IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
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DUSTIN BARRAL,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 64135

PETITION FOR EN BANC RECONSIDERATION

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and petitions this Court for en banc reconsideration in the above-styled case. This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 5th day of October, 2015.

Respecfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Attorney for Respondent

POINTS AND AUTHORITIES

On July 23, 2015, a panel of this Court published an Opinion reversing a sexual assault on a minor conviction due to perceived structural error arising from the failure to give a voir dire oath to prospective jurors. On August 6, 2015, the State filed a Petition for Rehearing, which was denied on September 25, 2015. The State now seeks en banc reconsideration.

En banc reconsideration of a panel decision will not be ordered except when "(1) reconsideration by the full court is necessary to secure or maintain uniformity in its decisions, or (2) the proceeding involves a substantial precedential, constitutional, or public policy issue." NRAP 40A(a). The instant motion is timely filed within 10 days of the Order Denying Rehearing. NRAP 40A(b).

A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the court's decisions shall demonstrate that the panel's decision is contrary to prior, published opinions of this court and shall include specific citations to those cases. NRAP 40A(c). If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved. Id. The petition shall be supported by points and authorities and shall contain such argument in support of the petition as the

petitioner desires to present. Id. Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time. Id.

Both of these grounds for en banc reconsideration exist in the present appeal. The Opinion is contrary to many other published opinions of this Court which conduct a prejudice analysis for errors in voir dire proceedings and which are cited in the argument below. En banc reconsideration is needed to secure or maintain uniformity with these cases and bring this Court back into conformity with the Constitution and United States Supreme Court authority which holds to a much narrower definition of structural error. The Opinion greatly expands this Court's prior precedent on structural error. Under what circumstances this Court will presume, without analysis, the existence of prejudice for Constitutional errors, is a substantial precedential issue worthy of the full Court's attention.

The Opinion in the present case holds, "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." Opinion, p. 8. This holding is directly contrary to what that very same Panel held just four short months earlier in another case:

> The district court plainly erred when it failed to administer the oath prior to beginning the questioning of the potential jurors as required

> by NRS 16.030(5). However, Lopez fails to demonstrate that the error resulted in actual prejudice or a miscarriage of justice. . . . he fails to argue or demonstrate that any empaneled juror was biased, prejudiced, or held discriminatory viewpoints. We therefore conclude that Lopez fails to demonstrate that the error affected his substantial rights.

Lopez v. State, 2015 Nev. Unpub. LEXIS 282, 1-2, Docket No. 65236 (Nev. 2015).[1] This blatant conflict and incongruity of rulings by the Panel should be cause for the full Court's concern. How can Barral be relieved of the burden of showing prejudice while Lopez is denied relief for the very same error because he failed to show prejudice? Lack of consistency in the Panel's rulings on this issue should cause the full Court to pause and reevaluate the appropriate reasoning and application for structural error. Although the Lopez decision is unpublished, it is better-reasoned and correctly analyzes the error at issue in a manner consistent with both federal and state law on structural error, while the Panel's reasoning in the present published Opinion is seriously flawed and contrary to binding authority which holds that errors in the voir dire process are not reversible absent a showing of prejudice.

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, as

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[1] Although unpublished case authority is not regarded as precedent per SCR 123, a repeal of this rule is contemplated by ADKT 0504.

enhanced by the voir dire oath of honesty in NRS 16.030(5), is obvious if this process is to serve its purpose. But the United States Supreme 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). The 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.

Nevada has quoted and cited approvingly to the reasoning of McDonough Power Equip. v. Greenwood, supra, by holding that to justify a new trial, a juror's failure to reveal a prior arrest during voir dire examination "must be prejudicial, that is, it must have improperly influenced the jury or tainted its verdict." Hale v. Riverboat Casino, 100 Nev. 299, 304-5, 682 P.2d 190, 193 (1984). Under the

circumstances of that case, a new trial was not justified despite the error in the voir dire proceedings. Id. Also, this Court has held that a prospective juror concealing repeated crime victimization during jury selection is reviewable for harmless error. Canada v. State, 1134 Nev. 938, 941, 944 P.2d 781, 783 (1997); see also Lopez v. State, 105 Nev. 68, 89, 769 P.2d 1276 (1989). Just like the United States Supreme Court, this Court is required to apply harmless error standards "without regard to technical error or defect which does not affect the substantial rights of the parties." NRS 177.255; see also NRS 178.598 ("any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). If a juror's actual dishonesty in answering voir dire questions is not per se structural error, 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.

