No. 125959

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 1-17-0675.
Respondent-Appellee,	)	There on appeal from the Circuit Court of Cook County, Illinois, No.
-vs-	)	14 DV 74336.
OMEGA MOON,	)	Honorable Caroline Kate Moreland, Judge Presiding.
Petitioner-Appellant.	)	

BRIEF AND ARGUMENT FORPETITIONER-APPELLANT

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NATURE OF THE CASE

Omega Moon was convicted of domestic battery after a jury trial and was sentenced to 12 months' probation.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether a conviction by a jury that was not administered the trial oath amounts to structural error that requires a new trial where the error violates the Sixth Amendment right to an "impartial jury," prevents the jury from being authorized to render a *true verdict* based on the *evidence and law*, and prevents jeopardy from attaching and leaving a defendant open to a second prosecution by the State.

STATEMENT OF FACTS

Overview

The appellate court below unanimously held that a trial court's failure to administer the trial oath to the jury is clear error. *People v. Moon*, 2020 IL (App (1st) 170675, ¶¶42, 68. The justices on the panel did not agree, however, on whether this error required a new trial: the two justices in the majority held that the error did not amount to structural error, while the dissenting justice found that this type of error is structural and requires a new trial. *Id.* at ¶¶43, 69-71. This Court granted leave to appeal to resolve whether the failure to administer the trial oath to the jury is structural error.

Pre-trial Jury Proceedings

The State charged Omega Moon with domestic battery, alleging that she caused bodily harm to S.M., a minor. After *voir dire* was conducted and the jurors were selected for trial, the trial judge asked the court clerk to swear in the jury. (R. 190) The jury was sworn in as follows: "do you solemnly swear or affirm you'll truthfully answer all questions asked concerning your qualifications as jurors in this case[1]." (R. 349) The jury was not sworn in with the trial oath, which asks potential jurors "to swear or affirm to well and truly try the matters at issue and render a true verdict according to the law and the evidence." Administrative Office of the Illinois Courts, *Petit Juror Handbook* (available at http://illinoiscourts.gov/CircuitCourt/Jury/Juror.asp

[1] While the actual report of the proceedings for the swearing in of the jury only contains a shorthand version of the swearing, the parties stipulated this was the actual language used to swear in the jury. (R. 349)

(retrieved Jan. 25, 2021)).

Trial

At trial, S.M. testified that on June 22, 2014, he was living with Moon, his legal guardian, who he referred to as mom. (R. 199-200) S.M. stated that he was given permission by Moon to go to the house of his biological mother. (R. 201-02, 208) When S.M. arrived back home, Moon whipped him with a belt. (R204-05)

The jury found Moon guilty of domestic battery. (R. 323)

Post-trial motion

Defense counsel filed a motion for acquittal, or, alternatively, a motion for new trial. (Supp C. 22) (R. 350) At the motion hearing, counsel argued that Moon should be afforded a new trial because the jury was not sworn in to try the issues and therefore Moon did not receive an impartial jury. (R. 352-53) The motion was supported by affidavits executed a month after the trial by two attorneys who were in court the day of trial. (Sup5 C. 4-6) After the motion was filed, the parties confirmed that the jury was not properly sworn. (R. 349).

The State conceded that there was an improper oath given to the jury, that it was structural error, and the error could not be waived. (R. 354, 356) The State proposed that the error could be cured by calling back the jury and administering the correct oath to the jurors. (R. 354) Defense counsel countered that administering an oath to the jurors, five months after the trial had concluded, would not constitute a meaningful oath. (R. 355)

The trial judge admitted that her failure to administer the proper oath to the jury was error, but she denied Moon's motion. (R. 364) The court noted that the jury was properly admonished with the *Zehr* principles; they were told to follow the law and not decide the case until they heard all of the evidence presented. (R. 357) The jury was asked to decide the case without prejudice and they were sworn by the clerk to tell the truth and nothing but the truth. (R. 357) While the court acknowledged that the jury was not given the proper oath, it noted that neither party objected. (R. 357-58)

Because the jury was given *voir dire* admonishments, the court suggested that Moon was not prejudiced. (R. 363) The court held the failure to administer the jury with the proper oath was a harmless error. (R. 364) The court denied Moon's motion for a new trial and then sentenced Moon to 12 months' probation. (C. 91-92) (R. 373)

Direct Appeal

On appeal, Moon contended, among other things, that her conviction was a nullity because she was convicted by an unsworn jury. *People v. Moon*, 2020 IL App (1st) 170675. She argued that a conviction by a jury not sworn in with the trial oath violated the Sixth Amendment and was structural error not subject to waiver or forfeiture analysis, which required a new trial. *Id.*

The appellate court recognized that there was a split among state courts surrounding the case law on juries not sworn in with the trial oath. *People v. Moon*, 2020 IL (App (1st) 170675, ¶40. It noted that some courts have held that a trial before a jury not sworn in to try the case is structural

error, while other courts have found that the failure to give the trial oath is not a structural error. *Id.* at ¶¶ 40-41.

The court affirmed Moon's conviction. *Id.* at ¶42. The court found that the evidence was not closely balanced and therefore plain error did not occur under the first prong. *Id.* at ¶45. With regard to second prong plain error, the court found that while the jury had not been administered the trial oath, it had been sworn with the *voir dire* oath to answer questions truthfully. *Id.* at ¶43. Although the court held this was "clear error" by the trial court, it did not find that the error was structural because the jury here was not "completely" unsworn. *Id.* at ¶¶ 42-43. The appellate court thus found that second prong plain error did not occur. *Id.* at ¶43.

The dissent found that there "was no trial jury oath sworn by [the] jury," and the trial court's error in failing to administer the trial oath was structural error not subject to waiver or harmless error analysis. *Moon*, 2020 IL App (1st) 170675, ¶¶ 63-67 (Connors, J. dissenting). Justice Connors distinguished between the *voir dire* oath that was administered to the jury and the trial oath, which was not administered by the trial court. *Id.* at ¶¶ 64-65. She explained that "[t]he admission of the trial oath marks a highly significant moment in the case. A defendant is not placed in jeopardy until a jury has been sworn to try a case." *Id.* at ¶ 65 (citing *Serfass v. United States*, 420 U.S. 377 (1975)). Without jeopardy attaching, a defendant may be reprosecuted for the same offense, whether she is acquitted or convicted. *Id.* (citing *Crist v. Bretz*, 437 U.S. 28, 38 (1978)).

The dissent also explained that it is the trial oath that provides a defendant with an impartial jury because the oath legally commences the office of the juror. *Id.* at ¶ 66. Justice Connors clarified that a "jury is not a jury until it is sworn to the trial oath not the *voir dire* oath." *Id.* (citing 725 ILCS 5/115-4(g) and Ill. S. Ct. R. 434(e)). Justice Connors criticized the majority for failing to recognize the significance of being tried by a jury that has been administered the trial oath and stated that the failure to give the oath violates a defendant's constitutional right against double jeopardy and to an impartial jury. *Id.* at ¶ 68. Thus, the dissent found that "the failure to receive the trial oath is structural plain error." *Id.* at ¶ 69.

This Court granted leave to appeal on September 30, 2020.

ARGUMENT

The Failure To Swear In A Jury With The Trial Oath, Which Protects An Accused's Right To An Impartial Jury Under The Sixth Amendment, Means That The Potential Jurors Were Not Authorized To Render A Verdict Based On The Law And Facts Of The Case, Jeopardy Never Attached, And The Trial Never Commenced; Such An Error Amounts To Structural Error That Requires Automatic Reversal.

A conviction by a jury that was not sworn to try the case is structural error that requires automatic reversal and a new trial. A jury trial oath is not a mere formality; swearing in the jury with the trial oath is an integral, essential, fundamental component to the constitutional guarantee of an impartial jury and a fair trial. The plain meaning of the word jury and its common law history shows that only a *sworn* body of individuals can serve as a jury authorized to try a criminal case. Only the trial oath, which instructs potential jurors to render a *true verdict* based on the *evidence and law,* can ensure an "impartial jury" under the Sixth Amendment. *See* U.S. Const. amend. VI. Swearing in potential jurors with the trial oath not only transforms those potential jurors into a jury authorized to try the case, but it marks the demarcation that clearly signals when jeopardy attaches, and, in Illinois, when a defendant no longer has an absolute right to waive the jury and proceed with a bench trial in a criminal case.

The majority of states to address this issue have found that a conviction by a jury not administered the trial oath is structural error that requires automatic reversal. See *Harris v. State*, 406 Md. 115, 129 (2008) (collecting cases). Moon asks this Court to follow the majority of states in finding that a conviction by a jury not administered the trial oath is

structural error which requires automatic reversal and a new trial.

Where there are no facts in dispute, as is the case here, and all that remains is a question of law, this Court's review is *de novo*. *People v. Guzman*, 2015 IL 118749, ¶ 13.

A. The history and text of the Sixth Amendment right to an impartial jury show that a defendant in a criminal case has a constitutional guarantee that the jurors be sworn with the trial oath.

