STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

Judges Cynthia Diane Stevens, P.J., and Michael J. Talbot and Christopher M. Murray, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appelleant

-vs-

BRANDON LEWIS CAIN,

Defendant-Appellee.
_____/

Supreme Court No. 149259

Court of Appeals No. 314342

Lower Court No. 12-003375-fc

BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE BRANDON CAIN

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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STATEMENT OF JURISDICTION

This Court granted leave to appeal in this matter on September 17, 2014, and thus there is jurisdiction pursuant to MCR 7.301(2).

STATEMENT OF QUESTIONS PRESENTED

I. IS THE STATUTORY AND COURT RULE REQUIREMENT THAT A JURY BE SWORN TO RENDER A TRUE VERDICT, BASED ONLY ON THE EVIDENCE INTRODUCED AT TRIAL AND IN ACCORDANCE WITH THE INSTRUCTIONS OF THE TRIAL COURT, SUCH A FUNDAMENTAL PART OF THE SYSTEM OF JUSTICE THAT A FAILURE TO ADMINISTER THE REQUISITE OATH IS A STRUCTURAL ERROR THAT IS PRESUMED PREJUDICAL TO THE ACCUSED OR, IF STANDARD PLAIN ERROR ANALYSIS FOR UNPRESERVED ERRORS IS APPLICABLE TO SUCH A FAILURE, THE ERROR DEMANDS REVERSAL AS IT AFFECTS THE FAIRNESS, INTEGRITY, AND/OR PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS, AND THE LAW PRECLUDES INQUIRY INTO THE EXISTENCE OF ACTUAL PREJUDICE?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

Amicus Curiae answers, “Yes”.

STATEMENT OF FACTS

Amicus accepts the Statement of Facts included in Defendant-Appellee's brief to this Court.

I. AS THE STATUTORY AND COURT RULE REQUIREMENT THAT A JURY BE SWORN TO RENDER A TRUE VERDICT, BASED ONLY ON THE EVIDENCE INTRODUCED AT TRIAL AND IN ACCORDANCE WITH THE INSTRUCTIONS OF THE TRIAL COURT, IS SUCH A FUNDAMENTAL PART OF THE SYSTEM OF JUSTICE THAT A FAILURE TO ADMINISTER THE REQUISITE OATH IS A STRUCTURAL ERROR THAT IS PRESUMED PREJUDICAL TO THE ACCUSED OR, IF STANDARD PLAIN ERROR ANALYSIS FOR UNPRESERVED ERRORS IS APPLICABLE TO SUCH A FAILURE, THE ERROR DEMANDS REVERSAL AS IT AFFECTS THE FAIRNESS, INTEGRITY, AND/OR PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS, AND THE LAW PRECLUDES INQUIRY INTO THE EXISTENCE OF ACTUAL PREJUDICE.

Standard of Review:

Amicus agrees with Plaintiff-Appellant that the appropriate appellate standard of review for this issue is *de novo*.

Argument:

This issue presented in this case involves much more than the recitation of a brief set of words to group of 12 people who are engaged in one of the most important roles citizens in our society and legal system can undertake – deciding whether the prosecution has proven beyond a reasonable doubt that another citizen is guilty of a charged criminal offense. This issue involves the fundamental role that swearing an oath, on the record, plays in the fairness and accuracy of a criminal trial in advancing its most important goal – an ascertainment of the truth – and the responsibility that jurors must follow the rule of law in reaching that result. Throughout the history of the English and American systems of justice, sworn oaths have played a critical role in seeking to insure that all interested stake holders in the system – witnesses, jurors, judges, attorneys, defendants – understand their legal, moral, and ethical duties to uphold the law. The

swearing of oaths is neither ceremonial nor trivial. The failure of a trial court to ensure that a jury is properly sworn is not an error this Court can or should treat lightly.

