmless, as the evidence of Petitioner's guilt was so overwhelming that no reasonable juror could have reached any other result.

Today, Petitioner contends that his conviction should be reversed outright because of the trial court's error in denying him his state law right to excuse Ms. Gomez. The implications of this argument,

however, extend well beyond this individual case. Petitioner's argument is not limited to cases where the trial court applies *Batson* too enthusiastically; his position would make *any* erroneous denial of a peremptory challenge—or any other error of state law that impacts the composition of the jury—a structural error of federal constitutional dimension. As discussed further below, this position has no support in this Court's cases, and accepting it would impair prosecutors' ability to balance and carry out their various roles at trial, including to protect jurors from discrimination by defendants and to preserve the integrity of the conviction and the criminal process.

ARGUMENT

This Court has defined structural errors as those "constitutional deprivations * * * affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). A trial judge's erroneous denial of a defendant's peremptory challenge does not fall within this limited category of constitutional deprivations. As this Court has repeatedly acknowledged, peremptory challenges are "auxiliary" and "not of federal constitutional dimension." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 311 (2000).

Accordingly, under this Court's cases, the good-faith denial of a peremptory challenge should not implicate the U.S. Constitution at all, much less create structural error that requires reversal as a matter of federal law. To hold otherwise would be to create serious practical problems for prosecutors. If States choose to continue offering defendants the right to exercise peremptory challenges—and it is not clear

that they would—Petitioner's rule would give defendants an increased incentive to exercise discriminatory peremptories, while also impairing the prosecution's ability to stop them.

I. Petitioner's argument seeks an unprecedented expansion of the concept of "structural error," extending it to include the deprivation of any *state law* right that impacts the jury's composition.

In terms of jury composition, the Sixth Amendment guarantees impartiality but nothing more. See U.S. Const. amend. VI. In other words, while a defendant has a constitutional right to exclude a biased or potentially biased juror for cause, he does not otherwise have a constitutional right to select or excuse any particular juror. On that basis, this Court has recognized repeatedly that a criminal defendant has no constitutional right to a peremptory challenge. See, *e.g.*, *United States* v. *Martinez-Salazar*, 528 U.S. 304, 307, 311 (2000) (peremptory challenges provided under federal statute "are not of federal constitutional dimension").

Although a State may elect to provide defendants with the right to excuse jurors without cause through peremptory challenges, that right remains within the bailiwick of the State, as long as the challenge is not used in a way that implicates the juror's rights under *Batson*. Indeed, a State may eliminate peremptory challenges altogether without impairing the defendant's Sixth Amendment rights. *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) ("[I]t is important to recall that peremptory challenges are not constitutionally protected fundamental rights * * *. This Court repeatedly has stated that the right to a per-

emptory challenge may be withheld altogether" without implicating Sixth Amendment rights) (citing *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965); *Frazier* v. *United States*, 335 U.S. 497, 505 n.11 (1948); *United States* v. *Wood*, 299 U.S. 123, 145 (1936); and *Stilson* v. *United States*, 250 U.S. 583, 586 (1919)); see also, *e.g.*, *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) (peremptory challenges provided under state statute "are not of constitutional dimension"); *Vasquez* v. *Hillery*, 474 U.S. 254, 262 (1986).

Where a peremptory challenge is used in a discriminatory fashion, the juror suffers unconstitutional discrimination, no matter who exercised the challenge. *Cf. McCollum*, 505 U.S. at 47-50 (stating that when subjected to an unconstitutionally discriminatory challenge, the open and public discrimination jurors suffer is a harm inflicted regardless of who invoked the challenge) (citing *Powers* v. *Ohio*, 499 U.S. 400 (1991); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991); *Batson*, 476 U.S. at 87; and *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880)). Thus, under this Court's cases, the Constitution is implicated only when a peremptory challenge is used *improperly*—not when it is used *properly* but is impeded by an error in the trial court.

In other words, as long as the improperly included juror was not subject to removal for cause[2] and was

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[2] Although Petitioner's brief hints to the contrary, there is no significant risk that Ms. Gomez became biased due to the peremptory challenge and the court's subsequent ruling, as the discussion about the potential for discrimination took place outside her hearing. See *State* v. *Rivera*, 879 N.E.2d 876, 879-880 (Ill. 2007) (reviewing and quoting *voir dire* transcript); 852 N.E.2d 771, 774-76 (Ill. 2006) (reviewing and quoting *voir dire* transcript in detail); 810

not otherwise improperly biased or prejudiced, there is no relevant federal constitutional distinction between the jury as seated and the jury the defendant would have preferred. See *Martinez-Salazar*, 528 U.S. at 316; *Frazier*, 335 U.S. at 507; *Pointer* v. *United States*, 151 U.S. 396, 408-12 (1894) (emphasizing that impaneled jury was duly qualified and impartial). The Illinois Supreme Court concluded that *Batson* was not implicated here at all, and as a result, no federal constitutional issues are at stake. Even for Ms. Gomez herself, the trial court's ruling erroneously *over*-protected her rights under the U.S. Constitution. By definition, that error did not impair any federally protected right. Thus it is state law—not federal law—that should determine whether to analyze the trial court's error for harmlessness.

