No. _____

In the Supreme Court of the United States

THE STATE OF NEVADA,
Petitioner,
v.
DUSTIN JAMES BARRAL,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

STEVEN B. WOLFSON
Clark County District Attorney

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Counsel for Petitioner

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QUESTION PRESENTED

Whether the failure to give a truthfulness oath to prospective jurors prior to conducting voir dire constitutes structural error under the 14th Amendment Due Process Clause or the 6th 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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The relevant orders of the Nevada Supreme Court reversing the conviction and denying rehearing and en banc reconsideration are reproduced in the Appendix to this Petition.

JURISDICTION

The Nevada Supreme Court issued its opinion on July 23, 2015, reversing a criminal conviction for two counts of sexual assault on a minor. The prosecution's timely petition for rehearing was denied on September 24, 2015. The prosecution's timely petition for en banc reconsideration was denied on December 2, 2015. The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides that, "[i]n 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 . . . ."

STATEMENT OF THE CASE

On November 29, 2010, the prosecution filed an Information charging Dustin James Barral with two counts of Sexual Assault with a Minor under Fourteen Years of Age (Felony – NRS 200.364, 200.366), for the digital penetration of his four-year old niece. On the first day of trial, the court conducted general voir dire of the entire venire and then began to question individual jurors, allowing each party to voir dire the individual jurors after the court. The court did not administer a truthfulness oath to prospective jurors prior to conducting voir dire nor at any time thereafter as required under state law. Once the parties had each questioned one potential juror who was subsequently excused, Barral's counsel requested to approach the bench. At the bench conference, Barral's counsel noted to the court that he could not remember if the venire had been sworn. The court responded that it does not administer the oath until the jury panel has been selected. At the conclusion of voir dire, the court properly administered an oath to the petit jury to well and truly try the case and a true verdict render. On May 31, 2013, after a four-day trial, the jury found Barral guilty of both counts in the Information. On September 18, 2013, the district court sentenced Barral to imprisonment for two concurrent terms of life in prison with a minimum parole eligibility of four hundred twenty (420) months. The Judgment of Conviction was filed on September 23, 2013. On appeal, the Nevada Supreme Court in a published opinion reversed and remanded due to perceived structural error under the federal constitution for the failure to administer a truthfulness oath to the jury venire prior to conducting voir dire.

REASONS WHY THE WRIT SHOULD ISSUE

Although the requirement for a voir dire oath of truthfulness to prospective jurors is a matter of Nevada state law, NRS 16.030(5), the Nevada Supreme Court has interpreted the federal constitution as elevating this particular state voir dire procedure to one of federal constitutional magnitude, the omission of which constitutes structural error under this Court's jurisprudence. In so ruling, Nevada has misinterpreted, misapplied, and over-extended this Court's prior decisions on structural error. The Nevada Supreme Court's published opinion on this issue conflicts with this Court's precedent, with federal circuit courts of appeal, and with the highest courts of several other states. Accordingly, certiorari is appropriate.

I. The Opinion Misinterprets and Conflicts With this Court's Precedent on Structural Error

A conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a strong reason for the granting of certiorari. See Limbach v. Hooven & Allison Co., 466 U.S. 353, 362, 104 S.Ct. 1837, 1843 (1984) ("We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court."). Certiorari is also appropriate to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation. See e.g.,Oregon v. Mathiason, 429 U.S. 492, 493, 97 S.Ct. 711, 713 (1977) (certiorari granted because state court "has read Miranda too broadly"). Specifically as it concerns structural error, this Court granted certiorari when the

Arizona Supreme Court erroneously ruled that this Court's precedent precluded the use of harmless-error analysis in the case of a coerced confession. Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246 (1991). Certiorari was also granted to reverse a state court which had incorrectly ruled that the failure to submit a sentencing factor to a jury was structural error. Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546 (2006). Likewise, certiorari is appropriate in the present case to overturn Nevada's interpretation of federal law that the absence of a voir dire oath constitutes structural error.