All the parties to this appeal agree on two basic facts from this record. First, the trial judge failed to have the jury properly sworn under either the applicable court rule[1] or statute.[2] The oath administered to the joint jury for Mr. Cain and his co-defendant, Brian Lee, following the end of the jury selection process, was rather the oath required of a venire of potential jurors prior to the voir dire. Contrary to the suggestions of Plaintiff-Appellant in their brief, that oath cannot be seen as a substantially compliant version of the correct oath, as it was limited to the jurors only swearing to provide true answers to the questions asked to them during voir dire about their qualifications to serve, and made no reference to the ultimate verdict, or the requirement that they consider only the admitted evidence at the trial and the applicable law. Even though it is true that the trial judge in this lengthy trial made brief and inaccurate references to an oath related to a "true verdict," those references cannot substitute as informing the jurors of a solemn vow to consider only the proper evidence and apply the applicable law in reaching a verdict.[3] This Court has often reiterated a basic rule concerning jurors – it is assumed that lay jurors will follow their instructions and not consider matters outside of either the evidence or the statements of the trial judge as to the law. In this case, the jurors were never required to swear to an oath to render a "true verdict," let alone to the requirement that they confine their

[1] MCR 2.511(H)(1).
[2] MCL 768.14.
[3] Given that the oath the jurors actually took was the pre-voir dire oath they had already taken, and that that oath said **nothing** about their responsibilities during deliberations and verdict, it didn't matter that this oath was related to jury service, no more so than perhaps the oath taken by witnesses to "tell the truth, the whole truth, and nothing but the truth," the Hippocratic oath taken by physicians, or the Pledge of Allegiance recited by school children. The trial judge's false reference to that oath actually given as related to a "true verdict" could not transform it into compliant with the court rule or statute – i.e." you can't make a silk purse from a sow's ear."

deliberations to the admitted evidence and instructions on the law. This Court cannot assume the jury understood the trial judge's brief references to such an oath as binding them to those fundamental principles of justice.

Second, the error in this case was plain on the record. There is no dispute that the trial court's clerk read the inapplicable oath to the jury following the voir dire, and that the required oath under MCR 2.511(H)(1) or MCL 7678.14 does not appear at any point, timely or untimely, in the transcripts of this trial.

Accordingly, the two primary points this Court must consider, as the briefs in this matter stress, are whether the trial court's error was a "structural" error that is not amenable to harmless error analysis, as the prejudice to the accused is presumed, and whether, if the error, as in this case, was unpreserved by the failure of the defense trial attorney to object to the lack of the requisite oath, that error demands reversal and a new trial under plain error law. Amicus asserts this error was structural, that harmless error review is not appropriate nor possible to fairly apply, and that even if plain error standards are applied, due to the lack of objection, the error mandates the guilty verdicts be overturned and the case remanded for a new trial.

Structural Error:

As both parties acknowledge, the concept of "structural" error has been the subject matter of a considerable amount of appellate litigation over the past century. In *Neder v United States*, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999), the United States Supreme Court summarized both that concept and the limited, but not definitive, types of errors the Court has previously recognized as "structural." In terms of the definition of that term, the Court wrote:

> Although this Rule [FRCP 52(a)] by its terms applies to all errors where a proper objection is made at trial, we have recognized a

> limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); see *Chapman v. California*, 386 U.S., at 23, 87 S.Ct. 824. Errors of this type are so intrinsically harmful as to require automatic reversal (i.e., "affect substantial rights") without regard to their effect on the outcome. For all other constitutional errors, reviewing courts must apply Rule 52(a)'s harmless-error analysis and must "disregar[d]" errors that are harmless "beyond a reasonable doubt." Id., at 24, 87 S.Ct. 824.
>
> * * *
>
> The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante, supra*, at 310, 111 S.Ct. 1246. Such errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and "necessarily render a trial fundamentally unfair," *Rose*, [*Rose v Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)*] 478 U.S., at 577, 106 S.Ct. 3101. Put another way, these errors deprive defendants of "basic protections" without which "**a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence** ... and no criminal punishment may be regarded as fundamentally fair." Id., at 577–578, 106 S.Ct. 3101.