The origin of the word "jury" is traceable back to the Anglo-French word "jurer," which literally means "to swear,"and the Latin word "iuro," which means "to swear an oath." Kathleen M. Knudsen, *The Juror's Sacred Oath: Is There A Constitutional Right to A Properly Sworn Jury?*, 32 Touro L. Rev. 489, 500 01 (2016) (hereinafter "*The Juror's Sacred Oath*"). Nearly every definition of "jury" references the swearing of an oath. *See, e.g.*, *Random House Webster's College Dictionary* (2001) (defining "jury" as "a group of persons *sworn* to render a verdict or true answer on a question or questions submitted to them, esp. such a group selected by law and *sworn* to examine the evidence in a case and render a verdict to a court") (emphasis added); *The Oxford Dictionary of English Etymology* (1974) ("[A] company of men *sworn* to give a verdict.") (emphasis added); *Black's Law Dictionary* (4th ed.) ("A certain number of men, selected according to law, and *sworn* (jurati) to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them."); *Funk and Wagnalls Practical Standard Dictionary of the English Language* (Chicago: J.G. Ferguson & Associates, 1945), p. 628 ("A body of persons (usually twelve) legally qualified and summoned to serve on a

judicial tribunal, there *sworn* to try well and truly a cause and give a true verdict according to the evidence.") (emphasis added).

The history of jury trials shows that the trial oath is a long and widely accepted requirement that is necessary to ensure the right to an "impartial jury" that is enshrined in the Sixth Amendment. In English law, the jury oath has been an integral part of the jury trial at least since the year of 1015. *The Juror's Sacred Oath*, at 501 02. The swearing in of the jury with the trial oath has been found recorded in transcripts from English trials as early as 1670. *Id*. at 503.

The ratification of the Sixth Amendment marked the preservation of this long-cherished institution born of English common law. *Smith v. Alabama*, 124 U.S. 465, 478 (1888) ("There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England"); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) ("[T]he historical foundation for our recognition of [the constitutional protections of the Sixth Amendment] extends down centuries into the common law."); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 385 (1979) ("The common-law right to a jury trial ... is explicitly embodied in the Sixth and Seventh Amendments.").The history of the right to a jury trial reveals that from the inception of the jury, "it was the power of the oath which decided the case..." Silving, Helen, *The Oath: I*, 68 Yale L.J. 1329, 1365 (1959); *see also* Thayer, James, B., *"Law and Fact" in Jury Trials*, 4 Harv L. Rev. 147, 156 157 (1890) (describing the emergence of trial by jury and stating that "it was the jury's

oath, or rather their verdict, that 'tried' the case").

Around the time the U.S. Constitution was written, "jury" was defined as a group of men "sworn to deliver a truth upon such evidence as shall be delivered then touching the matter in question." Samuel Johnson, *A Dictionary of the English Language* (1785); see also Bailey, *An Universal Etymological English Dictionary* (20th ed., 1763) (defining "jury" as "[in Common Law] a Company of twenty-four or twelve Men, *sworn to inquire of the Matter of Fact*, and declare the Truth upon such evidence as shall be given to them, relating to the Matter of Fact") (bracketing in original; emphasis added); Potts, *A Compendious Law Dictionary* (1803), p. 406 (defining "jury" as "a certain number of persons *sworn* to enquire of and try some matter of fact, and to declare the truth upon such evidence as shall be laid before them") (emphasis added). When considering the etymological roots of the word "jury," along with its history, it is quite implausible that the Framers, who lived in a time in which society placed great emphasis on oaths, intended anything other than a sworn jury when they drafted the Sixth Amendment. *See* Amar, *Sixth Amendment First Principles*, 84 Geo L.J. 641, 694 (1996) (stating that in the Framers' world, "great weight was placed on oaths"). Because the term "jury" in the Sixth Amendment naturally referred to a "sworn" jury, it would have been redundant for the Framers to add the descriptor "sworn" before "jury." A constitutional analysis based on the history, original meaning, and contextual reading of the text, shows the essential role the trial oath plays in a trial by an impartial jury under the

Sixth Amendment.

Recently, in *Ramos v. Louisiana*,, the U.S. Supreme Court examined the history of the jury trial right and concluded that, while not stated explicitly in the text, the Sixth Amendment right to a "trial by an impartial jury" includes a right that the jury's verdict be unanimous in order to convict. U.S. , 140 S. Ct. 1390, 1397 (2020). The Court explained that when interpreting a constitutional right, courts must enforce the right as it existed at the time of its adoption, "[w]hen the American people chose to enshrine that right in the Constitution." *Id.* At 1401-02. The Court warned that it is not the judiciary's role to reassess the function of that constitutional right in contemporary society to determine whether the right is still "important enough": "we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics." *Id.* at 1402; *see also D.C. v. Heller*, 554 U.S. 570, 634 35 (2008) ("rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad").

Here too, it is important that this Court look to the history of the right to an impartial jury and the American people's understanding of the meaning of that right when it was enshrined into the U.S. Constitution under the Sixth Amendment. As discussed above, the text of the amendment and its history establish that the founding fathers understood that the Sixth

Amendment's guarantee of an impartial jury could only be carried out by a jury sworn to try the case.

B. Jurors are authorized to try the case when they solemnly swear to render a "true verdict" based on the "law and the evidence."

The U.S. Constitution "presupposes that a jury... is impartial, ... so long as the jurors can conscientiously and properly carry out their *sworn duty* to apply the law to the facts of the particular case." *Lockhart v. McCree*, 476 U.S. 162, 183 84 (1986) (emphasis added); *See also Dennis v. United States*, 339 U.S. 162, 171 (1950) ("One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to *the sanctity of his oath* is well qualified to say whether he has an unbiased mind in a certain matter.") (emphasis added).

While there are moderate differences in the trial oaths prescribed among the different jurisdictions, the essential concepts of solemnity, a decision based on the *evidence and the law*, and a fair or *true verdict* are consistent across jurisdictions. *See The Juror's Sacred Oath* at 495-96 (collecting impanelment oaths from different jurisdictions). At least 40 states have codified the trial oath to be administered to petit juries in criminal trials.[2] *Id* at 490, 495.

While there is no federal rule setting out the text of the trial oath for federal courts to administer, the District Court Judge's Benchbook directs

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[2] *See* Appendix A-4 for a list of 40 States that codified the jury trial oath; the codified oaths are also listed.

that the following oath be administered to jurors before a federal criminal trial:

> Do each of you solemnly swear [or affirm] that you will well and truly try, and a true deliverance make in, the case now on trial, and render *a true verdict according to the law and evidence*, so help you God?"

Fed. Judicial Ctr., *Benchbook for U.S. District Court Judges* 269 (6th ed. Mar. 2013) (emphasis added).

Likewise, while in Illinois there is no codified trial oath, the Illinois "Petit Juror Handbook, " furnished by The Administrative Office of the Illinois Courts, provides guidance for the trial oath to be administered to petit juries and also explains the distinction between the *voir dire* oath and trial oath. Administrative Office of the Illinois Courts, *Petit Juror Handbook* (available at http://illinoiscourts.gov/CircuitCourt/Jury/Juror.asp (retrieved Jan. 25, 2021)). The handbook provides that "prospective jurors" will be given an oath prior to *voir dire* and asked to "rise and swear or affirm to answer truthfully all questions" asked of them regarding their qualifications to act as jurors in a case. *Id*. Then, to ensure that the jury selected will be composed of "fair and impartial persons," the group selected to try the case will be administered the trial oath, where they will swear or affirm to "render a *true verdict according to the law and the evidence*." *Id*. (emphasis added). After the jury is "selected and sworn, the trial of a case proceeds." *Id*.

Thus, Illinois law is consistent with the national consensus that the trial oath consists of instructing the jury to render a fair or *true verdict* based on the *evidence and the law*.

C. The *voir dire* oath cannot substitute for the trial oath.

Case law establishes a clear distinction between the *voir dire* oath and the trial oath. *United States v. Wedalowski*, 572 F.2d 69, 74 (2d Cir. 1978). The process of obtaining a jury for a trial begins with summoning a group of persons from which the jury is selected. *Id*. These prospective jurors must first be examined regarding their qualifications, and prior to that examination, they are administered an oath that they will answer truthfully all questions. *Id*. "This oath is often called the *'voir dire'* oath." *Id.* Once the jurors are selected, they are administered an oath and swear "they will truly weigh the evidence and a true verdict render according to the evidence." *Id*. This is called the trial oath, and only after it has been administered to the jury can the trial properly begin. *Id.*

The *voir dire* oath, thus, cannot properly instruct a jury to try a case as it is administered before *voir dire* and requires prospective jurors to answer truthfully all questions concerning their qualifications, while the trial oath requires jurors to swear or affirm that they will give careful attention to the proceedings, abide by the court's instructions, and render a true verdict in accordance with the law and evidence. 47 Am. Jur. 2d Jury § 191. *See also People v. Poole*, 284 Ill. 39, 40 (1918) (internal citation omitted). ("The word 'impanel' means the final formation by the court of the jury. It is the act that precedes the swearing of the jury and ascertains who are to be sworn.")

The trial oath is specifically designed to instruct jurors to be impartial as they try the case:

> The required oath is not a mere 'formality' which is required only by tradition. The oath represents a solemn promise on the part of each juror to do his duty according to the dictates of the law to see that justice is done. This duty is not just a final duty to render a verdict in accordance with the law, but the duty to act in accordance with the law at all stages of trial. The oath is administered to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as befits one holding such an important position. The oath is designed to protect the fundamental right of trial by an impartial jury.

People v. Pribble, 72 Mich.App. 219, 224 (1976). To awaken the conscience of the jury and impress upon the jurors the serious duty imposed upon them, the jury needs to solemnly swear an oath to render a fair and true verdict based on the evidence and the law.