This Court has recognized a special category of errors which must be corrected regardless of their effect on the outcome of the case. Arizona v. Fulminante, 499 U.S. 279, 306-12, 111 S.Ct. 1246, 1263-66 (1991). This Court has labeled this category of errors as "structural." Id. A structural error in a criminal trial always requires reversal of a conviction because such error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827 (1999). For an error to be structural, it first must qualify as a fundamental constitutional error. Id. ("structural errors belong to that 'limited class of fundamental constitutional errors' "). Structural error constitutes a "defect [ ] in the constitution of the trial mechanism" which defies harmless error analysis. Fulminante, 499 U.S. at 309, 111 S.Ct. at 1265. Structural error affects the "framework within which the trial proceeds, rather than simply ... the trial process itself." Id. at 310, 111 S.Ct. at 1265.

Automatic reversal is strong medicine that should be reserved for constitutional errors that "*always*" or "*necessarily*" produce such unfairness. United States v. Gonzales-Lopez, 548 U.S. 140, 126 S.Ct. 2557 (2006). Structural errors "are the exception and not the rule." Hedgepeth v. Pulido, 555 U.S. 57, 61, 129 S.Ct. 530, 532 (2008), *citing* Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101 (1986). Indeed, the Supreme Court has said that "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 not "structural errors." Rose, *supra*, at 579, 106 S.Ct. 3101. The Supreme Court has found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." Johnson v. United States, 520 U.S. 461, 468, 117 S.Ct. 1544 (1997) (citing Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927) (biased trial judge); Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617 (1986) (racial discrimination in selection of grand jury); McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210 (1984) (denial of public trial); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993) (defective reasonable-doubt instruction). Contrary to the Nevada opinion in this case, the failure to administer a voir dire oath to prospective jurors is not found among these six limited classes of structural error.

The Constitution does not dictate the use of a voir dire oath as a necessary and essential means by which an impartial jury is selected. Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992) ("[t]he

Constitution, after all, does not dictate a catechism for voir dire but only that the defendant be afforded an impartial jury"). No hard-and-fast formula dictates the necessary depth or breadth of voir dire. Skilling v. United States, 561 U.S. 358, 385-86, 130 S.Ct. 2896, 2917-18 (2010), citing United States v. Wood, 299 U.S. 123, 145-146, 57 S.Ct. 177 (1936) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."). Instead, this Court has repeatedly held that the jury selection process is "particularly within the province of the trial judge." Ristaino v. Ross, 424 U.S. 589, 594-5, 96 S.Ct. 1017 (1976); see also, Mu'Min v. Virginia, 500 U.S. 415, 424, 111 S.Ct. 1899 (1991); Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885 (1984); Rosales- Lopez v. United States, 451 U.S. 182, 188-89, 101 S.Ct. 1629 (1981); Connors v. United States, 158 U.S. 408, 408-13, 15 S.Ct. 951 (1985).

One touchstone of a fair trial is an impartial trier of fact capable and willing to decide the case solely on the evidence before it. Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. The necessity of truthful answers by prospective jurors is obvious if this process is to serve its purpose. But this Court has held that when the voir dire process deprives a party of an item of information which objectively he should have obtained from a juror on voir dire examination, it is "contrary to the practical necessities of judicial management" to automatically grant a new trial absent a showing of prejudice:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough Power Equip. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850 (1984). This Court further reasoned that "the harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." Id., 464 U.S. at 553. "We have come a long way from the time when all trial error was presumed prejudicial. . . ." Id.

If a juror's actual dishonesty in answering voir dire questions is not per se structural error under this Court's jurisprudence, then it necessarily follows that the failure to administer a truthfulness oath to prospective jurors, is likewise not structural error. State v. Vogh, 179 Ore.App. 585, 596, 41 P.3d 421, 428 (Or.App. 2002) ("We can conceive of no reason to treat a failure to administer the oath to the jury as more fundamental in nature – and thus, 'structural' – than the juror's actual performance of their duties in conformance with that oath, or the jurors' eligibility or competence to be jurors"). In either situation, the error is deemed harmless absent a showing of prejudice, namely that "a correct response would have provided a valid basis for a challenge for cause." McDonough,

supra. In other words, reversal is only warranted if a seated juror was actually biased.