This same analysis and reasoning also applies when a party is forced to resort to one of its peremptory challenges to remove a juror whom the trial court should have excused for cause.

Ross v. Oklahoma, 487 U.S. 81, 83-88, 108 S.Ct. 2273, 2275-78 (1988). Certainly, the court's error would have required automatic reversal had the biased juror actually sat on the jury. Id. But if a party exercises a peremptory challenge to remove the juror, then the error is not reversible unless a showing of prejudice is made that the jury which actually sat was not impartial. Id. The Court rejected the defense's argument that structural error applied. Id. Acknowledging that the erroneous denial of a cause challenge may have resulted in a different composition of jurors than would have otherwise decided the case, the Court held that this "possibility" of prejudice did not mandate reversal. Id. The Ross Court further rejected the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. Id. Peremptory challenges are not of constitutional dimension. Id. They are a means to achieve the end of an impartial jury. Id. Peremptory challenges are a creature of statute and are not required by the Constitution. Id. This is no different than the statutory obligation to administer an oath to prospective jurors prior to conducting voir dire which is simply an aid in the goal of seating an impartial jury.

Nevada has relied upon and cited approvingly to the reasoning of Ross v. Oklahoma, supra, and held that errors in the voir dire process do not result in the denial of the constitutional right to a fair and impartial jury so long as the jury that sits is impartial. Antiga-Morales v. State, 130 Nev. ___, 335 P.3d 179 (2014) (denying the defense access to juror background information developed by the prosecution not prejudicial absent the seating of an impartial juror); Blake v. State, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005) (erroneous denial of challenge for cause cured by exercise of peremptory); Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125-126 (2005) (Due Process claim based on erroneous denial of cause challenge required showing of prejudice); Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (court's limitation on the voir dire examination of one of the jurors subsequently removed by peremptory, not prejudicial). Likewise, this Court has held that "prejudice is not presumed 'based on extensive pretrial publicity' in the absence of a showing of actual bias on the part of jurors ultimately empaneled." Rhyne v. State, 118 Nev. 1, 11, 38 P.3d 163, 169 (2002); see also Sonner v. State, 112 Nev. 1328, 1336, 930 P.2d 707, 712 (1996).

This Court has declined the invitation to find structural error in a host of other situations involving the voir dire process and the right to an impartial jury. For example, the failure to instruct the jury to restart deliberations when an alternate juror replaces an original juror as required by NRS 175.061(4), is an error

of constitutional dimension, namely the Sixth Amendment right to a fair trial by an impartial jury, but is not structural error. Martinorellan v. State, 131 Nev. ___, 343 P.3d 590 (2015). The failure to properly administer required safeguards for juror questioning, namely holding bench conferences off the record to determine admissibility of numerous juror questions, amounts only to non-constitutional trial error subject to harmless-error review. Knipes v. State, 124 Nev. 927, 192 P.3d 1178 (2008). Erroneous instructions omitting, misdescribing, or presuming an element of an offense are subject to harmless-error review. Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000). The potential for a coerced jury verdict due to bringing a lone dissenting juror into chambers in front of the jury forewoman and inquiring whether the holdout juror heard the evidence and was willing to follow the jury instructions, was not structural error. Eden v. State, 109 Nev. 929, 860 P.2d 169 (1993).

The bold proclamation that this Court, "will not condone any deviation from constitutionally or statutorily prescribed procedures for jury selection" (Opinion, p. 8) is simply false and cannot be reconciled with the above precedent which holds harmless a host of errors involving the right to an impartial jury and fair trial. The purpose of the voir dire oath is to ensure truthful answers from prospective jurors in protection of the constitutional right to an impartial jury. This statutory procedural device is no different in its purpose and goals of ensuring an impartial

jury than the numerous other procedural violations above, all of which are amenable to harmless error analysis. In the Opinion, this Court erroneously singled out the voir dire oath as constituting structural error, without distinguishing these other types of juror errors which are all reviewed for harmlessness. The overbroad statement that a defendant "is denied due process whenever jury selection procedures do not strictly comport with the laws intended to preserve the integrity of the judicial process," (Opinion, p. 7) would, in effect, overrule this precedent and greatly enlarge what up until now has been a narrow category of errors which are deemed structural.

