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### Summary of Barral v. State, 131 Nev. Adv. Op. 52 (July 23, 2015)

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*Nevada Law Journal*

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CRIMINAL LAW: VOIR DIRE

**Summary**

Defendant Dustin James Barral was convicted of two counts of sexual assault with a minor under 14 years of age by a jury. The Supreme Court of Nevada held that the trial court committed a structural error by failing to administer an oath or affirmation to the jury panel prior to commencing voir dire. This error required reversal and a new trial.

**Background**

Dustin Barral (“Defendant”) was charged with sexually assault of a minor under the age of 14. At the beginning of voir dire, both the prosecution and defense explained to the potential jurors the importance of answering their questions honestly. After the questioning of the first potential juror, both parties conferred with the trial judge at a bench conference. At the conference, both parties, particularly counsel for Defendant, asked the trial judge multiple times if the panel needed to be sworn in *prior* to voir dire. The judge said no, “I don’t swear them in until the end.” The court then proceeded with voir dire. The district court clerk swore in the selected jury at the beginning of the second day of trial.

**Discussion**

On appeal, Barral claims that the district court committed a structural error requiring reversal when it failed to comply with NRS 16.030(5)<sup>2</sup> and administer the oath to the panel before voir dire. Barral argues that the court’s error compromised his right to trial by an impartial jury because potential jurors may not have felt obligated to respond truthfully during voir dire, as the court did not place them under oath. The parties agreed that oath or affirmation was required prior to voir dire under NRS 16.030(5). The prosecution, however, argued that the jury understood their duty to tell the truth and, therefore, reversal was not required.

NRS 16.030(5) states that “[b]efore persons whose names have been drawn are examined as to their qualifications to serve as jurors, the judge or the judge's clerk shall administer an oath or affirmation . . . .”

As a preliminary matter, the Court reiterated that “shall” in statutory construction imposes a duty, and, therefore, a district court must follow NRS 16.030(5) without discretion. Additionally, structural errors compromise the “framework of a trial” and are “intrinsically harmful.” The United States Supreme Court has repeatedly held that trial court errors which violate a defendant’s Sixth Amendment right to an impartial jury are

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<sup>1</sup> By Aleem A. Dhalla

<sup>2</sup> NEV. REV. STAT. § 16.030(5).

structural errors that create the probability of prejudice and preclude the need for showing actual prejudice to warrant relief.

The Court, relying on previous case law, reasoned that due process demands not only the absence of bias but the appearance.<sup>3</sup> A fair tribunal is an elementary prerequisite to due process, thus the Court could not condone any deviation from constitutionally or statutorily prescribed procedures for jury selection. The district court's error, therefore, required reversal.

### **Conclusion**

The district court erred in its deviation from NRS 16.030(5) and the jury verdict, therefore, required reversal. A jury panel must be sworn in prior to the commencement of voir dire.

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<sup>3</sup> See *Peters v. Kiff*, 407 U.S. 493, 502 (1972).