To accept Petitioner's "structural error" argument would be to federalize a wide range of state law rights related to the composition of the jury. Indeed, the fact that the error here related to *Batson* has nothing at all to do with the issue before the Court. The error could as easily have been a counting error—an error in determining how many peremptory challenges state law allows[3]—or an error about a juror's qualifi-

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N.E.2d 129, 131-32 (Ill. App. Ct. 2004) (summarizing facts). And, if a juror's mere knowledge of defendant's attempt to excuse her were, by itself, sufficient to create risk of bias, then a defendant could *create* "cause" merely by asserting it.

[3] This obvious implication of Petitioner's argument cannot be reconciled with this Court's rulings in *Ross* and *Martinez-Salazar*. These cases make clear that even if a trial court's counting error resulted in the loss of a peremptory strike in violation of state or federal law, such would amount to structural error *only if* the defendant's Sixth

cations under state law. The upshot would have been the same: the defendant would have been denied a jury constituted within the specific parameters set by state law. If that is a "structural error" under the U.S. Constitution, then nearly any error of state law that relates to the composition of the jury would provide the defendant with a basis to upset his conviction. The result would be much greater uncertainty in state law convictions and a serious encroachment on the ability of state governments to grant, interpret, and even take away procedural rights over and above what the U.S. Constitution requires.

The cases Petitioner cites in support of his argument are not to the contrary. Each case addresses either a fundamental problem with the power of a *federal* tribunal, a biased adjudicator, or a state court jury selection process that (unlike this one) *did* involve unconstitutional discrimination. See, *e.g.*, *Go-*

Amendment right to an impartial jury was violated. *Ross*, 487 U.S. at 85, 88-91 ("[T]he 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides. * * * Even then, the error is grounds for reversal *only if* the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him.") (emphasis added); see also *Martinez-Salazar*, 528 U.S. at 317 (defendant's right to peremptory challenges under federal statute not denied or impaired where defendant chooses to use a strike to remove a juror who should have been removed for cause). Regardless, in this case, although Ms. Gomez was seated, there is no dispute that Petitioner was afforded the opportunity to use the full number of peremptories allotted under state law, including a re-exercise of a strike ("backstrike") provided by the trial court after Petitioner's challenge to Ms. Gomez failed.

mez v. *United States*, 490 U.S. 858, 875-76 (1989) (delimiting the powers of federal magistrates under 28 U.S.C. § 2243); *Wingo* v. *Wedding*, 418 U.S. 461, 472-74 (1974) (same); *Nguyen* v. *United States*, 539 U.S. 69, 79-80 (2003) (composition of appellate panel violated congressional limits on powers conferred under Article III); *United States* v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960) (same); *Vasquez* v. *Hillery*, 474 U.S. 254, 262 (1986) (holding that remedies other than reversal of conviction would be ineffectual in deterring systematic racial discrimination in jury selection) (citing *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979)); *Peters* v. *Kiff*, 407 U.S. 493, 498 (1972) (overturning the conviction of a white defendant where African-Americans were systematically excluded from the jury because such violated the Constitution and federal law criminalizing discrimination in jury selection). None of these cases support the federalization of state rights that may be established and eliminated without implicating the U.S. Constitution.

As a matter of prudence and common sense, it cannot be that every error by a state judge in administering state processes that impact jury selection would amount to a structural error under the federal Due Process clause. And this Court has already so held. *Ross*, 487 U.S. at 86-87 (finding no structural error where the defendant used up one of his peremptory challenges to remove a juror who should have been removed for cause). In *Ross*, the Court expressly rejected the idea that a conviction must be reversed merely because an error may have changed the composition of the jury. *Ibid.* In so ruling, the *Ross* Court limited *Gray* v. *Mississippi*, 481 U.S. 648 (1987), in which the Court had previously determined that the defendant's right to an impartial jury was

violated when the trial court improperly excluded a juror who was generally opposed to the death penalty but also stated she could impose it in appropriate circumstances. The *Ross* Court also noted the dissent in *Gray*, which commented that a rule similar to the one now advanced by Petitioner would "def[y] literal application," as it would require a trial judge, upon realizing an error, to dismiss the entire venire and start anew, certainly impacting the composition of the jury. *Ross*, 487 U.S. at 88 n.2 (citing *Gray*, 481 U.S. at 678 (Scalia, J., dissenting)).

Certainly, as to errors of state law, the harmless error standard strikes an appropriate balance between "society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made." *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983)). And in any event, the State has the power to decide the consequences when a defendant has been denied a right that the State itself created. Here, according to the Illinois Supreme Court, an error that results in the wrongful deprivation of a peremptory strike will not result in reversal if the error was harmless. Nothing in the U.S. Constitution requires a different standard.