527 US at 7-9. (Emphasis added).

This definition of "structural" errors was applied by this Court in *People v Duncan*, 462 Mich 47, 51-53, 610 NW2d 551 (2000), where it was held that a trial court's failure to instruct on any of the essential elements of a charged offense is structural error, mandating reversal without consideration of whether the evidence presented at the trial supported the jury's guilty verdict on that charge:[4]

> Structural errors, as explained in *Neder*, are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. *Id* at 7, 119 S Ct 1827. Such an error necessarily renders unfair or unreliable the determining of guilt or

[4] In *Neder, supra*, the Supreme Court held that the failure of the trial judge to submit one of the several elements of a charged offense to the jury for determination is not a structural error, and thus can be found harmless depending on the record in the case. See also *People v Carines*, 460 Mich 750, 597 NW2d 130 (1999).

> innocence. As the United States Supreme Court said in *Rose v Clark*, 478 US 570, 577-578, 106 S Ct 3101, 92 L Ed 2d 460 (1986), structural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.
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> * * *
>
> As we stated in *People v Lambert*, 395 Mich 296, 304, 235 NW2d 338 (1975), juries cannot be allowed to speculate. The court must inform the jury of the law by which its verdict must be controlled. Incontrovertibly, when a jury is allowed to speculate, the subsequent verdict is not a reliable indicator of the defendant's guilt or lack thereof.

(Footnote omitted).

The *Duncan* majority held the complete failure of a trial judge to instruct a jury on the essential elements of a charged offense meets this definition of a structural error, as that jury would be left to speculate as to the law to apply to the evidence presented at the trial, that this error was of "much greater magnitude than presenting less than all elements," and thus "the reliability of the subsequent verdict is grossly undermined" in violation of the accused's Sixth Amendment right to trial by jury. US Const, Amend VI. *Id* at 54.

While "structural" errors are thus defined as those that are so fundamental to the truth seeking function of trials that harmless error analysis on a case-by-case basis is inapplicable, Plaintiff-Appellant asserts the trial judge's error in the case at bar was not structural when viewed in the context of the particular record in the case, primarily the trial judge's inaccurate, misleading, and false statements as to the substance of the oath that had been presented to the jurors. Plaintiff-Appellant's Brief at 11-16. That analysis, of course, is directly contrary to the concept of structural errors. In essence, Plaintiff is arguing the trial court's failure to administer the requisite oath to the jury was not structural, in **this** case, because the judge mistakenly told the jurors they had taken an oath to render a true verdict according to the fact and law, which they admittedly had not, and because the court read the standard jury instructions at the

beginning and end of the case, and thus the error was harmless on this record. That argument begs the question of the general status of this error. Where an error is so fundamental to a jury trial's " function as a vehicle for determination of guilt or innocence," prejudice is presumed, and the error cannot be excused by an examination of the record to determine if the verdict actually was prejudiced by that error. Here, Plaintiff, while recognizing that plain error was committed on the record, seeks to define that error as non-structural solely by asserting the error was harmless due to the trial court's other statements to the jury – effectively putting the cart before the horse. Errors are not deemed to be "structural" because on a particular record the error is seen to have been highly prejudicial and actually impacted on the guilty verdict, but rather because the error is so significant to the judicial system generally that specific and articulable prejudice in the particular case is immaterial.

The question of whether a trial court's failure to administer the requisite post-voir dire statutory or court rule jury oath is a structural or merely a constitutional error should be resolved by two considerations – the role oaths have traditionally played in the justice system, and the impact of a failure to give the required oath on the "framework" of a trial – whether the error "infect[s] the entire trial process," and "necessarily render[s] a trial fundamentally unfair." *Neder, supra*.