In the Nevada Supreme Court's Opinion, all of the supporting case authority for structural error was founded upon a constitutional violation not present in the failure to administer a voir dire oath. See e.g., Peters v. Kiff, 407 U.S. 493, 497-98, 92 S.Ct. 2163, 2165-66 (1972) (systematic exclusion of African-Americans from jury violates the Constitution). Absent such a constitutional violation, the appearance of bias and probability of prejudice alone do not constitute structural error. The words "always" and "necessarily" appear nowhere in the Opinion's structural error analysis in the instant case. Nor does the Opinion acknowledge any kind of presumption against structural error. Instead, the Nevada Supreme Court finds the error structural because of the "probability" or "likelihood" of prejudice and the "appearance" of bias alone. But this Court has rejected such an interpretation of its prior precedent. Skilling, supra, 561 U.S. at 380 ("our decisions, however, [ie., Estes v. Texas] 'cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process.'"). Nevada has overlooked Supreme Court authority directly on point while mis-reading and misinterpreting a few, select cases.

II. The Opinion Conflicts with Other State Courts and Federal Courts of Appeals

A conflict between decisions of a highest state court and a federal court of appeals on a question of federal law is ground for granting review of either decision. See Martinez v. Court of Appeal of Cal., 528 U.S. 152,

120 S.Ct. 684 (2000) (certiorari granted because petitioner "has raised a question on which both state and federal courts have expressed conflicting views"); United States v. Estate of Romani, 523 U.S. 517, 118 S.Ct. 1478 (1980) (certiorari granted where "the decision of the Pennsylvania Supreme Court conflict[ed] with two federal court of appeals decisions"). Specifically in regards to structural error, this Court granted certiorari to resolve an apparent conflict among state high courts over whether the erroneous denial of a peremptory challenge constitutes structural error as a matter of federal law. Rivera v. Illinois, 556 U.S. 148, 129 S.Ct. 1446 (2009).

Several other state high courts have reviewed the omission of a voir dire oath and concluded that the error is not structural. People v. Carter, 36 Cal.4th 1114, 1176-77, 117 P.3d 476, 518-19, 32 Cal.Rptr.3d 759, 808-09 (2005) (although empaneling one or more jurors who are actually biased would constitute structural error, the failure to swear some of the prospective jurors is not structural error unless it resulted in the inclusion of any biased jurors on the panel); State v. McNeill, 349 N.C. 634, 509 S.E.2d 415 (1998) (trial by a jury selected through a voir dire process that did not require an oath to "tell the truth," did not violate the constitution and was harmless under the circumstances); Gober v. State, 247 Ga. 652, 655, 278 S.E.2d 386, 389 (Ga. 1981) (absent a showing of actual prejudice, no reversal of conviction simply because voir dire was not conducted under oath); State v. Glaros, 170 Ohio St. 471, 166 N.E.2d 379 (1960) (where no false answer was given by a juror on the voir dire examination, the mere failure to administer an oath to prospective jurors before such examination as

required by statute, does not result in prejudice); State v. Tharp, 42 Wn.2d 494, 499-500, 256 P.2d 482, 486-87 (Wash. 1953) (omission of the voir dire oath not reversible absent a showing of prejudice in the seating of a disqualified juror). Nevada's interpretation of federal law on structural error is in conflict with these decisions and warrants granting certiorari.

Even when it concerns the more fundamental and traditional oath given to the petit jury at the start of trial, even this oath may not be necessarily required under the Constitution or in federal court at all. United States v. Turrietta, 696 F.3d 972 (10th Cir. 2012) ("we are aware of no binding authority, whether in the form of a constitutional provision, statute, rule or judicial decision, addressing whether the Sixth Amendment right to trial by jury necessarily requires the jury be sworn"). The question whether the oath to fairly render a verdict is required in federal courts is up in the air. 47 Am.Jur. 2d Jury § 192 (2011); see also United States v. Pinero, 948 F.2d 698, 700 (11th Cir. 1991) ("[I]t is not clear from the case law whether juries in the federal system are required to be sworn in."). The Turrietta court went so far as to proclaim that,

> No federal court in the history of American jurisprudence has held the constitutional guarantee of trial by jury to necessarily include trial by sworn jury. While courts routinely recognize the jury oath as standard practice in federal trials, only a handful have suggested the failure to duly swear the jury would amount to error.