A survey conducted of actual jurors in Illinois reveals that jurors take court-administered instructions and oaths very seriously. Hon. Amy J. St. Eve, Hon. Charles P. Burns, Michael A. Zuckerman, *More from the #jury Box: The Latest on Juries and Social Media*, 12 Duke L. & Tech. Rev. 64, 90 (2014). The survey was conducted over the course of three years on jurors who had served on a federal criminal or civil case in the Northern District of Illinois or a state criminal case in the Circuit Court of Cook County, criminal division. *Id*. at 78. The federal cases were presided over primarily by Judge Amy J. St. Eve, and all of the state criminal cases were presided over by Judge Charles P. Burns. *Id*. The survey, which was conducted anonymously, asked jurors whether they were tempted to communicate about the case on social media a violation of the court's orders and if so, what prevented them from doing so. *Id*. at 78-79. Numerous jurors that were tempted to do so, expressly pointed to the oath and their respect for the process as the reason

for not doing so:

- "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...
- "My duty as a juror 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"

Id. at 81-82. Some jurors pointed to their fear of losing their impartiality:

- "to keep an open mind"
- "I did not want to sway my opinion"
- "To keep an open mind"
- "Afraid I would be biased"
- "changing my personal opinion"

Id. at 82.

An oath serves as an anchor that reminds jurors of their duty, and it is essential that they be provided an oath that requires them to render a "true verdict" in accordance with the facts and law of the case to ensure Sixth Amendment impartiality. It is only the trial oath that can properly instruct the jury to try the case.

D. It is the trial oath, not the *voir dire* oath, that marks an extremely consequential moment in both federal and state law.

Swearing in the jury with the trial oath has a profound legal impact in a criminal case as it signifies critical procedural demarcations that make up

the structure of the trial itself: it authorizes jurors to try the case; it marks the exact point that jeopardy attaches; and, in Illinois, it marks the exact point when a defendant no longer has an absolute right to waive the jury and proceed with a bench trial.

The swearing in of the jury is necessary to form a group of jurors authorized to hear the case and issue a verdict. *Serfass v. U.S.*, 420 U.S. 377, 388, 391-92 (1975). Constitutional protections, such as the Fifth Amendment guarantee against a defendant being put in jeopardy twice for the same offense and the Sixth Amendment guarantee of an "impartial" jury, have been explicitly defined by the U.S. Supreme Court with the assumption that the jury is sworn. *Martinez v. Illinois*, 572 U.S. 833, 838-40 (2014) (holding that jeopardy attaches when the jury is sworn).

"[C]ourts have found that it is useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of attachment of jeopardy." *Serfass v. U.S.*, 420 U.S. at 388. Without receiving the trial oath, jeopardy never attaches and the jury does not have the authority to convict an accused, thus leaving the accused open to a second prosecution for the same offense. *Id.* at 388, 391-92 (holding that, in the case of a jury trial, "jeopardy attaches when a jury is impaneled and *sworn*" because that is when "a proceeding begins before a trier of fact having jurisdiction to try the question of the guilt or innocence of the accused.") When the jury is not sworn to try a criminal case, even an acquittal will not bar a second prosecution for the same offense. *See Spencer*

v. State, 281 Ga. 533, 534-35 (2007) (holding State could prosecute defendant a second time for the same offense where defendant was initially acquitted by a jury not sworn to try the case).

It is only the trial oath, not the *voir dire* oath, that triggers double jeopardy. *United States v. Green*, 556 F.2d 71, 72 (D.C. Cir. 1977) (citing *Serfass*, 420 U.S. at 388, 391-92). When the U.S. Supreme Court held in *Serfass* that jeopardy attaches when the jury is "empaneled and sworn," the word sworn referred "of course, to the trial jury oath and not the *voir dire* oath." *Wedalowski*, 572 F.2d at 74 (quoting *Serfass*, 420 U.S. at 388); *see also Green*, 556 F.2d at 72 (finding language used in *Serfass* of 'empaneled and sworn' "refers to a jury sworn to try the case rather than to a panel sworn only for *voir dire*."). A defendant cannot be placed in jeopardy until he is subjected to the risk of being convicted; the accused is not placed at risk of being convicted until the jury is sworn with the trial oath because it is only after they are sworn to try the case that they have the power to convict a defendant. *Green*, 556 F.2d at 72. Courts are virtually unanimous in holding that jeopardy attaches when the jury is sworn to try the case, not when it is selected. *Wedalowski*, 572 F.2d at 74; s*ee also Hoffler v. Bezio*, 726 F.3d 144, 156 (2d Cir. 2013) (relying on *Serfass* and *Wedalowski* to find that the word 'sworn' refers only to the trial jury oath and not the *voir dire* oath).

In Illinois, up until the point the jury is sworn, an accused has an absolute right to waive her constitutional right to a jury trial and proceed with a bench trial instead. *See People v. Jordan*, 2019 IL App (1st) 161848,

¶24 ("our cases have appropriately drawn the line, for purposes of defining when a defendant no longer has an absolute right to waive a jury trial, at the moment the jury is sworn. This is the same bright line that defines the start of a trial for double jeopardy purposes, and we see no reason to stray from it here."); *People v. Rand*, 291 Ill. App. 3d 431, 436 (1st Dist. 1997) (same); *People ex rel. Daley v. Joyce*, 126 Ill.2d 209, 222 (1988) ("The dimension of our constitutionally protected right to a trial by jury...encompass[es] the right of an accused to waive trial by jury"); Ill. Const.1970, art. I, § 13; *People v. Frazier*, 127 Ill. App. 3d 151, 152 (1st Dist. 1984) (citing *People v. Spegal*, 5 Ill. 2d 211 (1955))(finding it is error to deny a defendant's request for a bench trial prior to the commencement of trial.)

The swearing in of the jury with the trial oath is an integral element of trial on which other federal and state constitutional rights depend. Without properly swearing in jurors with the trial oath, a body authorized to try the case is never formed, and a defendant's constitutional guarantee against double jeopardy and her right to waive a jury collapse.

E. This Court should follow the majority of states and hold that the failure to administer the trial oath constitutes structural error.

Given the essential nature of the trial oath to an impartial jury, the trial court' s failure to swear in the jury with the trial oath undermines the integrity of the judicial process and denies a defendant her right to a fair trial. Highlighting the structural nature of this error is the fact jeopardy does not attach until the jury has been sworn to uphold the trial oath and that, up until the moment the jury takes the trial oath, a defendant has an absolute

right to elect a bench trial. Any holding to the contrary would blur the line of when a trial starts and jeopardy attaches. Accordingly, this Court should join the majority of states that have addressed this issue and hold that the failure to administer the trial oath constitutes structural error.

There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) Structural errors affect "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Id*. Such protections include the denial of the right to counsel or self-representation, the lack of an impartial judge, and the denial of the right to a public trial. *Id*. A trial before a biased tribunal constitutes "structural error not subject to harmless-error review." *People v. Glasper*, 234 Ill. 2d 173, 200-01(2009); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Structural error in Illinois constitutes second prong plain error that requires reversal without regard to a harmless error analysis. This Court has equated the second prong of plain error review with structural error. *See People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Ordinarily, a constitutional error is not reversible unless there is prejudice to the defendant. *See People v. Rivera*, 227 Ill. 2d 1, 15 21 (2007) (determining whether reversal is automatically required for a constitutional error or whether the harmless-error analysis should apply). However, "automatic reversal is required... when an error is deemed structural. Structural errors are systemic, serving

to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. An error is typically designated as structural... if it necessarily renders a criminal trial fundamentally unfair *or* an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at 608 (internal citations and quotation marks omitted) (emphasis added).

A review of law in other states shows a significant majority of state courts holding a conviction by a jury that has not been administered the trial oath is structural error. In *Harris v. State*, 406 Md. 115 (2008), Maryland's supreme court reversed defendant's conviction finding it was structural error to be tried by a jury not administered the trial oath. *Harris*, 406 Md. at 125-27. It clearly delineated between cases where the oath is belatedly administered to the jurors at some point before deliberations (where some courts have applied a harmless error analysis) and cases where there is a complete failure to swear in the jury. *Id.* at 127-29. Because the jury was never sworn to try the case in *Harris*, the *Harris* court declined to address whether a harmless error analysis was appropriate in cases were a jury is belatedly sworn. *Id*. at 129. It emphasized that "the appellate courts in other states, almost unanimously, hold that the complete failure to swear the jury can never be harmless error." *Id*. at 130.

Critically, the *Harris* court also explained that the harmless error principle was inapplicable in a criminal case because jeopardy does not attach until the jury is impaneled and sworn. *Id.* at 131. Thus, an acquittal by a jury not sworn to try the case would allow the State to prosecute the

defendant a second time for the same offense. *Id.* (citing *Spencer v. State*, 281 Ga. 533, 534-35 (2007) (holding State could prosecute defendant a second time for the same offense where defendant was initially acquitted by an unsworn jury.)

Similarly, most states that have addressed the issue have found structural error. *See Ex Parte Benford*, 935 So.2d 421, 429-30 (Ala. 2006) ("a verdict rendered by jurors who have never been sworn is a nullity"); *People v. Pelton*, 116 Cal. App. Supp 789, 791 (1931) ("an entire failure to swear the jury cannot be waived in any manner or under any circumstances"); *Spencer v. State*, 281 Ga. 533, 534 (2007) ("the failure to administer [the] oath to the trial jury requires the setting aside of any conviction"); *State v. Mitchell*, 199 Mo. 105, 108 (1906) (reversing conviction where jury was not sworn); *Brown v. State*, 220 S.W. 3d 552, 554 (Tex. App. 2007) ("a complete failure to administer the jury oath renders the Jury's verdict a nullity and is reversible error"); *State v. Moore*, 57 W.Va. 146, 148 (1905) (jury must be "sworn in the manner prescribed by law before there can be a legal conviction"); *Commonwealth v. Robinson*, 317 Pa. 321 (1935) ("unless it affirmatively appears in a criminal case that the jury was sworn as to all defendants, the constitutional [right to trial by jury] is breached.")