Oaths have traditionally played a critical role in the trial process. From the earliest days of English law, debates over oaths have been central to some of the most celebrated legal and political events of the times, including the execution of Sir Thomas More for refusing to swear an oath to honor the English king over the Catholic church. See Wiebe, *Oath Martyrs*, 2 Brit J amend Legal Stud 205, 221 (2013):

> Tudor England, and late medieval Europe, also provides fertile ground for considering oaths:
>
> > [F]or early modern Europeans, oaths defined and legitimated the relationships between governing authorities and their constituents or subjects, regulated the relationships between fellow citizens and fellow peasants, and served as the glue that held both urban and rural sociopolitical structures in place. The existence of a community without an oath was unthinkable. Thus the refusal of the oath seemed like a repudiation of society. It invited ... charges of anarchy and insurrection, and virtually guaranteed persecution.
>
> As mentioned above, oaths undergirded virtually every aspect of society -- in rural areas, in university, in pledging fealty to lords and kings, in commercial settings, as well as in the courts. Oaths were a form of social ordering and social control. To mess with the oath was to mess with power.

(Citation omitted).

To legal scholars, the oath a jury takes to truly decide a case and to limit the deliberations to the admitted evidence and the law, as given to them by the trial judge, is the principle protection from the concept known as "jury nullification" – lay jurors' rejection of the law through its power to render a verdict despite law and fact. See Bissell, *Comments on Jury Nullification*, 7 Cornell J L & Pub Pol'y 51, 51, 53-54 (1997):

> According to Judge Bissell, lawyers and judges take oaths to honor and administer the rule of law. To ignore the law and render an ad hoc decision, which occurs with jury nullification, is a gross perversion of the legal system. Judge Bissell argued that jury nullification should not be used as a defense strategy. A jury trial has various participants: judge, advocates, parties, witnesses, and jury. Each participant plays a separate and distinct role. Allowing jury nullification would place the jury in the improper position of the "second defender." The Judge also argued that as it would be clearly improper for prosecutors to suggest nullification to a jury, defense attorneys should not be allowed to do so either.
>
> * * *
>
> We take this occasion to restate some basic principles regarding the character of our jury system. **Nullification is, by definition, a violation of a juror's oath to apply the law as**

> **instructed by the court--in the words of the standard oath administered to jurors in the federal courts, to "render a true verdict according to the law and the evidence."** We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent. Accordingly, we conclude that a juror who intends to nullify the applicable law is no less subject to dismissal than is a juror who disregards the court's instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict.
>
> * * *
>
> What clearly emerges from the *Thomas* [*United States v Thomas*, 116 F. 3d 606 (2d Cir. 1997)] opinion is a realization that while juries have a power to nullify **which, because of the nature of a jury deliberation, may go undetected,** it is not a right enjoyed either by the jury or by a party to any lawsuit. Such decisions, in the language endorsed by Justice (then Circuit Judge) Ginsburg, "are lawless, a denial of due process and constituting an exercise of erroneously seized power."

(Emphasis added).

Under Michigan law, while a jury has the inherent power to render a verdict that is contrary to the law, the parties are not permitted to argue to a jury that they should use the power of nullification to render a verdict despite the legal instructions from the court or the clear facts of the case. See, for example, *People v Demers*, 195 Mich App 205, 489 NW2d 173 (1992); *People v Vaughn*, 409 Mich 463, 295 NW2d 354 (1980). The requisite oath taken by the jury prior to the presentation of any evidence is meant to insure that jurors fully understand, and swear to comply with, their obligation to fairly apply the law to the facts in each case. Where the proper oath is not given, or sworn to by the jurors, no reviewing court can presume that all of the jurors lived up to those obligations.