II. Accepting Petitioner's position would distort the incentives of the parties with respect to *Batson* and peremptory challenges and would create significant practical difficulties for prosecutors.

Petitioner's novel theory that *any* trial court error impacting jury composition creates structural error will result in two highly undesirable practical out-

comes, fundamentally at odds with the purpose of *Batson* and its progeny.

First, under Petitioner's proposed rule, criminal defendants would have a powerful incentive to exercise peremptory challenges that approach—and even cross—the *Batson* line, because any error by the court in response to such a *Batson*-suspect peremptory strike could provide a way to undo the entire conviction. Permitting *Batson* to be used as a sword by defendants, rather than as a shield for jurors, would work to unravel the constitutional fabric from which *Batson* was created. *See* Audrey M. Fried, *Fulfilling the Promise of Batson: Protecting Jurors From the Use of Race-Based Peremptory Challenges By Defense Counsel*, 64 U. Chi. L. Rev. 1311, 1312-13 (1997) ("[E]xcluded jurors are best served by a rule that does not encourage defendants to violate jurors' equal protection rights.").

Second, when faced with such *Batson*-questionable peremptory strikes, Petitioner's proposed rule would leave prosecutors in an untenable position, forcing them to weigh the Fourteenth Amendment rights of a challenged juror against the risk that raising a *Batson* argument could create structural error requiring reversal of the conviction. The specter of reversible error would thus encourage prosecutors to reserve *Batson* arguments for only the most egregious, clear-cut instances of discrimination—leaving harder or closer instances of discrimination unremedied.[4]

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[4] As this case demonstrates, trial judges too may find themselves in the same untenable position, with an incentive to stop a discriminatory peremptory strike only when the evidence of discrimination is clear-cut and undeniable.

As this Court has explained, "discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." *Powers*, 499 U.S. at 411 (quotations and citation omitted). See also *McCollum*, 505 U.S. at 49-50 ("Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, [it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justices—our citizens' confidence in it.") (quotations and citation omitted); *Edmonson*, 500 U.S. 614 (1991); *Batson*, 476 U.S. at 87; *Strauder*, 100 U.S. at 308. Nor does any question remain that jury selection and the exercise of peremptory strikes can be a hotbed of discrimination. See, *e.g.*, *McCollum*, 505 U.S. at 46-47 (reciting the history of the Court's battle against discrimination in the jury selection process); *Batson*, 476 U.S. at 84-88 (same). Through this Court's unwavering focus on the rights of the venireperson, *Batson* has been extended to encourage the protection of jurors' Equal Protection rights in all cases and without regard to the race or gender of the party exercising the peremptory challenge. *See, e.g.*, *McCollum*, 505 U.S. at 50 (extending standing to the State to challenge defendant's racially motivated peremptory challenges); *Powers*, 499 U.S. at 411 (rejecting requirement that defendant and challenged juror share the same race); *Edmonson*, 500 U.S. at 630 (extending *Batson* to civil proceedings).

Prosecutors—the literal embodiment of the State in criminal trials—should be enabled and encouraged to serve *Batson*'s objectives. If, as *Batson* first held, a defendant can stand in the shoes of the discriminated

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Given the nature of peremptory challenges, few cases are so clear-cut.

juror to raise her Fourteenth Amendment rights, certainly it is proper that the State's own representative do the same. And *McCollum* made clear that prosecutors have the legal standing to do so. 505 U.S. at 50. The interests of a prosecutor and an improperly excluded juror are aligned: they both seek to prevent the defendant from illegally discriminating against the juror for the purpose of gaining an improper advantage. Accepting Petitioner's position would make it far more difficult for prosecutors to serve this vital role.[5]

In sum, Petitioners' proposed rule will encourage defendants to exercise constitutionally questionable peremptory challenges and simultaneously discourage prosecutors from asserting *Batson* to protect jurors' Fourteenth Amendment rights. Ultimately, such a rule would undermine the fundamental fairness and integrity of criminal proceedings—the very things *Batson* aimed to protect. As this Court warned in *Neder*, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Neither this Court's cases nor common sense supports such a rule in this context.

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[5] This reasoning applies with equal force when considering a trial court's *sua sponte* review of peremptory strikes on *Batson* grounds. Indeed, judges too should "actively protect the interests of jurors by initiating *Batson* hearings *sua sponte* whenever the circumstances would permit a prosecutor to do so. This *sua sponte* obligation will also enhance the integrity of the criminal justice system by signaling the courts' commitment to uphold the Constitution." Fried, *supra* p. 11, at 1312-13.

CONCLUSION

For all these reasons, NDAA respectfully urges the Court to affirm the decision of the Illinois Supreme Court.

Respectfully submitted.

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