

In The  
**Supreme Court of the United States**

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THE STATE OF NEVADA,

*Petitioner,*

v.

DUSTIN JAMES BARRAL,

*Respondent.*

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**On Petition For Writ Of Certiorari To The  
Supreme Court Of The State Of Nevada**

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the failure by a trial court judge to give a State law mandated truthfulness oath to the venire prior to beginning the voir dire process constitutes structural error that requires reversal absent a showing of prejudice under the Fourteenth Amendment Due Process Clause or the Sixth Amendment right to an impartial jury.

**PARTIES TO THE PROCEEDING**

There are no parties to this proceeding other than those listed in the caption.

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## **STATEMENT OF THE CASE**

The Respondent concurs with the Petitioner's Statement of the Case.

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### **INTRODUCTION**

At its base, this case is about whether the failure to give a state law truthfulness oath to the venire constitutes error that requires automatic reversal under the Due Process Clause of the Fourteenth Amendment. The Petitioner believes that it does not and that this Court should grant the State's petition for Cert. and consider reversing the Nevada Supreme Court's decision. However, Cert. should not be granted because there is an adequate and independent state law basis upon which the Nevada Supreme Court based its decision, the State misinterprets the existing case law, and the cases cited by the State are distinguishable in several respects.

First, in the underlying decision, the Nevada Supreme Court partially relied on the Nevada Rules of Civil Procedure in rendering its decision. This reliance constitutes an independent state law basis upon which the decision was made and although the citation was made as part of a parallel citation, it is an adequate basis under this Court's caselaw. Second, the Petitioner misplaces its reliance on the cases to which it cites and as a result the writ should not issue as will be demonstrated in full below. Finally, many of the cases cited by the Petitioner are distinguishable from the instant

case and therefore cannot be used as a basis for the writ to issue.

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### **REASONS WHY THE WRIT SHOULD NOT ISSUE**

- I. The decision below was in part based on the Nevada Rules of Civil Procedure and therefore an adequate and independent state law ground exists and the writ should not issue.**

“This Court will not review a decision of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). In *Michigan v. Long*, the Court explained that this jurisdictional bar applies where “the adequacy and independence of any possible state law ground is . . . clear from the face of the opinion” or where the court below relies on federal law but “make[s] clear by a plain statement . . . that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. 463 U.S. 1032, 1040-41 (1983).

In the opinion below, the Nevada Supreme Court relied on Nevada Rules of Civil Procedure to hold that the failure to administer a mandatory voir dire oath required automatic reversal without a showing of prejudice. This is clearly an independent state law basis

upon which the Nevada Supreme Court based its decision. The only question that remains is whether this is an adequate basis.

In the case below, the Nevada Supreme Court cited to the Rules of Civil Procedure for the proposition that “[n]o error . . . in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict . . . , unless refusal to take such action appears to the court inconsistent with substantial justice.” Nev. R. Civ. P. 61. The opinion then went on to examine federal law on the issue of structural error and the Nevada Supreme Court ultimately concluded that the failure to administer the truthfulness oath constituted structural error. The citation to Rule 61 is an adequate state law ground because the failure to administer the oath appeared to the court to be inconsistent with substantial justice. The federal case law used by the Nevada Supreme Court was the basis upon which it was inspired to decide a state law issue.

**II. Without the mandated state law voir dire oath, there was no way to know whether Mr. Barral was tried by an impartial adjudicator.**

While it is true that this Court has only found structural error in a small number of cases, the list cited in *Johnson v. United States* is merely illustrative and not exhaustive. 520 U.S. 461, 468 117 S.Ct. 1544 (1997) (the citation string begins with the introductory signal *see*). As a result, the fact that a failure to administer a voir dire oath to prospective jurors is not among

the list in *Johnson* does not mean that this Court has ruled that it is not structural error.

In *Rose v. Clark*, this Court held that if a defendant had counsel and he was tried by an impartial finder of fact, then there is a strong presumption that any other error that occurred was not structural. 478 U.S. 570, 579, 106 S.Ct. 3101 (1986). However, a “state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

Under this Court’s structural error analysis, an impartial finder of fact is necessary. While voir dire is “particularly within the province of the trial judge,” *Ristaino v. Ross*, 424 U.S. 589, 594-95, 96 S.Ct. 1017 (1976), Nevada has taken some of the trial judge’s autonomy away by requiring the truthfulness oath. By imposing this additional requirement, the Nevada Legislature has effectively raised the minimum Due Process floor.

