STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Stephens, C.J., Murray, J., and Talbot, J.)

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 149259
Plaintiffs-Appellant,	Court of Appeals No. 314342
v	Wayne Circuit Court No. 12-005176-01-FC
BRANDON LEWIS CAIN,	
Defendant-Appellee.	

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BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, is a structural error requiring a new trial.

Appellant's answer:	Yes.
Amicus answers:	Yes. Even assuming for purposes of argument that it is a structural error, it is not one that meets the plain error test.
Appellee's answer:	No.
Court of Appeals' answer:	No.

INTRODUCTION

Unpreserved structural error. It arises in many contexts: a biased trial judge, race discrimination in the selection of jurors, denial of the right to a public trial, and a biased juror. There are others.

All share the same characteristic: they are not amenable to harmless error analysis. This is true whether raised as a claim of plain error, as an ineffective assistance of counsel claim, or in habeas corpus. In each case, a court is asked to review for prejudice an error for which a court cannot really determine whether the verdict would have been different. As argued by Wayne County, there is a good claim that the failure to properly swear the jury is a not structural error at all. But even if it is, this Court should deny Cain's request for a new trial.

Not all structural errors are equal. Some are more troubling than others. The fourth prong of *Carines* provides a path for answering the question. Some structural errors cannot be excused, because they cut to the heart of the criminal justice system. A biased juror is the paradigm case. If all of the jurors had been paid off to convict the criminal defendant, it would not matter whether defendant objected or not, such an error would compromise the fairness, integrity, or public reputation of the trial.

Not so with a defective oath. It is not the same. Rather, like the closure of the courtroom in *People v Vaughn,* 491 Mich 642 (2012), such an error even though a structural one does not offend fundamental fairness. In the absence of an objection, the grant of relief for this error would be a windfall; it would be an offense against justice. The law is not about playing gotcha. This Court should reverse.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Attorney General adopts the People's recitation of facts as accurate and complete.

ARGUMENT

I. Irrespective whether the failure to swear the jury properly is a structural error, when unpreserved it does not seriously affect the fairness, integrity, or public reputation of the trial.

The fourth prong of the plain-error test under *People v Carines,* 460 Mich 750 (2014) requires that a criminal defendant prove that any error seriously affected the fairness, integrity, or public reputation of the trial. The failure to swear a jury properly is not such an error. This Court should reverse.

A. In a number of different settings, courts review even errors that are not amenable to harmless-error analysis for prejudice.

A "structural defect" is one that is not amenable to harmless error analysis. It inheres in the framework of the trial itself and is not a "trial error." *United States v Gonzalez-Lopez,* 548 US 140, 148-149 (2006) ("These [structural defects] defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself") (internal quotes and brackets omitted). The U.S. Supreme Court in *Neder v United States*, 527 US 1, 7 (1999), citing *Arizona v Fulminante*, 499 US 279, 306 (1991), identified a non-exhaustive list of the "limited class of cases" of structural errors:

- complete denial of counsel, *Johnson v United States*, 520 US 461, 468 (1997), citing *Gideon v Wainwright*, 372 US 335 (1963);
- biased trial judge, *Tumey v Ohio*, 273 US 510 (1927);
- racial discrimination in selection of grand jury, *Vasquez v Hillery*, 474 US 254 (1986);
- denial of self-representation at trial, *McKaskle v Wiggins*, 465 US 168 (1984);
- denial of public trial, *Waller v Georgia*, 467 US 39 (1984); and
- defective reasonable-doubt instruction, *Sullivan v Louisiana*, 508 US 275, (1993). [*Neder*, 527 US at 7 (formatting inserted); see also *United States v Marcus,* 560 US 258, 263 (2010).]

It is likely that there are others that might be included in this list:

- fair-cross-section violation in selection of jury pools, *Duren v Missouri,* 439 US 357 (1979); and
- biased jurors, see *Bell v Quintero,* 125 S Ct 2240 (2005) (Thomas, J., dissenting).