Oaths are critical parts of many other fundamental processes in the judicial system. All witnesses are placed under oath prior to testifying.[5] This requirement again is neither ceremonial nor unimportant. It is meant to impress upon witnesses the basic law requiring truthful testimony, and to put them on notice that violation of that duty will not be countenanced. The legal significance of the witness oath is obvious in the language of perjury statutes, which make the oath a prerequisite to commission of the offense:

> (1) Any person authorized by a statute of this state to take an oath, or any person of whom an oath is required by law, who willfully swears falsely in regard to any matter or thing respecting which the oath is authorized or required is guilty of perjury, a felony punishable by imprisonment for not more than 15 years.

MCL 750.423.

It is obvious that most persons in society are aware they are required to testify truthfully in court, and may be subject to perjury charges if they do not, but that general knowledge has not eliminated the need or mandatory nature of the oath, just as in the case at bar the fact the jurors received the standard jury instructions regarding deliberations and evidence did not and should not eliminate the requirement of the juror oath. Listening to instructions is not the same as being required to personally swear an oath. If it was, the court rules and statutes on required oaths would be rendered nullities.

Empirical studies have shown that juror behavior is impacted by the taking of an oath. In an effort to determine the most effective means to insure that jurors do not consult Internet search sites or discuss cases over social media, researchers questioned hundreds of jurors as to whether they did, or even were tempted to, take these actions. The large majority of jurors

[5] MRE 603: Oath or Affirmation. "Before testifying, every witness **shall be required** to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." (Emphasis added).

responded they did not improperly consult these sources during the trial. When asked why they did not, a significant number of jurors stated that in addition to the trial judge's instructions, they felt a moral and legal obligation due to the oath they took at the beginning of the case:

> Other tempted jurors indirectly referred to the judge's instruction in explaining why they did not communicate about the case on social media. At least two of them mentioned the "law"--"point of law" and "I have to be loyal to the law"--and numerous others pointed to their oath or respect for the process:
>
> • "I took an oath"
> • "My oath"
> • "I follow rules under the oath I made"
> • "I knew it was my duty to fulfill the oath I took before the court not to say anything"
> • "My duty as a jur[or] under oath"
> • "Took oath not to communicate"
> • "My oath not to tell"
> • "I took this very seriously and wanted to do what I swore I would"
> • "I swore not to"
> • "I had to remind myself that this is a job and I made an oath and was going to follow rules under the oath I made"
> • "I was tempted, but my respect for the privilege of service as a juror to our Court System prevented me from doing so"
> • "I respect the process"
>
> * * *
>
> For a handful of jurors, their lack of temptation and their juror oaths went hand-in-hand:
>
> • "I was sworn to not say anything"
> • "it would have been improper once I was instructed not to"
> • "My duty not to do so"
>
> Others attributed their lack of temptation to something more personal:
>
> • "promise to God"
> • "morally"
> • "I took this very serious[ly] and kept my mouth shut"
> • "I was not going to undermine the integrity of the process"
> • "Civic duty"
> • "My sense of integrity"
> • "Kept an open mind"

- "did my job"
- "Respect" (two jurors)

St. Eve, Burns & Zuckerman, *More From the Jury Box: The Latest on Juries and Social Media*, 12 Duke L & Tech Rev 64, 81-82, 84-85 (2014).

The authors of this study (a United States District judge, a state judge, and a private attorney) concluded from this research that the use of an oath is significant, even in addition to instructions, to impress upon jurors the duty to follow the law:

> Jurors generally want to do the right thing. They recognize that "[j]ury service is a duty as well as a privilege of citizenship," and that their work is essential to the fair administration of justice. Some may cringe at the prospect of jury duty, but in our experience, nearly all who serve take their obligation seriously and find the experience personally rewarding. It is thus not surprising that many jurors in the informal survey referenced their oaths as the reason they did not communicate about the case on social media. Staying true to their oath was personal--a source of ""pride" for one, a "civic duty" for another, and a matter of "respect" for several others.
>
> An effective instruction should capitalize on these concepts, weaving them into the instruction. Rather than threatening jurors with contempt, jury instructions should remind the jurors of their oath and its importance, and work in references to civic pride, respect, and democratic ideals. These concepts resonate with jurors and help them to further appreciate their opportunity to "participate in the administration of justice," an opportunity that one scholar has called the "pinnacle of democratic participation."