The State of Nevada has wisely chosen to mandate that all potential jurors submitted to a truthfulness oath before the voir dire process begins. Nev. Rev. Stat. 16.030(5). This has effectively raised the minimum Due Process floor in the state of Nevada, which is permissible because Due Process is a floor, not a ceiling.

This case is distinguishable from the cases cited in Petitioner’s brief because the issue there was whether a voir dire oath was compelled by the Due Process Clause. In Mr. Barral’s case, the issue is whether the

failure to give a mandated truthfulness oath required under state law constitutes structural error.

### **III. There is no conflict between the Nevada Supreme Court's Decision and the Federal Courts of Appeals.**

As mentioned in Petitioner's brief, if there is a conflict between an interpretation of federal law by federal courts and state supreme courts, then it may be proper to grant certiorari. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 120 S.Ct. 684 (2000).

As demonstrated by the cases cited by Petitioner, there is no conflict between the Nevada Supreme Court's opinion and a federal court of appeals. In *Riveria v. Illinois*, the issue was whether a denial of a preemptory challenge against a specific potential juror was structural error. 556 U.S. 148, 129 S.Ct. 1446 (2009). Ultimately, the Court held that it was not structural error because there is no guarantee to pre-emptory challenges under the Constitution. *See id.* However, Barral's case is distinguishable because there is no case on point with regards to whether the failure to administer a state mandated truthfulness oath constitutes structural error. Even by analogy, the reasoning is strained because a record is readily apparent to determine whether the failure to excuse a juror for cause was the appropriate decision. The failure to give a mandated truthfulness oath does not provide a similar record because it is impossible to determine whether a juror was truthful during the voir dire process.

The next set of cases cited by Petitioner are all state supreme court cases. *People v. Carter*, 36 Cal.4th 1114, 1176-77, 117 P.3d 476, 518-19, 32 Cal.Rptr.3d 759, 808-09 (2005); *State v. McNeill*, 349 N.C. 634, 509 S.E.2d 415 (1998); *Gober v. State*, 247 Ga. 652, 655, 278 S.E.2d 386, 389 (Ga. 1981); *State v. Glaros*, 170 Ohio St. 471, 166 N.E.2d 379 (1960); *State v. Tharp*, 42 Wn.2d 494, 499-500, 256 P.2d 482, 486-87 (Wash. 1953). Petitioner seems to be citing these cases to bolster the argument that the Nevada Supreme Court decision was incorrect; however, state supreme courts can, and frequently do, disagree on many issues. The fact that these state supreme courts came to the opposite conclusion on the issue of structural error with regards to portions of the voir dire process does not mean that it is appropriate to grant certiorari.

In *People v. Carter*, 36 Cal.4th 1114, 117 P.3d 476 (2005), the court found there was not structural error when “the prospective jurors each filled out a juror questionnaire that was signed under penalty of perjury, a circumstance that undoubtedly impressed upon the prospective jurors the gravity of the matter before them and the importance of being truthful and thereby ameliorated at least in part the trial court’s failure to timely administer the oath.” *Carter*, 36 Cal.4th at 1117, 117 P.3d at 518. In contrast, no admonition was given to the prospective jurors in the Respondent’s case.

In *Gober v. State*, 247 Ga. 652, 278 S.E.2d 386 (1981), the court found that the defendant forfeited his right to appellate review when he failed to object to the

voir dire not being conducted under oath until after the verdict. *Gober*, 247 Ga. at 654, 278 S.E.2d at 389. In contrast, Respondent timely objected when the oath was not administered. See *Barral v. State*, 131 Nev. Adv. Op. 52, 353 P.3d 1197, 1197 (2015), *reh'g denied* (Sept. 25, 2015), *reconsideration en banc denied* (Dec. 2, 2015).