Turrietta, 696 F.3d at 982. If the jury oath to faithfully deliberate is not even constitutionally required, how less so is the voir dire oath to answer questions truthfully. Nevada's conclusion that constitutional Due Process and the right to an impartial jury requires a truthfulness oath be given to prospective jurors, the omission of which constitutes structural error under federal law, is in opposition to the above federal and state case authority.

CONCLUSION

Nevada is free to interpret its own laws respecting the requirement for a truthfulness oath to prospective jurors prior to conducting voir dire as set forth in NRS 16.030(5). But when Nevada declares the violation of that state statute to be structural error under the federal constitution and in reliance upon this Court's prior precedent, certiorari review of the federal question is warranted. Nevada has grossly misinterpreted and expanded the narrow category of errors this Court has deemed structural under the federal constitution. A voir dire oath to prospective jurors is not required under the federal constitution and any error in failing to administer such an oath under state law is amenable to harmless error analysis. Nevada's published Opinion in this case conflicts with this Court's case law, with federal courts of appeal, and with the highest court of many other states. Therefore, certiorari relief is requested.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 64135

[Filed July 23, 2015]

DUSTIN JAMES BARRAL, Appellant,
vs.
THE STATE OF NEVADA, Respondent.

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault with a minor under 14 years of age. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Reversed and remanded.

Las Vegas Defense Group, LLC, and Michael L. Becker and Michael V. Castillo, Las Vegas,
for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Steven S. Owens, Chief Deputy District Attorney, and Michelle Y. Jobe, Deputy District Attorney, Clark County,
for Respondent.

BEFORE PARRAGUIRRE, DOUGLAS and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

In this opinion, we address whether a district court commits structural error when it fails to administer an oath to the jury panel, pursuant to NRS 16.030(5), prior to commencing voir dire. We hold that it does.

FACTS AND PROCEDURAL HISTORY

Dustin Barral was charged with sexually assaulting a child. His case proceeded to a jury trial. At the beginning of voir dire, both the prosecution and defense explained to the potential jurors the importance of answering their questions honestly. After questioning the first potential juror, the following bench conference took place:

> MR. BECKER [for Barral]: My recollection may not be correct, but I think it's possible that the panel was not sworn in.
>
> THE COURT: They aren't.
>
> MR. BECKER: Okay.
>
> THE COURT: I don't swear them in until the end.
>
> MR. BECKER: Okay. In other words, admonish [the jury] that they are to give truthful answers to all the questions—
>
> MS. FLECK [for the State]: Yeah[.]
>
> MR. CASTILLO [for Barral]: That's fine.
>
> . . . .

THE COURT: —I won't swear them in.

MR. BECKER: Okay.

THE COURT: Because the ones who are sworn in; that's the panel.

MR. BECKER: Right.

. . . .

MS. FLECK: But do we have to give them the oath that they have to tell the truth[?]

THE COURT: No.

MS. FLECK: Or no?

THE COURT: No.

MS. FLECK: Okay.

THE COURT: No.

MS FLECK: Okay.

The court then proceeded with voir dire. The district court clerk swore in the petit jury at the beginning of the second day of trial. After both parties rested and presented closing arguments, the jury deliberated for approximately three hours and returned guilty verdicts on both charges. Following a post-trial motion for acquittal that the court denied, Banal appealed.