The claim here arises from the failure of the criminal defendant to object to a defective oath. So the issue is subject to a plain-error analysis. In *Carines*, 460 Mich at 774, this Court adopted the framework for plain-error review developed by the U.S. Supreme Court in *United States v Olano*, 507 US 725 (1993). This framework imposes upon a criminal defendant who has forfeited a claim of error the burden of establishing four elements:

> (1) that the error occurred,
>
> (2) that the error was "plain,"
>
> (3) that the error affected substantial rights, and
>
> (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Carines,* 460 Mich at 774.]

The question that the amicus brief addresses is whether Cain has proven that the failure to properly swear the jury meets the fourth prong of the test. The Attorney General contends that it does not.

Before examining this standard, it is helpful to consider that this is not the only posture in which a court is called upon to examine a question of error and the issue of prejudice where the error itself is one claimed to be structural. This same posture arises (1) for ineffective-assistance-of-counsel claims in failing to object to an error that is structural and (2) in habeas cases where a petitioner will seek to excuse a default by arguing cause and prejudice.

For a claim of ineffective assistance of counsel, a criminal defendant will have the obligation to prove both deficient performance and that there is a "reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington,* 466 US 668, 694 (1984). Applying the fourth prong of *Carines* for a structural error claim arising from a closed courtroom, this Court examined whether the criminal defendant was also entitled to relief for ineffective of counsel for failing to object to the courtroom's closure. *Vaughn,* 491 Mich at 306-308 (requiring proof of prejudice under second prong of *Strickland* even though a claim of structural error).

The same may occur in habeas. A habeas petitioner who seeks to excuse the failure to raise the claim properly in state court, i.e., who procedurally defaulted the claim, will have an obligation to prove cause and prejudice. *Coleman v Thompson,* 501 US 722, 750 (1991). In fact, this Court in *Vaughn* relied on a habeas case from the Eleventh Circuit, *Purvis v Crosby,* 451 F3d 734 (CA 11, 2006), as persuasive support in concluding that a criminal defendant still had to prove prejudice under *Strickland* to be entitled to relief for a claim of structural error for the improper closure of the courtroom. *Vaughn,* 491 Mich at 307. ("The Eleventh Circuit elaborated on the concept of prejudice in applying that requirement to the case before it, which involved an ineffective assistance of counsel claim premised on the failure to object when the trial judge closed the courtroom for the victim's testimony"). By including ineffective-assistance-of-counsel cases and habeas cases, this Court has other precedent to examine to tackle the question presented here.

B. As a claim of plain error, any error here did not seriously affect the fairness, integrity, or public reputation of the trial.

Not many cases have examined the fourth prong of *Carines*. This Court examined the question for the right to a public trial in *Vaughn*. There, this Court engaged in an examination of the individual circumstances in determining whether the standard had been satisfied. It emphasized the applicability of this requirement, observing that "[w]hile any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires us to consider whether an error *seriously* affected those factors." *Id.* at 667 (internal quotation marks omitted; emphasis in original). Accordingly, the mere presence of structural error alone does not suffice to satisfy the fourth prong.

In determining that the defendant was not entitled to a new trial on the basis of his forfeited claim of error regarding the trial court's closure of the courtroom, this Court was satisfied that the closure did not "seriously affect[ ] the fairness, integrity, or public reputation of the judicial proceedings." *Vaughn,* 491 Mich at 668-669. The Court based this conclusion upon a review of the transcript of the trial court's proceedings during the defendant's voir dire. *Id.* at 668. The Court observed that "both parties engaged in a vigorous voir dire process[.]" *Id.* Furthermore, "there were no objections to either party's peremptory challenges of potential jurors," and "each party expressed satisfaction with the ultimate jury chosen." *Id.* This Court then concluded that the criminal defendant had failed to demonstrate a violation.

This Court properly examined the individual circumstances of the case. This approach follows the U.S. Supreme Court's admonition that the fourth prong "is meant to be applied on a case-specific and fact-intensive basis," and that a "per se approach to plain-error review is flawed." *Puckett v U.S.*, 556 US 129, 142 (2009).