F. The few decisions to the contrary fail to consider the important consequences that follow from the jury being administered the trial oath.

Appellate counsel is aware of only three states finding that a conviction by a jury that was not sworn in with the trial oath does not require

automatic reversal: *People v. Cain*, 489 Mich. 108 (2015); *People v. Arellano*, 125 N.M. 709 (1998); and *State v. Vogh*, 179 Or. App. 585 (2002) However, in none of these cases did the courts give serious consideration to the constitutional nature of the error, nor to the double jeopardy ramifications highlighted above in section D of this argument. *See Vogh*, 179 Or. App. at 587, 598, n. 13 (expressly declining to address double jeopardy implications.)

The analysis in these cases runs counter to the U.S. Supreme Court's recent decision in *Ramos*, which provided that courts must examine the history of the Sixth Amendment right and the Framer's intention in enshrining that right in the U.S. Constitution when considering its application. *Ramos*, U.S. , 140 S. Ct. at 1401 02. Instead of looking to the history of the right to an impartial jury and the constitutional nature of the error in failing to swear in the jury with the trial oath, the *Cain*, *Arellano*, and *Vogh* courts engaged in the exact type of analysis that the Court in *Ramos* denounced when those courts determined that administering the jury with the trial oath was not "important enough." *See Ramos*, U.S. , 140 S. Ct. at 1401 02 (finding it is not the judiciary's role to determine whether a constitutional right is "important enough" to retain); *Cain*, 498 Mich. at 119, n. 4 ("We need not decide at this time whether the error here was limited to a violation of a court rule, as the prosecutor argues, or was a structural constitutional error, as defendant argues, because it is undisputed that since this is an unpreserved error, defendant must satisfy the plain-error standard of Carines in either event."); *Arellano*, 125 N.M. at 713

("We hold that although the oath generally may not be bypassed, if by some inadvertence the court has not administered it to the jury before the jury renders the verdict, it is not necessarily reversible error."); *Vogh*, 179 Or. App. at 596 ("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 jurors' actual performance of their duties in conformance with that oath, or the jurors' eligibility or competence to be jurors."*)*

Notably, the dissents in *Cain* and *Arellano* both conducted a well-reasoned and in-depth analysis of the right to an impartial jury and of the history of the oath that fell more in line with the spirit of *Ramos*. The dissent in *Cain* explained how history showed that the right to an impartial jury hinged on the jury being administered the trial oath. *Cain*, 498 Mich. at 129-41 (Viviano, J. dissenting) The dissent in *Arellano* recognized that "a sworn jury in a criminal trial is fundamental to our system of justice," and criticized the majority for relegating that fundamental right "to the status of a mere formality or technicality that can be ignored." *Arellano*, 125 N.M. at 717 (McKinnon, J. dissenting). The *Arellano* dissent also addressed the essential function of a trial oath and explained its purpose, the effect it has on the jury, and its "design[] to protect the fundamental right of trial by an impartial jury." *Id*. at 718.

G. This Court should reverse the judgment of the appellate court and remand for a new trial.

As found in *Harris* and the majority of state courts to address this issue, the trial court's complete failure to administer the trial oath to the

jury, here, is structural error. Instead of being sworn under the trial oath necessary to try a case and ensure an impartial jury, the jury was sworn in as follows: "do you solemnly swear or affirm you'll truthfully answer all questions asked concerning your qualifications as jurors in this case." (R. 349) Thus, there was a complete failure to administer the jury with the trial oath. As a consequence of the trial court's failure to properly swear in the jury, Moon was not provided with a constitutionally mandated impartial jury, jeopardy never attached, and she still had an absolute right to elect a bench trial. (R. 349)

In affirming Moon's conviction, the appellate court majority below concluded there was no structural error because "the jury here was not completely unsworn." *Moon*, 2020 IL App (1st) 170675, ¶ 43. This conclusion was wrong: "In the Supreme Court's statement [in *Serfass*], the word 'sworn' refers, of course, to the trial jury oath and not to the *voir dire* oath." *Wedalowski*, 572 F.2d at 74. As Justice Connors stated in her dissent, "a jury is not a jury until it is sworn to the trial oath not the *voir dire* oath." *Moon,* 2020 IL App (1st) 170675*,* at ¶ 66 (citing 725 ILCS 5/115-4(g) and Ill. S. Ct. R. 434(e)). She explained that a *voir dire* oath is administered to potential jurors to ensure that they will answer truthfully all questions concerning their qualifications as trial jurors prior to being selected. *Id*. at ¶ 64. The trial oath, on the other hand, is administered to selected jurors to ensure that they will truly weigh the evidence and render a true verdict according to the law and the evidence. *Id*.

Justice Connors also criticized the majority's failure to recognize that the administration of the trial oath marks a critical moment in the case: "The majority fails to recognize the significance of being tried by a jury that has been administered the trial oath. Failure to give the oath not only affects the defendant's rights, including as they pertain to double jeopardy, but also precludes an impartial jury." *Id.* at ¶ 68. The dissent explained that it is the administration of the oath that legally commences the office of the jurors. *Id.* at ¶¶ 65-66. Accordingly, the dissent found that "the trial oath is essential to legally form a jury" and the trial court's error in not administering the trial oath was structural error subject to automatic reversal. *Id.* at ¶¶ 62-71.

Conclusion

Moon asks this Court to agree with the majority of state courts in finding that a conviction by an unsworn jury is structural error, and such an error in Illinois amounts to second-prong plain error that requires automatic reversal.

CONCLUSION

For the foregoing reasons, Omega Moon, petitioner-appellant, respectfully requests that this Court find that a conviction by a jury not sworn to try the case amounts to structural error, which requires automatic reversal and that this Court remand this matter for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 27 pages.

/s/Eric E. Castañeda
ERIC E. CASTAÑEDA
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Omega Moon No. 125959

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2020 IL App (1st) 170675

FIRST DISTRICT
SIXTH DIVISION
March 20, 2020

No. 1-17-0675

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 14 DV 74336
	)	
OMEGA MOON,	)	Honorable
	)	Caroline Kate Moreland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Mikva concurred in the judgment and opinion.
Justice Connors dissented, with opinion.

OPINION

¶ 1 Following a 2016 jury trial, defendant Omega Moon was convicted of domestic battery and sentenced to one year of probation. On appeal, defendant contends that (1) her conviction is a nullity because the jury was not properly sworn before trial, (2) the trial court erred by not asking potential jurors all the *voir dire* questions required by Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and (3) the court did not give a jury instruction required by statute. For the reasons stated below, we affirm.

¶ 2 I. JURISDICTION

¶ 3 On October 24, 2016, a jury found defendant guilty of domestic battery. On March 7, 2017, the court sentenced defendant to one year of probation with fines and fees. Defendant filed her notice of appeal on March 13, 2017. Accordingly, this court has jurisdiction pursuant to article VI,

section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013) and Rule 606 (eff. July 1, 2017) governing appeals from a final judgment of conviction in a criminal case.

¶ 4 II. BACKGROUND

¶ 5 Defendant was charged with domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2014)) for allegedly, on or about June 22, 2014, "knowing and intentionally caus[ing] bodily harm to" family member Shontrell Moon by striking him "several times with a object," leaving belt-buckle-shaped marks on his left arm and "causing redness, swelling and broken skin."

¶ 6 A. Pretrial and Commencement of Trial

¶ 7 The Public Defender of Cook County was appointed to represent defendant.

¶ 8 The State filed a motion to admit as evidence "under the hearsay exception delineated in 725 ILCS 5/115-10" statements made by then-eight-year-old Shontrell to named persons, including a police officer and an employee of the Department of Children and Family Services (Department). Following hearing testimony by the officer and Department employee, the court found their testimony to Shontrell's statements to be admissible.

¶ 9 Before *voir dire*, the court made various remarks to the venire. The court said that it would "discuss some principles of law" but this would not be "your final or formal instructions on the law." The court told the venire that the domestic battery charge against defendant was not evidence and the venire could draw no inference of guilt from it. The court asked if everyone understood, and noted that everyone nodded. The court told the venire that defendant is presumed innocent of the charge unless and until the jury is convinced of her guilt beyond a reasonable doubt. The court asked if everyone understood and accepted this principle, asked the venire to raise a hand if anyone

did not, and noted that nobody did. The court told the venire that the State bears the burden of proving defendant guilty beyond a reasonable doubt. The court asked if everyone understood and accepted this principle, asked the venire to raise a hand if anyone did not, and noted that nobody did. The court told the venire that defendant is not required to prove her innocence and need not present any witnesses. The court asked if anyone disagreed with this principle, asked the venire to raise a hand if anyone did, and noted that nobody did. The court then asked if everyone understood and accepted this principle, asked the venire to raise a hand if anyone did not, and noted that nobody did. The court told the venire that defendant does not have to testify, asked the venire if anyone would hold that principle against her, asked the venire to raise a hand if anyone would, and noted that nobody did. Neither party objected during the court's remarks and questions.