DISCUSSION

Barral claims that the district court committed structural error requiring reversal when it failed to

comply with NRS 16.030(5)[1] and administer the oath to the jury venire before voir dire. He argues that the court's error compromised his right to trial by an impartial jury because potential jurors may not have felt obligated to respond truthfully during voir dire, as the court did not place them under oath. The State contends that the potential jurors understood that they were required to answer truthfully because the court and counsel for both sides repeatedly stressed to the venire the importance of answering their questions honestly. The State also argues that the court's error did not undermine the framework of the trial.

Whether the district court's actions in this case constituted structural error is a question of law that we review de novo. *See Neder v. United States,* 527 U.S. 1, 7 (1999) ("[W]e have recognized a limited class of fundamental constitutional errors that defy analysis by harmless error standards. Errors of this type are so intrinsically harmful as to require automatic reversal

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[1] NRS 16.030(5) dictates:

> Before persons whose names have been drawn are examined as to their qualifications to serve as jurors, the judge or the judge's clerk *shall* administer an oath or affirmation to them in substantially the following form:
>
> > Do you, and each of you, (solemnly swear, or affirm under the pains and penalties of perjury) that you will well and truly answer all questions put to you touching upon your qualifications to serve as jurors in the case now pending before this court (so help you God)?

(Emphasis added.) Although this statute is articulated in the civil practice section of the Nevada Revised Statutes, it applies to criminal proceedings through NRS 175.021(1).

(i.e., affect substantial rights) without regard to their effect on the outcome." (internal citations and quotation marks omitted)); *see also* NRCP 61 ("No 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."). *NRS 16.030(5)*

NRS 16.030(5) does not give the district courts discretion: "the judge or the judge's clerk *shall* administer an oath or affirmation." *Id.* (emphasis added); *see also* NRS 0.025(1)(d) (stating that "'[s]hall' imposes a duty to act"). Thus, we conclude that the district court violated NRS 16.030(5) in the instant case when, according to its apparent general preference, it failed to administer the oath to the venire. Neither party disputes that the district court erred by violating NRS 16.030(5). However, a district court's error will not always entitle a convicted defendant to a new trial. The type of relief, if any, to which a criminal defendant is entitled following a trial court's violation of NRS 16.030(5) is an issue of first impression for this court.

Structural error

Structural errors compromise "the framework of a trial." *Brass v. State,* 128 Nev., Adv. Op. 68, 291 P.3d 145, 148 (2012). Such errors mandate routine reversal because they are "'intrinsically harmful.'" *Id.* (quoting *Cortinas v. State,* 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008)). The United States Supreme Court has repeatedly held that trial court errors which violate a defendant's Sixth Amendment right to an impartial jury are structural errors that create the probability of prejudice and preclude the need for showing actual

prejudice to warrant relief. *See Peters v. Kiff,* 407 U.S. 493, 502 (1972) (stating that "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias," and citing, as examples, *Mayberry v. Pennsylvania,* 400 U.S. 455, 465-66 (1971) (concluding that the same judge who was subject to a trial lawyer's insults that were "apt to strike at the most vulnerable and human qualities of a judge's temperament" was precluded from deciding the criminal contempt charges against the lawyer in order for "justice [to] satisfy the appearance of justice") (internal citations and quotations omitted from parenthetical)); *Estes v. Texas,* 381 U.S. 532, 545 (1965) (reversing a criminal conviction without a showing of the actual prejudice caused by the television broadcast of the trial proceedings because "[t]he conscious or unconscious effect that [broadcasting the trial] may have on [the proceedings] cannot be evaluated, but experience indicates that it is not only possible but highly probable"); *Turner v. Louisiana,* 379 U.S. 466, 467-73 (1965) (reversing a criminal conviction without a showing of prejudice because two of the sheriff's deputies (who were "key witnesses" at trial and testified regarding disputed facts) were responsible for the sequestered jury over the course of the trial and were continuously in the jurors' company, including transporting the jurors to restaurants for each meal, transporting the jurors to and from their lodgings, conversing with the jurors, and handling errands for the jurors); *In re Murchison,* 349 U.S. 133, 133-34, 136 (1955) (holding that a judge who acted as a "one-man grand jury" could not try the case of two witnesses the judge charged with contempt because "[a] fair trial in a fair tribunal is a basic requirement of due process