That said, not all structural errors are the same. Cf. *United States v Benitez*, 542 US 74 (2004) ("It is only for *certain* structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding.") (emphasis added). The nature of the structural defect is critical to the determination whether there is error. As this brief noted earlier, there may be as many as nine different kinds of structural defects (including the one at issue here listed for purposes of argument):

[1] complete denial of counsel;
[2] biased trial judge;
[3] racial discrimination in selection of grand jury;
[4] denial of self-representation at trial;
[5] denial of public trial;
[6] defective reasonable-doubt instruction;
[7] fair-cross-section violation in selection of jury pools;
[8] biased jurors; and
[9] failure to properly swear the jury.[1]

The Attorney General suggests that these categories of error may be treated differently from each other because they affect the trial's framework differently.

[1] The Attorney General does not address whether this is a structural error. Wayne County credibly argues that it is not. See Brief, pp 12-16. See also *United States v Turrietta,* 696 F3d 972, 986 (CA 10, 2012) (Kelly, J., concurring) ("I doubt the mistake here falls into that narrow category of error deemed structural error").

In navigating between these very different kinds of error, the U.S. Supreme Court has characterized the fourth prong of the plain error test as one that requires a "miscarriage of justice" to satisfy the standard. *Olano,* 507 US 736; *Johnson,* 520 US 470. This test should be given effect by determining whether the error goes to the "heart of the entire judicial process." See *United States v Floresca,* 38 F3d 706, 712 (CA 4, 1994).

The easiest case among the nine listed categories is the complete denial of counsel. It is one for which the question whether there was an objection may well be inapposite because there likely was no attorney to raise an objection. For this reason, this is one of the cases for which the U.S. Supreme Court indicates that a court should presume prejudice for an analysis of ineffective assistance of counsel. *Strickland,* 466 US at 691 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.") It makes sense that the same rule would apply and would meet the plain-error test where the claim was forfeited and then raised on appeal for the first time.

Likewise, one would expect the same outcome for a biased judge or a biased jury. These errors touch on the basic fairness of the system, and the suggestion that a conviction should remain because of the strength of the evidence offends fundamental principles of justice. For this reason, the courts have generally granted relief for such errors. See, e.g., *Virgil v Dretke,* 446 F3d 598, 612-613 (CA 5, 2006) ("we are confronted with a situation in which, due to counsel's failure, two persons, each expressly stating that they were unable to serve as fair and impartial

jurors, found themselves seated on the petit jury that convicted Virgil and sentenced him to thirty years in prison. . . . Given the fundamental nature of the impartial jury and the consistent line of Supreme Court precedent enforcing it, we must conclude that the result of Virgil's trial is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.") (internal quotes and brackets omitted); *Quintero v Bell,* 368 F3d 892, 894 (CA 6, 2004), reinstating 256 F3d 409, 415 (CA 6, 2001) ("the structural nature of the tainted jury error warrants a presumption of prejudice").

The same is true for a deficient reasonable-doubt instruction raised for the first time on appeal. Where the instruction does not require the jury to be reasonably certain, the law holds that there really has been no verdict. *Sullivan,* 508 US 279 ("to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.")[2] For this reason, the courts have generally found plain error in warranting relief in such circumstances. See, e.g., *United States v Birbal,* 62 F3d 456, 461 (CA 2, 1995) ("We may also presume that, by its nature, the erroneous instruction seriously affected the fairness, integrity or public reputation of judicial proceedings as a constitutionally deficient reasonable-doubt instruction is a structural defect in the constitution of the trial mechanism.")

[2] In a similar vein, the Fourth Circuit found a violation of the fourth prong of plain error for the failure to obtain a waiver of a right to a jury trial. *United States v Ramirez-Castillo,* 748 F.3d 205, 217 (CA 4, 2014) ("Appellant did not waive his fundamental right to a trial by jury, yet no jury has declared Appellant guilty[.] Regardless of the evidence presented against Appellant at [the bench] trial—which we acknowledge was substantial—we cannot condone this practice.")