Id at 89-90.

The jury oath plays a key jurisdictional role in constitutional law. At a jury trial, jeopardy attaches, for the purposes of the Fifth Amendment, when the jury is sworn. See *Crist v Bretz*, 437 US 28, 98 S Ct 2156, 57 L Ed 2d 24 (1978);[6] *Downum v United States*, 372 US 734, 83 S Ct 1033, 10 L Ed 2d 100 (1963).

[6] The *Crist* Court found this principle so fundamental that it applied it to all states under the Fifth and Fourteenth Amendments.

In the present matter, it is acknowledged, as pointed out by Plaintiff-Appellee, that if this Court holds the failure of the trial judge to administer the requisite oath to the jurors following the voir dire mandates reversal of the convictions, that ruling would mean the defendant and his co-defendant were never put in jeopardy under the Fifth Amendment guarantee. Accordingly, this Court should not hold that this error was not structural, and thus amenable to harmless error review, as to excuse the failure to properly swear a jury would mean a conviction arising from such a trial may not bar the prosecution from retrying the same charge or inflicting double punishment for the same offense. No conviction should stand where jeopardy did not validly attach.

Because of this fundamental and constitutional importance of a properly sworn jury, this Court should conclude that any error in administering the requisite oath is a structural error, as this error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," one which "infect[s] the entire trial process," and thus any trial where the proper oath is not sworn "cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." *Neder*, *supra*. The convictions in this case should be reversed, without regard to the record or the evidence, as this error is presumed sufficiently prejudicial to require a new trial before a properly sworn jury.

In the alternative, if this Court either finds that the error in swearing the jury is not a structural error, or is a structural error that is still subject to prejudice review under the plain error standards, given the lack of objection below, the Court still should reverse the convictions and remand for a new trial.

In *People v Vaughn*, 491 Mich 642, 821 NW2d 288 (2012), this Court considered whether it was reversible error for a trial judge to exclude members of the public from the voir dire portions of a trial, where no justifiable reasons were placed on the record for that exclusion. Finding that the accused, under the Sixth Amendment, and the public at large, under the First Amendment, had constitutional rights to a public trial during the voir dire stage, the Court found clear and plain error on the record. However, the Court further ruled that since the defendant did not object to the closing of the courtroom, this error was not a structural error immune from any review, but rather had to be reviewed under the "plain error" standards expressed in *People v Carines*, 460 Mich 750, 597 NW2d 130 (1999), and *United States v Olano*, 507 US 725, 113 S Ct 1770, 123 L Ed 2d 508 (1993). The Court recognized that certain structural errors, such as denial of counsel, are not subject to any preservation requirement in the trial court, but concluded the Sixth Amendment right to a public trial does not fall within that limited class of constitutional rights:

> Neither the Supreme Court of the United States nor this Court has held that the Sixth Amendment right to a public trial is so fundamental to the protection of a defendant's other constitutional rights that it falls within this exceedingly narrow class of rights that are placed outside the general preservation requirements and require a personal and informed waiver.

460 Mich at 657.

Under the *Carines* and *Olano* plain error standard, reversal is required if the following four tests are met:

> (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.

Id at 654.

The *Vaughn* Court found the closing of the courtroom during the voir dire was erroneous, and that this error was "plain" on the face of the record. As to the third prong of the test, the Court noted that while the United States Supreme Court has not ruled on "whether an unpreserved structural error automatically affects a defendant's substantial rights,"[7] citing to their prior opinion in *Duncan, supra*, which reversed without a prejudice review even though no objection had been made to the erroneous instructions, the Court found "our caselaw suggests that a plain structural error satisfies the third *Carines* prong." *Id* at 666..