¶ 10 During *voir dire*, the court asked each potential juror, in relevant part, if he or she would decide this case without sympathy, bias, or prejudice to either side; if he or she would wait for all the evidence, arguments, and instructions before making up his or her mind; if he or she would follow the law as given by the court; and if he or she would be fair to both sides.

¶ 11 After 12 jurors and an alternate juror were chosen, the court asked for the jury to be sworn, and the record indicates "(Jury sworn to answer questions.)"

¶ 12 B. Trial Evidence

¶ 13 Shontrell Moon testified that he was 11 years old as of the 2016 trial, had lived with defendant as of June 2014 for about 8 years, and referred to defendant then as his "mom." On June 22, he visited his mother Angel for a few hours with defendant's permission. Angel picked him up by car, and he went home by bicycle when defendant came to Angel's home to tell him to come home. It was still daytime when he arrived home. Defendant then "whipped me with a belt buckle"

multiple times on his bare back and arm when nobody else was in the room. "A little bit later," a police officer came to the home, and Shontrell spoke with her on the porch "about what had happened." That night, he went to a hospital, where he spoke "about what had happened" with a Department employee named Karen. Shontrell had belt buckle marks on his arm and back.

¶ 14 On cross-examination, Shontrell testified that he asked defendant's permission to go to Angel's home when Angel arrived at his home, and that defendant gave permission. He could not recall what time that happened. When asked if he knew that defendant did not allow him to go to Angel's house, Shontrell replied that she gave him such permission, although not often, and denied that the occasion at issue was the first time he asked for permission to go to Angel's home. When asked if two officers came to his home, he maintained that "[t]here was one," the officer who spoke with him on the porch. The officer asked where he had been "because they were looking for you." He denied telling the officer that he was home the entire time, and denied that he was afraid to admit being at Angel's home. He also denied telling Karen at the hospital that defendant's son was in the room when defendant struck him with the belt buckle. However, he acknowledged telling Karen that defendant "doesn't hit" him and that he is not afraid of her. After the night in question, Shontrell lived with defendant for another two months.

¶ 15 On redirect examination, Shontrell clarified that he told Karen that defendant struck him with a belt on the day in question but had not struck him before that day.

¶ 16 Police officer Kimberly Nelson testified that she and another officer went to defendant's home at about 7:30 p.m. on June 22, 2014, in response to a report of a missing child. There, she spoke with defendant, who said that her son Shontrell was missing. When asked why she thought so, defendant said that "some neighborhood kid told her that the child's stepmother came, put his

bike in her car, and took him away in the car." Defendant and Nelson unsuccessfully searched the neighborhood together until defendant spoke with someone by telephone and then said that Shontrell was at home. Nelson and defendant returned home, where defendant stayed in the police car while Nelson spoke with Shontrell. He was shirtless and had a bruise on his arm. When Nelson asked how he came to be bruised, he answered that "he got a whipping" from "his momma" with a belt buckle. When Nelson was asked at trial if Shontrell had clarified who he meant, she testified that he said that "Momma Moon"—that is, defendant—whipped him.

¶ 17 Officer Nelson then went to ask defendant how Shontrell came to be bruised. She initially replied by asking Nelson the same question, before claiming that Shontrell fell while playing basketball the previous day. After conferring with her partner, Nelson decided to arrest defendant. She took her to the police station and summoned an ambulance for Shontrell to take him to a hospital. At trial, Nelson identified various photographs as depicting the buckle-shaped bruises she saw that day on Shontrell's left arm.

¶ 18 On cross-examination, Officer Nelson testified that her search for Shontrell included going to Angel's house, where someone told her that Angel was not home. However, Nelson's report reflected that Angel answered certain questions from Nelson, including admitting that she has no visitation rights regarding Shontrell. Nelson then acknowledged that "I guess I did" speak with Angel. When Nelson questioned Shontrell on the porch, she did not ask him when he was whipped. He told her at first that he went to Angel's home but then said that he had been home "the whole time." Nelson did not "know what his time frame was" for that remark.

¶ 19 Karen Dixon testified to being a child abuse investigator for the Department. She interviewed Shontrell at the hospital on June 22, 2014. He told her that he was out riding his bicycle

when Angel approached him and took him to her home, where he stayed until defendant came to Angel's home and told him to come home. (Dixon explained that Angel, actually named Tara Sahara, is Shontrell's natural mother and defendant was his guardian.) By his account, he returned home by bicycle, where defendant whipped him with a belt in the presence of her son. Shontrell told her that he was not afraid of defendant and that he did not strike him often. Dixon saw "belt marks on his arm and his back" after he removed his shirt. At trial, Dixon identified various photographs as depicting the multiple buckle-shaped bruises she saw that day on Shontrell's back and arm. Shontrell told Dixon that day that he received those injuries from a whipping by defendant. On June 25, Dixon spoke with defendant. She told Dixon that she searched for Shontrell on the day in question until she found him and sent him home, where she whipped him with a belt. Defendant did not tell Dixon that anyone else had harmed Shontrell.

¶ 20 On cross-examination, Dixon testified that Shontrell never told her that he asked defendant for permission to visit Angel. While Dixon's meeting notes indicated that Shontrell said "he is not hit by" defendant, she explained that he said that defendant did not routinely discipline him by hitting him. When defendant was released from police custody, Shontrell was returned to her home. Dixon's notes of her June 25 meeting with defendant, including that defendant admitted whipping Shontrell, were not prepared until mid-August.

¶ 21 On redirect examination, Dixon testified that she documented her investigation, including the meeting notes with defendant, once her investigation was complete. Shontrell did not tell Dixon that defendant did not strike him on June 22, nor that someone else struck him that day. However, on recross-examination, Dixon testified that Shontrell acknowledged being with other adults than defendant on the day in question.

¶ 22 The defense moved for a directed verdict, which the court denied following arguments. The jury instruction conference was then held, during which the defense made no objections. Defendant personally elected not to testify, after conferring with counsel, and the instructions were adjusted accordingly. Neither party sought a jury instruction pursuant to Illinois Pattern Jury Instructions, Criminal, No. 11.66 (approved July 18, 2014) (hereinafter IPI Criminal No. 11.66).

¶ 23 Ariel Gray, defendant's daughter, testified that she was visiting defendant's home at about 1 p.m. on June 22, 2014, when Shontrell and defendant's son went outside to play. After about an hour, defendant left to search for Shontrell, as he was no longer outside her home. Her search was unsuccessful, but Shontrell returned home a few hours later. He did not appear injured but was "a little worried and unsettled." He told Gray that he had been at Angel's home, and Gray phoned defendant to inform her that Shontrell was home. Defendant did not reenter the home. Gray was in a back room when the police arrived so she did not see them. On cross-examination, Gray testified that she did not see Shontrell shirtless that day and thus did not see his back or upper left arm.

¶ 24 Tara Sahara testified that she is Shontrell's natural mother and is also known as Angel. She denied hitting Shontrell on the day in question and denied ever striking him with a belt. While Shontrell was at her home that day, Sahara denied picking him up at defendant's home and presumed he arrived by bicycle. She was not home when he was at her home, so she did not see him on the day in question.

¶ 25 C. Instructions, Deliberations, and Posttrial

¶ 26 The jury was given instruction, including the pattern instruction on general witness credibility (IPI Criminal No. 1.02) but not IPI Criminal No. 11.66.

¶ 27 Following closing arguments, the jury found defendant guilty of domestic battery.

¶ 28 Defendant filed a posttrial motion claiming, in relevant part, insufficiency of the evidence and that the "jury was not sworn to try the issues." The posttrial motion raised no claims regarding *voir dire* or jury instructions. Regarding the jury, defendant alleged that the clerk of the court administered the *voir dire* oath, rather than the trial oath, after jury selection.

¶ 29 Attached to the posttrial motion were affidavits by two assistant public defenders averring to being in court during defendant's trial. After jury selection,

> "the Clerk of Court asked the jurors to swear or affirm that they would truthfully answer all questions asked concerning their qualifications to sit as jurors. *** The Clerk did not administer any oath to the jurors that involved their faithful performance to honestly try the issues joined in the case, without fear, sympathy or prejudice and render a just and fair verdict according to the law and the evidence."

¶ 30 The State responded to the posttrial motion, arguing in relevant part that the evidence was sufficient to convict defendant and that the jury was properly sworn. Regarding the latter, the State noted that the trial transcript did not record the oath verbatim and that defendant made no objection during trial despite two assistant public defenders (while the public defender represented defendant) later averring to hearing the wrong oath administered to the jury. The State argued that "there is a presumption that the correct language was used when the record indicates that an oath was administered."

¶ 31 At the posttrial hearing, the parties stipulated that the jury was administered the *voir dire* oath—"do you solemnly swear or affirm you'll truthfully answer all questions asked concerning your qualifications as jurors in this case"—after jury selection. Following arguments by the parties,

the court denied the motion. Noting that Illinois case law has not determined the effect of a complete trial by an unsworn jury and that several states have found such to be a nullity while other states have found otherwise, the trial court found that a trial by an unsworn jury is not a *per se* error. Thus, a defendant must show prejudice. The court found no prejudice to defendant from the lack of a trial oath, noting that the specific content of the jury's trial oath is not prescribed by statute and that nobody objected when the incorrect oath was given nor thereafter during the trial. The court also noted that the potential jurors were admonished regarding the legal principles governing a criminal case and that all were asked if they could decide the case without prejudice or sympathy and wait for all the evidence, arguments, and instructions before so deciding. Regarding the sufficiency of the evidence, the court noted that there were discrepancies in the testimony but expressly found Shontrell's testimony to be consistent and amply corroborated on the key question of who inflicted belt-buckle-shaped marks upon him.