The other errors that have been identified as structural – racial discrimination in selection of grand jury, denial of public trial, fair-cross-section violation in selection of jury pools, and the failure to properly swear the jury – are all errors that do not affect the fundamental fairness, integrity, or the public reputation of the trial in the same way. They do not cut to the heart of the justice system. Generally these errors – when unpreserved – should not entitle a defendant to relief under the plain error standard.

The exemplar analysis comes from the U.S. Supreme Court when it assumed that there was a structural error for the failure to provide an instruction to the jury on one of the elements of the crime – materiality for the crime of perjury – but denied relief. The Court determined that the fourth prong of the plain error test was not offended:

> On this record there is no basis for concluding that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Indeed, it would be the reversal of a conviction such as this which would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." R. Traynor, The Riddle of Harmless Error 50 (1970). No "miscarriage of justice" will result here if we do not notice the error, *Olano*, *supra*, at 736, 113 SCt, at 1779, and we decline to do so. [*Johnson,* 520 US at 470.]

One of the key considerations in this analysis is the ability of the criminal defendant to harbor error, and then to spring the claim on the court for the first time on appeal as an appellate parachute. In *Johnson,* the issue of materiality was not in dispute. Thus, the grant of relief would have been a windfall that itself would have damaged the justice system. The same is true for the other structural errors that are less fundamental to the fairness of the trial.

This Court effectively recognized that point in *Vaughn* for a violation of the right to a public trial in denying relief when it noted that the "voir dire process yielded a jury that satisfied both parties." *Vaughn,* 491 Mich at 668. See also *Purvis v Crosby,* 451 F3d 734, 742 (CA 11, 2006) ("the law of this circuit that an ineffective assistance of counsel claim based on the failure to object to a structural error at trial requires proof of prejudice"). Other courts have disagreed for closed courtrooms, but have done so reflexively based on the fact that the error was structural. *United States v Withers,* 638 F3d 1055, 1065 (CA 9, 2010) ("Because violation of the public trial right is a structural error, Withers would have been entitled to automatic reversal of his conviction and a new trial had he established a violation"); *Johnson v Sherry*, 586 F3d 439, 447 (CA 6, 2009) ("if the closure were unjustified or broader than necessary, prejudice would be presumed"). See also *Owens v U.S.*, 483 F3d 48, 63 (CA 1, 2007). *Vaughn* answers the question properly.

For similar reasons, the courts have found that a violation of the right to have a grand jury selected free of racial discrimination or a trial taken from a fair-cross-section does not automatically entitle the convicted person to relief. See, e.g., *Hollis v Davis,* 941 F2d 1471 (CA 11, 1991) ("[the habeas petitioner] must show cause for not raising the issue [of racial exclusion from the grand jury], and actual prejudice from the error"), citing *Francis v Henderson*, 425 US 536, 542 (1976); *Ambrose v Booker,* 684 F3d 638, 649 (CA 6, 2012) ("petitioners must show actual prejudice to excuse their default [of the fair-cross-section claim], even if the error is structural.") This also is the right answer for these claims under plain error.

This same framework should govern this Court's analysis of the improper swearing of a jury. See *United States v Turrietta,* 696 F3d 972, 985 (CA 10, 2012). The Tenth Circuit's analysis on whether the failure to properly instruct the jury affected the fairness, integrity, or public reputation of the trial is persuasive. The reasoning consists of two points: (1) the trial bore other indicia of fairness; and (2) the importance of the oath was communicated to the jury. *Id.*

With respect to the integrity and fairness of the proceedings, the Tenth Circuit noted that "jury was fairly selected," was "clearly instructed," the trial was "open to the public," and was presided over with an "unbiased judge." *Id.* All earmarks of a fair trial. These attributes were all present at Cain's trial.