For an error to be structural, it first must qualify as a fundamental constitutional error. Knipes v. State, 124 Nev. 927, 934, 192 P.3d 1178 (2008), citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827 (1999) ("structural errors belong to that 'limited class of fundamental constitutional errors' "). But the statutory requirement for a voir dire oath in Nevada is not found in the constitution. In fact, the version of the statute prior to 1977 had no such requirement and the voir dire oath did not exist in Nevada jurisprudence. NRS 16.030(5); 1977 Statutes of Nevada, Page 417-18. It is curious how a relatively modern practice that did not exist in Nevada for the better part of the twentieth century can now be deemed of such constitutional magnitude that its absence in a particular case strikes at the very framework of the trial so as to constitute structural error. Given the vast

number of trials that have proceeded and verdicts rendered without the aid of a voir dire oath in years past, the implications of now deeming such error as structural is astounding.

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, the United States Supreme 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).

In the 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, contrary to what the Opinion indicates. The Supreme 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.' "). The reasoning of the Opinion overlooks Supreme Court authority directly on point while mis-reading and misinterpreting a few, select cases.

Many federal courts have specifically affirmed that the failure to give prospective jurors a truthfulness oath prior to voir dire does not implicate any federal constitutional right at all. Lucero v. Holland, 2014 U.S.Dist. LEXIS 171749, 63 (E.D.Cal. Dec. 10, 2014) ("Petitioner does not show that failure to swear a jury at such a stage in the proceedings [prior to conducting voir dire] violated any federal constitutional right . . . ."); Carter v. Chappell, 2013 U.S.Dist. LEXIS 37838, 142-146, 2013 WL 781910 (C.D. Cal. Mar. 1, 2013) ("the Court finds no support for Petitioner's argument that a federal constitutional violation

may be shown in a trial court's failure to administer an oath of truthfulness to prospective jurors"); Theard v. Artus, 2012 U.S. Dist. LEXIS 147642, 2012 WL 4756070 (E.D.N.Y. Aug. 27, 2012) ("[W]hether the trial court administered the jury truthfulness oath . . . is a state law issue for which habeas relief is unavailable"); Robertson v. McKee, 2012 U.S. Dist. LEXIS 10715, 2012 WL 263099, at 4 (E.D. Mich. Jan. 30, 2012) ("Petitioner has failed to show that the federal Constitution is violated where the trial court fails to swear a prospective jury pool prior to voir dire"); McLeod v. Graham, 2010 U.S.Dist. LEXIS 130186, 17, 2010 WL 5125317 (E.D.N.Y. Dec. 8, 2010) ("The jury truthfulness oath is an aspect of voir dire, which is solely a state issue"); see also Baldwin v. State of Kansas, 129 U.S. 52, 56, 9 S.Ct. 193 (1889) (finding no federal issue in the allegedly improper swearing of a state court jury).

Even when it concerns the more fundamental and traditional oath given to the petit jury at the start of trial[2], 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

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[2] NRS 16.060. This particular oath was in fact given to the jury in this case. 2 AA 337.

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 pre-trial voir dire oath to answer questions truthfully. The Panel's conclusion that constitutional Due Process requires a truthfulness oath be given to prospective jurors prior to conducting voir dire, is in opposition to the above federal authority. Just because a practice may be traditional, does not make it constitutional.