In regards to the fourth prong, the *Vaughn* Court found the specific error at issue – the denial of the right to a public trial during the voir dire – did not in this case meet that final prong of the standard:

> Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we "must exercise ... discretion" and only grant defendant a new trial if the error "resulted in the conviction of an actually innocent defendant" or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Although denial of the right to a public trial is a structural error, it is still subject to this requirement. While "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 666-667. (Footnotes omitted).

In order to evaluate whether, in their discretion, the Court should find reversible error in *Vaughn*, the Court reviewed the record of the case, and concluded the voir dire in the case was "vigorous," that neither party raised any objections during the voir dire, and that both parties expressed satisfaction with the jury ultimately selected. *Id* at 668. In addition, the Court found the right of the public to be present was met, in part, by the presence of the jury venire. Thus, the Court held:

[7] See *Puckett v United States*, 556 US 129, 140; 129 S Ct 1423; 173 L Ed 2d 266 (2009).

> Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure "seriously affected the fairness, integrity, or public reputation of judicial proceedings."

Id at 668-669.

In regards to the error in this case, however, a case-by-case analysis of the record to determine if the error met the fourth prong of the *Carines* standard is neither factually nor legally possible. In order to determine if the failure of the trial court to administer the requisite jury oath impacted on the fairness, integrity, or public reputation of the judicial proceedings, a reviewing court would have to determine whether the absence of an oath tainted the deliberations of the jury as a whole or of any of the individual jurors. However, there is no ascertainable record that can be reviewed to make that inquiry, as the transcripts of the case obviously do not reveal the thought processes of the jurors, nor the substance of their deliberations. Not only does no such record initially exist, the law **precludes** any investigation of those topics, and thus prevents creation of a record of the possible impact of failure to correctly swear the jury on the fairness or validity of a verdict.

Michigan and Federal law is clear that the parties may not inquire into the substance of a jury's deliberations except under very limited circumstances – essentially only where an allegation is made that the jurors considered evidence outside the record in making their decision. In *People v Budzyn*, 456 Mich 77, 91, 566 NW2d 229 (1997), this Court wrote:

> Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room. *People v. Pizzino*, 313 Mich 97, 108; 20 NW2d 824 (1945). See also *Tanner v United States*, 483 US 107, 107 S Ct 2739, 97 L Ed 2d 90 (1987). As the Court of Appeals has previously noted, once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such

> as undue influence by outside parties. See *Hoffman v Monroe Public Schools*, 96 Mich App. 256, 257–258, 292 NW2d 542 (1980), citing *Mattox v United States*, 146 US 140, 13 S Ct 50, 36 L Ed 917 (1892). See also *People v Larry Smith*, 106 Mich App 203, 211–212, 307 NW2d 441 (1981). As the United States Supreme Court has explained, the distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the "irregularity" occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence. See *Tanner*, *supra* at 117–118, 107 S Ct at 2745–46. In examining these affidavits, a trial court should not investigate their subjective content, but limit its factual inquiry to determining the extent to which the jurors saw or discussed the extrinsic evidence. See *Dickson v Sullivan*, 849 F2d 403, 406 (CA9, 1988).

In the situation of a failure to properly swear a jury, there is no issue (unless otherwise shown on the record, independent of the oath error) of any improper extraneous influence on the jurors. To the contrary, an inquiry into whether the absence of an oath impacted on the verdict would require the parties and the court to delve into the subject matter arguably most "intrinsic to the jury's deliberative process" – the individual jurors' moral and legal duty to apply the law fairly and equitably to the facts as they find them. Requiring the accused to establish a record specifically showing, on a case-by-case basis, that the failure to swear the jury did in fact taint the verdict would necessitate the defendant seeking to impeach a guilty verdict via affidavits or other proof of juror misconduct within the jury room – a practice strictly barred under law in the absence of a claim of reliance on extrinsic evidence. Just as a defendant cannot raise an issue that the jurors, during their deliberations, misapplied the burden of proof or applied erroneous factors in assessing the credibility of the witnesses, an accused cannot even inquire as to whether the jurors' deliberations were impacted by the lack of a sworn oath. Hence, the accused stands in the classic "Catch-22" dilemma – having under the law to establish some actual prejudice while being at the same time barred under the law from presenting any evidence proving prejudice.