With respect to the oath itself, the Tenth Circuit determined that the "thrust of what the oath was designed to impart" was communicated to the jury. *Id.* The jurors, as here, were sworn to tell the truth during voir dire and reminded by the court of their "sworn duty." *Id.* The instructions repeatedly emphasized the importance of "rendering a verdict in light of the burden of the proof and based solely on the evidence." *Id.* In this way, the point of the oath was achieved:

> Between the instructions, the oath at voir dire, and the repeated references to the oath at trial, the jury had plenty to remind them of the importance of their task. [*Turietta,* 696 F3d at 985.]

The same is true here. The Wayne County Prosecutor's Brief is particularly persuasive on these points. See Brief, pp 16-20.

The point is the same as the one made in by the U.S. Supreme Court in *Johnson.* "[T]he reversal of a conviction such as this" would offend justice. *Johnson,* 520 U.S. at 70. It would be nothing short of a windfall.

In fact, the recognition of this point is likely what drove the U.S. Supreme Court in its refusal to hear as a federal question the failure to object to an allegedly defective oath in an appeal from a state supreme court decision. *Baldwin v State of Kansas,* 129 US 52, 56-57 (1889). The Kansas Supreme Court concluded that the record did not support the contention that the oath was defective, but further reasoned that there was no objection and that court would not then consider the issue:

> A still more conclusive answer on this point is that no objection was made to the form of the oath when it was administered, or at any other time prior to its presentation in this court. If there was any irregularity in this respect, it should, and probably would, have been objected to at the time it occurred. It is quite unlikely that there was any departure from the form of the oath so well understood, and which is in universal use in all of the courts of the state[.]
>
> [B]ut, if the form of the oath was defective, the attention of the court should have been called to it at the time the oath was taken, so that it might have been corrected. *A party cannot sit silently by and take the chances of acquittal, and subsequently, when convicted, make objections to an irregularity in the form of the oath.* Not only must the objection be made when the irregularity is committed, but the form in which the oath was taken, as well as the objection, should be incorporated into the bill of exceptions, in order that this court may see whether or not it is sufficient. This was not done. [*Baldwin,* 129 US at 56 (emphasis added).]

The U.S. Supreme Court concluded that "the condition of the record shows that no federal question is presented in regard to the oath" and declined to review the claim. Rather, it stated that the Kansas Supreme Court "refused to consider the objection, on the ground that it was not taken at the trial" and "[f]or that reason," "we also cannot consider it." *Id.*

The same should be found here. In failing to object, Cain should not be heard now to complain that the oath was defective. If not raised, the issue should be foreclosed. Otherwise, such a resolution "encourages litigants to abuse the judicial process and bestirs the public to ridicule it." See *Johnson,* 520 US at 70. As a matter of law and justice, this Court should reverse and reinstate Cain's conviction for first-degree murder.

C. As a corollary point, the State would have been barred from reprosecuting Cain if the jury had acquitted.

The only way this conclusion makes sense, of course, is that the prosecution would be equally barred from seeking to reprosecute a criminal defendant based on double jeopardy where it raises the claim that the oath was defective for the first time on appeal. The claim would be that no trial has occurred if the jury had not been properly sworn. Cf. *Baldwin,* 129 U.S. at 55 ("when the record does purport to set out in full form of the oath upon which the verdict is based, it must be in substantial compliance with law; otherwise, the conviction cannot stand"). Thus, the prosecution might argue that jeopardy never attached.

But the same principle would dispose of any prosecutor who sought to retry a criminal defendant acquitted by a defectively sworn jury. A court should not consider such a claim when raised for the first time on appeal. Like a defendant, the prosecution cannot harbor error. A court would properly "refuse[] to consider the objection, on the ground that it was not taken at trial." Cf. *Baldwin,* 129 US at 57, quoting *State v Baldwin,* 36 Kan 1 (1886). Any acquittal would stand.

CONCLUSION AND RELIEF REQUESTED

This Court should reverse the decision of the Court of Appeals and reinstate Cain's conviction for first-degree murder.

Respectfully submitted,

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