¶ 32 Following a sentencing hearing, the court sentenced defendant to one year of probation with fines and fees. This appeal timely followed.

¶ 33 III. ANALYSIS

¶ 34 On appeal, defendant contends that (1) her conviction is a nullity because the jury was not properly sworn before trial, (2) the trial court erred by not asking potential jurors all the *voir dire* questions required by Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and (3) the court did not give the IPI Criminal No. 11.66 instruction as required by statute.

¶ 35 A. Jurors' Trial Oath

¶ 36 Defendant primarily contends that her conviction is a nullity because the jury was not properly sworn before trial, and she seeks remand for a new trial. While defendant raised this claim

in her posttrial motion, she did not object before or during trial to the jury not being administered the trial oath.

¶ 37 Swearing in a criminal trial jury is vital, as it signifies the moment at which jeopardy attaches. *Martinez v. Illinois*, 572 U.S. 833, 840 (2014) (*per curiam*); 720 ILCS 5/3-4(a)(3) (West 2018). However, no Illinois statute or Supreme Court Rule prescribes the form or language of the criminal trial juror's oath, though statutes prescribe the form of various other jury oaths. See, *e.g.*, 725 ILCS 5/112-2(c) (West 2018) (criminal grand jury); 55 ILCS 5/3-3024 (West 2018) (coroner's jury); 735 ILCS 30/10-5-40 (West 2018) (eminent domain cases).

¶ 38 Of historical interest is *Cornelius v. Boucher*, 1 Ill. 32 (1820), where our supreme court found that an irregularity in swearing a civil jury (the jury was sworn to try only one issue of fact among three while its verdict was not based on that issue) was waived or forfeited by the failure to object at the time. "The swearing the jury, is matter of form, and if not objected to at the time, an irregularity in the manner of swearing them, can not afterwards be assigned as error." *Id.* at 33. Our supreme court similarly held in *McDonald v. Fairbanks, Morse & Co.*, 161 Ill. 124, 131 (1896), that a civil verdict was not void or irregular merely because the trial proceeded to verdict without the jury being fully sworn (the jury was sworn to try the issues but not to assess damages) when "no objection was made, and the attention of the court was not called to the matter in any way."

¶ 39 In *People v. Abadia*, 328 Ill. App. 3d 669, 675-76 (2001), this court considered as a matter "of first impression in Illinois" a claim that two criminal defendants were entitled to a new trial when their jury was not sworn until the second day of trial. There, as here, the exact wording of the jurors' oath was not recorded, and the defendants did not object at trial to the absence of the

oath. *Id.* While noting that "the juror's oath is a solemn vow to serve the rule of law which governs the social contract of our society," we found that the issue was "whether the failure to administer the juror's oath until the conclusion of the first day of testimony vitiates the entire proceeding and entitles defendants to a new trial." *Id.* at 676. We answered that question in the negative, noting that the court had instructed the jury on its duties at length before trial commenced. *Id.* at 676-77.

> "The extensive nature of the Judge's pretrial instructions to the jury and the fact that the jury in this case was sworn before they began deliberations obviate our concern that the proceeding was tainted. All the concepts required by our system of justice to be communicated to a juror were effectively imparted in these pretrial instructions. In this case, it is clear from the record that the pretrial instructions preserved the integrity of the proceeding until the juror's oath was administered. While swearing the jury is preferably done prior to opening statements (as all pretrial instructions may not be as thorough as those given in the instant case), the one-day delay in giving the oath did not deprive these defendants of a fair trial." *Id.* at 677.

The *Abadia* court cited various cases from other jurisdictions as persuasive. *Id.* at 677-78 (and cases cited therein). We also stated that "we believe that it is incumbent upon the defense to raise an objection to an unsworn jury at trial or risk waiving the issue on appeal." *Id.* at 678.

¶ 40 Turning to courts outside Illinois, we find a significant split in the case law on unsworn juries. See, *e.g.*, *Adams v. State*, 690 S.E.2d 171, 173 (Ga. 2010) (discussing the stances of various state courts); *Harris v. State*, 956 A.2d 204, 210-11 (Md. 2008) (same). Some courts have held a trial with an unsworn jury is a nullity. *Adams*, 690 S.E.2d at 173-74 (complete trial by unsworn jury is a nullity, but prejudice must be shown when oath given before deliberations); *Barclay v.*

State, 39 So. 3d 209, 211 (Ala. Crim. App. 2008) (as verdict by unsworn jury is a nullity, claim of such is jurisdictional). In other words, these courts have found an unsworn jury to be a structural error not subject to forfeiture or harmless error analysis. *Adams*, 690 S.E.2d at 173 (but belated oath is subject to harmless error); *Harris*, 956 A.2d at 211-12; *Barclay*, 39 So. 3d at 211.

¶ 41 However, other courts have held that a jury not given the trial oath is not structural error but an error subject to forfeiture. See, *e.g.*, *People v. Cain*, 869 N.W.2d 829 (Mich. 2015); *State v. Arellano*, 1998-NMSC-026, 125 N.M. 709, 965 P.2d 293. "The oath imposes on the jurors three duties: (1) to justly decide the questions submitted, (2) to render a true verdict, and (3) to do these things only on the evidence introduced and in accordance with the instructions of the court." (Internal quotation marks omitted.) *Cain*, 869 N.W.2d at 836. "Our review of the record in this case reveals that the error of failing to properly swear the jury did not undermine the proceedings with respect to the broader pursuits and values that the oath seeks to advance." *Id.*

> "The failure to provide the correct oath was an error, but not one that would result in manifest injustice if left unremedied here. We do nothing to diminish the value of the juror's oath to say that its absence *in this case* did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. It is but one component—as important and as symbolic as it may be—in a larger process of fair and impartial adjudication. Because the record before us indicates that defendant was actually ensured a fair and impartial jury, we conclude that his constitutional rights were upheld and reversal is not warranted." (Emphasis in original.) *Id.* at 840.

¶ 42 Here, the jurors were administered the *voir dire* oath rather than the trial oath before trial, and defendant did not bring this to the trial court's attention until her posttrial motion, so that the

entire trial was heard by a jury not given the trial oath. We are faced with a clear error of a trial by a jury never sworn to try the case and an equally clear forfeiture of defendant's claim.

¶ 43 However, we need not resolve the effect under Illinois law of a forfeited claim of a trial by an unsworn jury, because the jury here was not completely unsworn. It was administered an oath at the trial court's direction after the jury was selected and before opening statements and testimony. While that oath did not mention trying the issues in the case according to the law and evidence, the jurors all solemnly swore to truthfully answer all questions asked, albeit about their qualifications as jurors. We cannot find anything but clear error in the defective wording of that oath. Of the duties imposed by the trial oath as described in *Cain*, the oath sworn by the jury here directed the jurors to properly answer all questions submitted to them but did not direct them to render a true verdict upon only the evidence and instructions presented. However, we also cannot in fairness to all involved in the trial find that this jury was outright or absolutely not administered a solemn oath at the proper and crucial moment between its selection and the commencement of trial. We note that the Michigan Supreme Court in *Cain* faced the same circumstances as here: the jury was given the *voir dire* oath rather than the trial oath just before trial. *Cain*, 869 N.W.2d at 831. See also *Ex parte Benford*, 935 So. 2d 421, 429 (Ala. 2006) (when venire given *voir dire* oath but jurors not given trial oath, oath was defective rather than nonexistent and forfeiture applied).

¶ 44 We may consider a forfeited claim as a matter of plain error: a clear and obvious error that either (1) occurred when the evidence was so closely balanced that the error alone threatened to change the result or (2) was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. We shall therefore conduct a plain error analysis, beginning by reiterating that the error in giving the wrong oath was clear.

¶ 45 We find that the evidence here was not closely balanced. The evidence was clear that Shontrell was whipped with a belt so that the buckle struck his back multiple times. Shontrell testified to being so attacked on the day alleged, Officer Nelson and Department investigator Dixon testified to seeing the buckle-shaped injuries on Shontrell that same day, and photographs of Shontrell's injuries were entered into trial evidence. Shontrell was consistent that defendant was the person who whipped him with a belt buckle, telling Officer Nelson and Dixon so on the day in question as well as testifying so at trial. Moreover, Dixon testified that defendant admitted to whipping Shontrell with a belt. We agree with the trial court that, while there were discrepancies in the testimony, they did not impeach the evidence that defendant battered Shontrell as alleged. Indeed, to the extent that evidence showed that Shontrell went to Sahara's home without defendant's permission, contrary to Shontrell's trial testimony, such evidence tends to show defendant's motive for whipping Shontrell.

¶ 46 Turning to second-prong plain error, we find, as the *Cain* court found, that our

> "review of the record reveals that the jurors were conscious of the gravity of the task before them and the manner in which that task was to be carried out, the two primary purposes served by the juror's oath. Thus, we cannot say that the error here of failing to properly swear the jury seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Cain*, 869 N.W.2d at 831.

Here, the court asked every potential juror during *voir dire* if he or she would decide this case without sympathy, bias, or prejudice to either side; if he or she would wait for all the evidence, arguments, and instructions before making up his or her mind; if he or she would follow the law as given by the court; and if he or she would be fair to both sides. As in *Cain*, we find that those

inquiries, and the court's other instructions and admonishments, sufficiently addressed the purposes of the trial oath to conclude that the clear error did not affect the fairness of the trial or challenge the integrity of the judicial process.[1] Giving the wrong oath was clear error but not plain error under either prong.