Even if the voir dire oath is somehow constitutionally required in Nevada, the full Court must recognize that 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). 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). 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. 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 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 words "always" and "necessarily" appear nowhere in the structural error analysis in the published Opinion in the instant appeal. Nor does the Opinion apply any kind of presumption against structural error. Instead, the published Opinion holds the error structural because of the "probability" or "likelihood" of prejudice and the "appearance" of bias alone. As demonstrated above, this is an incorrect standard for structural error. Absent an actual constitutional violation, such uncertainty regarding prejudice does not by itself equate with structural error. The omission of a voir dire oath does not "always" or "necessarily" result in an unfair trial or biased jury. At most, the error simply increases the risk that a prospective juror might be less than truthful. Because of the formal courtroom

setting, presence of the judge, and solemnity of the occasion, prospective jurors feel obliged to be honest in their voir dire answers even without taking an oath. Honesty is a matter of personal integrity and is not always enhanced or ensured just because a formalistic oath is administered. But even when a prospective juror is known to have actually lied during voir dire, this Court's precedent holds that the error is amenable to harmless error review. So, too, must the failure to administer a voir dire oath be reviewed for harmlessness.

Many other state courts are in agreement that errors in the voir dire process, in particular the omission of a voir dire oath, are not structural error. People v. Stover, 2011 Mich.App. LEXIS 644, 5-7, 2011 WL 1377084 (Mich.Ct.App. Feb 12, 2011) (No structural error in failing to administer oath to jurors before jury selection); 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. Vogh, 179 Ore.App. 585, 598, 41 P.3d 421, 429 (Ore.Ct.App. 2002) (failure to administer voir dire oath to prospective jurors is not structural error requiring automatic reversal without a showing of prejudice); 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). Where so many other state courts have reached the opposite conclusion from the published Opinion in this appeal, en banc reconsideration is warranted.

Finally, the Opinion fails to address that the issue was not preserved below and is forfeited. No doubt, the defense brought the factual omission of the voir dire oath to the attention of the trial judge, but counsel did not object to its omission, claimed no violation of statutory or constitutional right, did not seek a mistrial, made no assertion of structural error, filed no written motion or brief, nor requested any type of relief from the judge below. In fact, counsel actually agreed with the trial judge that the voir dire oath was not necessary by responding, “okay” and “[t]hat’s fine” and “right”. 1 AA 133-34. Counsel should not be permitted to sandbag the trial judge in this manner. This Court has consistently reaffirmed that

“[t]he ‘failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below.’” Pantano v. State, 122 Nev. 782, 795 n. 28, 138 P.3d 477, 486 n. 28 (2006), as quoted in Thomas v. Hardwick, 231 P.3d 1111, 1120 (2010). The failure to cite a controlling statute to the trial judge as grounds for an objection fails to preserve the issue for appeal. Byford v. State, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000) (“Byford did not cite NRS 175.554(1) to the district court as grounds for his proposed instruction. Therefore, he did not properly preserve this issue for appeal”), citing Lizotte v. State, 102 Nev. 238, 239-40, 720 P.2d 1212, 1214 (1986) (appellate review requires that the district court be given a chance to rule on the legal and constitutional questions involved). Regardless of whether the error in this case is structural or not, the plain error standard of review remains applicable. Puckett v. United States, 556 U.S. 129, 140, 129 S.Ct. 1423, 1432 (2009) (reserving the question whether “structural errors” automatically satisfy the plain error criteria); United States v. Kieffer, 681 F.3d 1143, 1158 (10th Cir. 2012) (“[a] defendant failing to object to structural error in the district court likely would still need to establish that an error was plain and seriously affected the fairness, integrity, or public reputation of the judicial proceedings”).

Because the Panel chose to publish its decision in an Opinion, its analysis and reasoning now constitute precedent of this Court with impact beyond the

litigants involved. The failure to give a voir dire oath may be an unusual event unlikely to be repeated in other cases, but the broad language of the Opinion will be the new standard by which structural errors of all kinds will be judged. It constitutes the first step down a slippery slope of ever-expanding structural errors. There are other ways to get the trial judge's attention in an isolated case than publishing an Opinion that greatly enlarges the concept of structural error. Because the Opinion is contrary to controlling authority of both this Court and the United States Supreme Court, and has substantial precedential and constitutional implications for all manner of errors in other cases, en banc reconsideration is necessary.

WHEREFORE, the States respectfully requests en banc reconsideration.

Dated this 5th day of October, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the page or type-volume limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6), because it is either proportionately spaced, has a typeface of 14 points or more and contains 4,584 words and 362 lines of text.

Dated this 5th day of October, 2015.

Respecfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on October 5, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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