In *State v. Glaros*, 170 Ohio St. 471, 475, 166 N.E.2d 379, 383 (1960), the Petitioner omitted the fact that the court noted that “if counsel for the defendant had requested the trial judge to avoid that error and the trial judge had refused to do so, then clearly this defendant should be able to rely upon such error as a ground for reversal of his conviction.” That is exactly the factual scenario that the Respondent faced. *Glaros*, 170 Ohio St. at 475, 166 N.E.2d at 383.

*State v. Tharpe*, 42 Wash. 2d 494, 256 P.2d 482 (1953) is distinguished from the Respondent’s case in that the State of Washington did not have a statute requiring an oath from the jury venire and broad discretion was granted to the trial court. *Tharpe*, 42 Wash. 2d at 499, 256 P.2d at 486. In contrast, Nevada law states that a judge or the judge’s clerk shall administer the oath. *Barral*, 131 Nev. Adv. Op. 52, 353 P.3d at 1198. (Nev. Rev. Stat. 16.030(5)).

*State v. McNeill*, 349 N.C. 634, 642, 509 S.E.2d 415, 420 (1998) is distinguished in that the record reflected that prospective jurors were sworn in the jury pool room by a deputy clerk of the superior court after a juror orientation by that clerk, but being assigned to any

particular courtroom for jury service. *McNeill*, 349 N.C. at 642, 509 S.E.2d at 420.

The Petitioner then concludes by citing to dicta from cases decided by the Tenth and Eleventh Circuit Courts of Appeals where those courts expressed uncertainty with regards to whether a jury was required to be sworn in, under the Constitution, before the jury deliberated. However, as mentioned previously, the issue is more correctly characterized as whether the failure to comply with state law with regards to the truthfulness oath constitutes structural error.

Further, the primary federal case cited by the Petitioner is likewise inapplicable. Petitioner relies on *United States v. Turrietta*, 696 F.3d 972 (10th Cir. 2012) for the proposition that no federal court has expressly recognized the Sixth Amendment right to a sworn jury. While the Petitioner clings to this sentence in its petition, it should be noted that the *Turrietta* court did not render its decision on whether or not the failure to swear in a petit jury at the start of a federal trial was based on structural error, but instead focused on the plain error test. *Turrietta*, 696 F.3d at 984. Ultimately the *Turrietta* court declined to grant relief because defense counsel had admitted that he knew about the error and waited until an unfavorable verdict to bring it to the court's attention. *Id.* at 973-74. The court observed that this was textbook "sandbagging," which imperils the integrity of the judicial system just the same as the error itself. *Id.* at 985. As set forth above, the Respondent was diligent in objecting in order to preserve his rights.

This Court’s Rule 10, entitled “Considerations Governing Review on Certiorari,” says that certiorari will be granted “only for compelling reasons,” which include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort. As detailed above, the Petitioner is unable to demonstrate that Nevada’s interpretation of structural error with regards to failure to swear in the jury venire is in conflict with state courts of last resort and federal appeals courts.

Assuming arguendo that this Honorable Court believes that there is conflict present, the conflict still does not rise to the level warranting a grant of certiorari. Even where a state court has wrongly decided an important question of federal law, we often decline to grant certiorari, instead reserving such grants for instances where the benefits of hearing a case outweigh the costs of so doing. *Kansas v. Carr*, 136 S.Ct. 633, 647-48, 193 L.Ed.2d 535 (2016) (Sotomayor, J., dissenting). Otherwise, there is a risk of issuing opinions that, while not strictly advisory, may have little effect if a lower court is able to reinstate its holding as a matter of state law. *Florida v. Powell*, 559 U.S. 50, 66, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010) (Stevens, J., dissenting). As this Court’s Rule 10 informs, “[a] petition for a writ of certiorari is rarely granted when the asserted error [is] . . . the misapplication of a properly stated rule of law.” *Cavazos v. Smith*, 132 S.Ct. 2, 9, 181 L.Ed.2d 311 (2011). The reasoning of the Nevada Supreme Court is sound, namely that a defendant in a criminal case is

denied due process whenever jury selection procedures do not strictly comport with the laws intended to preserve the integrity of the judicial process. As a result, the writ should not issue.

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## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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