¶ 47 B. Rule 431(b)

¶ 48 Defendant also contends that the trial court erred by not asking the venire or potential jurors all the *voir dire* questions required by Rule 431(b). In particular, she argues that the court erred by not asking whether the venire both understood and accepted the principle that it cannot be held against a defendant that he or she does not testify.

¶ 49 Defendant forfeited this claim by not raising it in the trial court (see *Sebby*, 2017 IL 119445, ¶ 48) but argues that we may consider it as plain error. As stated above, plain error is a clear and obvious error that either (1) occurred when the evidence was so closely balanced that the error alone threatened to change the result or (2) was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *Id.*

¶ 50 Failure to comply with Rule 431(b) is not second-prong plain error unless the defendant shows that the Rule 431(b) violation actually produced a biased jury. *Id.* ¶ 52. As defendant does not so claim, any plain error here would have to arise from closely balanced evidence. In determining whether evidence was closely balanced, we perform a commonsense and qualitative, rather than strictly quantitative, assessment of the entirety of the trial evidence in context against

[1]This conclusion should not be confused with a finding that the error was harmless. A forfeited error not constituting second-prong plain error is not the same as a preserved error being harmless beyond a reasonable doubt. *People v. Effinger*, 2016 IL App (3d) 140203, ¶ 43 (citing *People v. Thurow*, 203 Ill. 2d 352, 363 (2003)).

the elements of the charged offense. *Id.* ¶ 53. Evidence is closely balanced when the State and defense witnesses presented two plausible opposing accounts of events and no extrinsic evidence corroborated or contradicted either version, so that the conviction necessarily rested upon a credibility contest. *Id.* ¶¶ 61-63. Conversely, there is no credibility contest, and evidence is not closely balanced, "when one party's version of events is unrefuted, implausible, or corroborated by other evidence." *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 48. "[E]vidence need not be perfect to avoid application of the plain error doctrine." *Id.* ¶ 49.

¶ 51 Rule 431 governs *voir dire* examination of potential jurors, and Rule 431(b) provides that:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 52 Under Rule 431(b), a court may not merely give "a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." Ill. S. Ct. R. 431, Committee Comments (eff. July 1, 2012). As our supreme court has stated, "the language of Rule 431(b) is clear and unambiguous; the rule states that the trial court 'shall ask' whether jurors

understand and accept the four principles set forth in the rule. The failure to do so constitutes error." *People v. Belknap*, 2014 IL 117094, ¶ 45. It has found that "the trial court committed error when it failed to ask prospective jurors whether they *both* understood and accepted the principles set forth in Rule 431(b)." (Emphasis in original.) *Id.* ¶ 46. "While *** it is arguable that the trial court's asking for disagreement, and getting none, is equivalent to the jurors' acceptance of the Rule 431(b) principles, the court's failure to ask the jurors whether they understood the principles is error in and of itself." *Id.* ¶ 44. The supreme court has found clear error where the "trial court asked jurors whether they 'had any problems with' or 'believed in' those principles." *Sebby*, 2017 IL 119445, ¶ 49.

¶ 53 Here, we find clear error because the trial court did not ask the venire or prospective jurors if they understood the fourth Rule 431(b) principle: that it cannot be held against a defendant if he or she does not testify. However, we find no plain error because the trial evidence was not closely balanced, as stated above. See *Sebby*, 2017 IL 119445, ¶¶ 49-52 (finding "a clear error" under Rule 431(b), holding that a Rule 431(b) violation is generally not second-prong plain error, and "turn[ing] to the trial evidence because a requisite to relief under the first prong is a finding that that evidence was closely balanced").

¶ 54 C. Jury Instructions

¶ 55 Lastly, defendant contends that the court erred in not giving the jury the IPI Criminal No. 11.66 instruction as required when evidence is admitted pursuant to the hearsay exception under section 115-10 of the Code of Criminal Procedure. 725 ILCS 5/115-10 (West 2014).

¶ 56 Section 115-10 provides that, if the trial court admits a hearsay statement pursuant to its provisions, the trial court must instruct the jury that "it is for the jury to determine the weight and

credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2014). IPI Criminal No. 11.66 implements this statutory provision and states:

> "You have before you evidence that ____ made statements concerning the offense charged in this case. It is for you to determine whether the statements were made, and, if so, what weight should be given to the statements. In making that determination, you should consider the age and maturity of ____, the nature of the statements, and the circumstances under which the statements were made." IPI Criminal No. 11.66.

¶ 57 Failure to give IPI Criminal No. 11.66 when a statement was admitted under section 115-10 is clear and obvious error. See *People v. Sargent*, 239 Ill. 2d 166, 190 (2010). Thus, even if a defendant fails to seek IPI Criminal No. 11.66 and to challenge the absence of IPI Criminal No. 11.66 in the posttrial motion, the absence of IPI Criminal No. 11.66 may be considered on appeal as a matter of plain error. *Id.* at 188-89. "The erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Id.* at 191. However, where the jury was given IPI Criminal No. 1.02 on witness credibility, there was no second-prong plain error because the jury was provided "similar principles regarding the jury's role in assessing witness credibility and the various criteria jurors may consider when making that assessment." *Id.* at 192.

¶ 58 Here, defendant did not seek the IPI Criminal No. 11.66 instruction at trial, nor challenge the absence of IPI Criminal No. 11.66 in her posttrial motion. Thus, we may consider this

contention only as plain error that, in light of *Sargent*, would have to be first-prong plain error. However, as stated above, we find the trial evidence here to not be closely balanced. That analysis does not change because Shontrell's pretrial statements admitted under section 115-10 are part of that trial evidence, as this jury received the same witness credibility instruction, IPI Criminal No. 1.02, as in *Sargent*.

> "[W]e may consider the hearsay outcry statements on the prosecution's side of the scale as we determine whether the evidence was closely balanced for purposes of plain error review and whether the omitted instruction was the error that tipped the scales of justice against defendant, in light of the fact that a similar, though not identical, instruction was given." *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 71 (citing *Sargent*, 239 Ill. 2d at 194).

Thus, we find no plain error here.

¶ 59 IV. CONCLUSION

¶ 60 Accordingly, we affirm the judgment of the circuit court.

¶ 61 Affirmed.

¶ 62 JUSTICE CONNORS, dissenting:

¶ 63 I disagree with the majority that the trial court's instructions and admonishment were sufficient to cure the defects in the oath sworn by this jury. There was no trial jury oath sworn by this jury. Accordingly, I respectfully dissent.

¶ 64 The process of obtaining a jury for trial begins with the summoning of a jury panel, which is the group of people from which the trial jury is selected. When this group has assembled in the

courtroom, an oath is administered to all members that they will answer truthfully all questions concerning their qualifications as trial jurors. This oath is often called the *voir dire* oath. A jury is then selected from this group. Before the trial properly begins, an oath is administered to the jurors selected for the trial that they will truly weigh the evidence and render a true verdict according to the evidence. This may be called the trial oath, to distinguish it from the *voir dire* oath.

¶ 65 The administration of the trial oath marks a highly significant moment in the case. A defendant is not placed in jeopardy until a jury has been sworn to try a case: "[U]ntil that moment, a defendant is subject to no jeopardy, for the twelve individuals in the box have no power to convict him." *United States v. Green*, 556 F.2d 71, 72 (D.C. Cir. 1977) (citing *Breed v. Jones*, 421 U.S. 519 (1975), and *Serfass v. United States*, 420 U.S. 377 (1975)). Jeopardy attaches at the time after which the defendant may not be reprosecuted on the same claim, whether the defendant is acquitted or convicted. *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

¶ 66 Further, in *Patton v. Yount*, 467 U.S. 1025 (1984), the Supreme Court confirmed that it is the trial oath that provides the defendant an impartial jury by obligating jurors to set aside any previous knowledge or bias. In reviewing whether a juror should have been excused for cause, the Supreme Court held that the key question was whether the juror swore "that he could set aside any opinion he might hold and decide the case on the evidence." *Id.* at 1036. A year later, in *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), the Supreme Court stated that the proper standard for determining when a prospective juror may be excluded for cause "is whether the juror's views would 'prevent or substantially impair the performance of his *duties as a juror* in accordance with his instructions and his *oath*' " (emphases added) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). Thus, the trial oath has implications for when jurors can be excused. Ultimately, upon being impaneled, an oath legally commences the office of the juror. *United States v. Olano*, 507

U.S. 725, 740 (1993). A jury is not a jury until it is sworn to the trial oath—not the *voir dire* oath. Both section 115-4(g) of the Code of Criminal Procedure (725 ILCS 5/115-4(g) (West 2014) ("Trial by Court and Jury"), and Illinois Supreme Court Rule 434(e) (eff. Feb. 6, 2013) ("Jury Selection"), require that a jury be impaneled and sworn. Here, the jurors were never asked to swear or affirm to well and truly try the matters at issue and render a true verdict according to the law and evidence.