For this reason, this Court should find either that an error in properly swearing a jury is a structural error that falls outside either harmless error or plain error review, as with a denial of counsel, or that such an error by definition "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" and meets the fourth prong of the *Carines* plain error standard. See *People v Allan*, 299 Mich App 205, 829 NW2d 319 (2013). Reviewing the few cases in which such errors occur on a case-by-case basis would be both unfair to the parties, and an exercise in futility.[8]

The absence of the required oath should be considered on a par with other structural issues where inquiry as to the actual impact of the error is neither required nor possible. For example, it is clear structural error for a trial to be held before a biased judge. See *Tumey v Ohio*, 273 US 510, 47 S Ct 437 (1927). In *Tumey*, the Supreme Court found reversible error arising from a system where a town mayor acted as the judge at bench trials for minor offenses, and where the mayor and the town coffers were compensated only if the defendant was convicted and assessed a fine. The conviction was reversed even though the record of the particular case did not show that the mayor, acting as the judge, made **any** legally erroneous rulings or entered an improper verdict, let alone made decisions actually influenced by his own or the town's pecuniary interests. Instead, the Court recognized the mere potential for taint

[8] Amicus must presume that it is exceedingly rare that Michigan trial judges fail to administer the required oath to juries, given that the Court of Appeals in *People v Allan*, 299 Mich App 205; 829 NW2d 319 (2013), the published authority upon which the Court of Appeals granted peremptory reversal to Mr. Cain in this matter, did not cite to any prior precedent directly on point, indicating this precise issue does not arise often. Few convictions in the future will be required to be reversed if this Court rules that this error is not subject to harmless error review, or clearly meets the four prong plain error standard. To the contrary, a strong statement by this Court as to the fundamental nature of the oath requirement will reemphasize to the trial bench to take care to comply with the statutory and court rule requirement. On the other hand, a refusal to grant relief in this matter will send the wrong signal to the bench, that a failure to administer the oath, either negligently or intentionally, will be disregarded on appellate review and/or extremely unlikely to cause reversal.

arising from the bias was sufficient, without consideration on a case-by-case basis, to strike down the conviction:

> There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

273 US at 532. The Court went on the hold that even though the record of the case showed the defendant was clearly guilty of the charged offense, and fined the minimum amount under the law, the conviction and fine could not stand. *Id* at 535. The Court did not hold it is necessary, or even allowed, to inquire of any particular judge as to whether his or her rulings or verdicts in a case were impacted by bias.

The issue of an unsworn jury should be resolved with the same considerations in mind. The law requires a jury to be sworn to uphold their duties during the trial. While clearly, as shown by the empirical studies, many jurors take their oaths very seriously as both legal and moral obligations, it cannot be presumed that in the absence of an oath every juror would still comply with the duty to act according to the law and render a "true" verdict. Just as the only person who could give evidence as to whether there was actual prejudice arising from judicial bias would be the judge himself or herself, the only persons who could testify as to whether the absence of an oath impacted on the deliberations would be the jurors. As demonstrated above, that inquiry is foreclosed. It would be fundamentally unfair to deny a defendant relief on the basis of an inadequate record of actual prejudice where creation of such a record is forbidden.

This Court should find that even under the *Carines* plain error review, the failure of a Michigan trial judge to administer the requisite jury oath seriously affects the fairness, integrity, or public reputation of judicial proceedings, and thus is reversible even in the absence of a timely objection. *Carines, supra*; *Allan, supra.*

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Amicus asks this Honorable Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

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