[and] requires [not only] an absence of actual bias [but the prevention of] even the probability of unfairness"); and *Tumey v. Ohio,* 273 U.S. 510, 531, 535 (1927) (reversing a defendant's criminal conviction by a judge who was "paid for his service only when he convicts the defendant" because "[n]o matter what the evidence was against [the defendant], he had the right to have an impartial judge"). In *Peters,* the Court reasoned that due process demands not only the absence of bias but the appearance of bias as well:

> These principles [that fairness requires not only the absence of actual bias but also preventing even a possibility of bias] compel the conclusion that a State cannot, consistent with due process, subject a defendant to. . . trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

407 U.S. at 502-03.

The *Peters* Court considered whether the arbitrary exclusion of African Americans from the grand jury invalidated the indictment and subsequent conviction of a Caucasian criminal defendant. *Id.* at 496-97. Peters claimed that (1) the juries that indicted and convicted him were created through constitutional and statutorily prohibited means, (2) the consequence of this error on a single prosecution is indeterminable, and (3) any indictment or conviction returned by a jury

selected in violation of the Constitution or federal law must be reversed. *Id.* at 496-97. The Supreme Court agreed with Peters and concluded that neither the indictment nor the conviction against him was valid due to illegal selection procedures used to seat the grand and petit juries. *Id.* at 501.

The *Peters* Court was specifically concerned with protecting the integrity of the jury selection process through procedural safeguards. *Id.* at 501-03. The Court explained that our system of justice "'has always endeavored to prevent *even the probability* of unfairness.'" *Id.* at 502 (emphasis added) (quoting *In re Murchison,* 349 U.S. at 136). The Court further clarified that "[i]t is in the nature of the *practices* here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce," because "there is no way to determine" the composition of the jury or the decision it would have rendered if the jury had been selected pursuant to constitutional mandates. *Peters,* 407 U.S. at 504 (emphasis added).

Based on the Supreme Court's reasoning, *see id.* at 498-505, we are persuaded 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. An indictment or a conviction resulting from an improperly selected jury must be reversed. A fair tribunal is an elementary prerequisite to due process, so we will not condone any deviation from constitutionally or statutorily prescribed procedures for jury selection. *Cf. id.* at 501. Accordingly, we hold that a district court commits structural error when it fails to administer the oath to potential jurors pursuant to

NRS 16.030(5). As we have concluded that failing to swear the potential jurors is a structural error, it is reversible *per se*; a defendant need not prove prejudice to obtain relief.

Therefore, we reverse Barral's convictions for sexual assault of a minor under 14 years of age and remand this matter to the district court for a new trial. Because we reverse Barral's convictions on the grounds that the district court committed structural error in the jury selection process, we need not address the remaining issues in his appeal.

s/_____, J.
Cherry

We concur:

s/_____, J.
Parraguirre

s/_____, J.
Douglas

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 64135

[Filed September 25, 2015]

DUSTIN JAMES BARRAL,)
Appellant,)
vs.)
THE STATE OF NEVADA,)
Respondent.)

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

s/_____ J.
Parraguirre
s/_____ J.
Douglas
s/_____ J.
Cherry

cc: Hon. Douglas Smith, District Judge
Las Vegas Defense Group, LLC
Attorney General/Carson City
Clark County District Attorney
Clark County District Attorney/Juvenile Division
Eighth District Court Clerk

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 64135

[Filed December 2, 2015]

DUSTIN JAMES BARRAL, Appellant,
vs.
THE STATE OF NEVADA, Respondent.

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

s/_____, C.J.
Hardesty

s/_____, J.
Parraguirre

s/_____, J.
Douglas

s/_____, J.
Cherry

s/_____, J.
Saitta

s/_____, J.
Gibbons

s/_____, J.
Pickering

cc: Hon. Douglas Smith, District Judge
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Attorney General/Carson City
Clark County District Attorney
Clark County District Attorney/Juvenile Division
Eighth District Court Clerk