¶ 67 The solemnity of the trial oath awakens the conscience of the jurors and impresses on them their serious duty. *State v. Arellano*, 1998-NMSC-026, ¶ 43, 125 N.M. 709, 965 P.2d 293 (McKinnon, J., dissenting, joined by Minzner, J.). I believe that the failure to properly swear the jury—that is, administer the trial oath—is structural error. Of note, during defendant's motion for a new trial, the State conceded that the error was structural and could not be waived. A criminal defendant has a constitutional right to a trial by an impartial jury. *People v. Encalado*, 2018 IL 112059, ¶ 24 (citing *Morgan v. Illinois*, 504 U.S. 719, 727 (1992)). The trial oath is designed to protect that fundamental right. *Arellano*, 1998-NMSC-026, ¶ 41 (McKinnon, J., dissenting, joined by Minzner, J.). And, the Maryland Court of Appeals has found that it was structural error to be tried by an unsworn jury, not subject to waiver or harmless error analysis. *Harris v. State*, 956 A.2d 204, 209-11 (Md. 2008). Notably, *Harris* differentiated between cases where the jury was sworn at some point and cases where the jury had not been sworn at all. *Harris* also stated that "the appellate courts in other states, almost unanimously, hold that the complete failure to swear the jury can never be harmless error." *Id.* at 213.

¶ 68 Nonetheless, the majority states, "[w]e are faced with a clear error of a trial [court] by a jury never sworn to try the case" (*supra* ¶ 42), but then decides without in-depth analysis that the trial court's admonishments and instructions were sufficient to cure the error. The majority also

mentions, but does not elaborate on, the numerous jurisdictions that have found an unsworn jury to be structural error and not subject to forfeiture or harmless error. The majority finds significant the analysis in *People v. Cain*, 869 N.W.2d 829 (Mich. 2015). However, I find *Cain* compelling because of the research and reasoning in the dissent, which provides a careful history of the trial oath and a thorough explanation of the conclusion that the sixth amendment to the United States Constitution guarantees the right to a sworn jury and that a defendant tried without a sworn jury is deprived of constitutional protection. *Id.* at 840-58 (Viviano, J., dissenting, joined by McCormack, J.). The majority fails to recognize the significance of being tried by a jury that has been administered the trial oath. Failure to give the oath not only affects the defendant's rights, including as they pertain to double jeopardy, but also precludes an impartial jury.

¶ 69 In *People v. Cole*, 54 Ill. 2d 401, 411 (1973), our supreme court stated that "[t]he right to a trial by an impartial tribunal is so basic that a violation of the right requires a reversal." In my view, the failure of the jury to receive the trial oath is structural plain error.

¶ 70 Under the second prong of plain error review, "[p]rejudice to the defendant is presumed because the importance of the right involved, '*regardless* of the strength of the evidence.' " (Emphasis in original.) *People v. Herron*, 215 Ill. 2d 167, 187 (2005) (quoting *People v. Blue*, 189 Ill. 2d 99, 138 (2000)). In *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), the court equated the second prong of plain error with structural error, asserting that "automatic reversal is only required where an error is deemed 'structural,' *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial' " (quoting *Herron*, 215 Ill. 2d at 186).

¶ 71 For these reasons, I dissent and would hold that the trial oath is essential to legally form a jury.

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS)
)
)
vs.)
Omega Moon)

Case No: 14DV7433601
Judge: Caroline Kate Moreland
Attorney: Andrew Wrona, ASAD

NOTICE OF APPEAL

FILED
MAR 13 2017
DOROTHY BROWN
CLERK OF CIRCUIT COURT

An Appeal is taken from the order of judgment described below:

APPELLANT'S NAME: Omega Moon
APPELLANT'S ADDRESS: 14544 San Francisco, Posen, IL 60469
APPELLANT'S ATTORNEY: Office of the State Appellate Defender
ATTORNEY'S ADDRESS: 203 North LaSalle Street, 24th Floor, Chicago, IL 60601
ATTORNEY'S EMAIL: 1stDistrict@osad.state.il.us
OFFENSE: Domestic Battery (a)(1)
JUDGMENT: Verdict of guilty
DATE OF JUDGMENT: 3/7/17
SENTENCE: 12 mos. probation
IF NOT A CONVICTION, NATURE OF ORDER APPEALED FROM:

APPELLANT/APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the Appellant; order the Clerk to prepare the Record on appeal, and to appoint the State Appellate Defender as counsel on appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is now unable to pay for the Record or to retain counsel on appeal.

APPELLANT/APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED that the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished to appellant without cost, within 45 days of receipt of this Order.
Dates to be Transcribed: 10/24/16; 11/28/16; 12/20/16; 1/10/17; 1/20/17; 2/7/17; 3/7/17
C203

DATE: March 13, 2017

ENTER:
JUDGE

64 RM C 101)

Collection of Codified Trial Oaths From 40 States

The majority of states have codified some variation of the language "true verdict according to the law and/or evidence evidence" in the impanelment oath, or that have codified some variation of the language "true deliverance and/or truly try according to the law and/or evidence."

1. **Alabama:**
"You do solemnly swear, or affirm, that you will well and truly try all issues joined between the defendant(s) and the State of Alabama and render a **true verdict** thereon **according to the law and evidence**, so help you God."

AL ST RCRP Rule 18.5

2. **Alaska:**
Do each of you solemnly swear or affirm that you will **well and truly try** the issues in the matter now before the court **solely on the evidence introduced** and in accordance with the instructions of the court?

Alaska R. Crim. P. 24

3. **Arizona:**
When the jury has been selected, the justice of the peace shall administer to it substantially the following oath: "Do you swear or affirm that you will give careful attention to the proceedings, abide by the court's instructions and **render a verdict in accordance with the law and evidence** presented to you, so help you God".

Ariz. Rev. Stat. Ann. § 22-322

4. **Arkansas:**
Petit jurors upon being impaneled pursuant to this act shall take the following oath: "I do solemnly swear (or affirm) that I will well and truly try each and all of the issues submitted to me as a juror and a **true verdict** render **according to the law and the evidence**."

Ark. Code Ann. § 16-30-103 (b) (West)

When a jury of twelve (12) qualified jurors shall have been duly impaneled, they shall be sworn substantially as follows:
"You, and each of you, do solemnly swear, that you will well and truly try the case

of the State of Arkansas against A. B., and a **true verdict render**, unless discharged by the court or withdrawn by the parties."
Ark. Code Ann. § 16-89-109 (West)

5. **Colorado:**
That you and each of you will well and truly try the matter at issue between _____, the plaintiff, and _____, the defendant, and a **true verdict** render, **according to the evidence**.

CO ST CTY CT RCP Rule 347 (i)

6. **Connecticut:**
You solemnly swear or solemnly and sincerely affirm, as the case may be, that you will, without respect of any persons or favor of any person, **decide this case** between the state of Connecticut and the defendant (or defendants) **based on the evidence given in court and on the laws of this state**, as explained by the judge; that you will not talk to each other about this case until instructed to do so; that you will listen to and consider what the other jurors have to say in deliberations about this case; that you will not speak to anyone else, or allow anyone else to speak to you, about this case until you have been discharged by the court; and that when you reach a decision, you will not disclose the decision until it is announced in court; so help you God or upon penalty of perjury.

Conn. Gen. Stat. Ann. § 1-25 (West)

7. **Delaware:**
The jury shall be sworn or affirmed that they will "faithfully and impartially **try the cause** pending between the said ..... plaintiff and ..... defendant and make a true and just report thereupon **according to the evidence**"

Del. Code Ann. tit. 25, § 5713 (b) (West)

8. **Florida:**
The following oath shall be administered to the jurors: "Do you solemnly swear (or affirm) that you will well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and the evidence, so help you God?"

Fla. R. Crim. P. 3.360

9. Georgia:
Each panel of the trial jury shall take the following oath:
"You shall well and truly try each case submitted to you during the present term and a **true verdict** give, **according to the law** as given you in charge and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge, without favor or affection to either party, provided you are not discharged from the consideration of the case submitted. So help you God."

Ga. Code Ann. § 15-12-139 (West)

10. Idaho:
You do swear that you will well and truly try this issue between the state of Idaho and A.B., the defendant, and a **true verdict render according to the evidence.**

Idaho Code Ann. § 19-3913 (West)

11. Indiana:
Before the commencement of the trial, an oath must be administered to each juror that the juror will:
(1) well and truly try the matter in issue between the parties; and
(2) **give a true verdict; according to law and evidence.**

Ind. Code Ann. § 34-36-3-6 (West)

12. Iowa:
2.67(7) Oath of jurors. The magistrate must thereupon administer to them the following oath or affirmation: "You do swear (or, you do solemnly affirm, as the case may be) that you will well and truly try the issue between the state of Iowa and the defendant, and a **true verdict give according to the law and evidence.**"

Iowa R. Crim. P. 2.67 (7)

13. Kansas:
(d) Oath of jurors. The jurors must swear or affirm to try the case conscientiously and return a **verdict according to the law and the evidence.**

Kan. Stat. Ann. § 60-247 (West) (Kansas)

14. **Kentucky:**
The court shall swear the petit jurors using substantially the following oath: "Do you swear or affirm that you will impartially try the case between the parties and give a **true verdict according to the evidence and the law**, unless dismissed by the court?"

Ky. Rev. Stat. Ann. § 29A.300 (West)

15. **Louisiana:**
When selection of jurors and alternate jurors has been completed, and all issues properly raised under Article 795 have been resolved, the jurors shall then be sworn together to **try the case in a just and impartial manner**, each to the best of his judgment, and to render a **verdict according to the law and the evidence.**

Crim. Proc. Ann. art. 790

16. **Maine:**
The following oath shall be administered to jurors in criminal cases: "You swear, that in all causes committed to you, you will give a **true verdict** therein, **according to the law and evidence** given you. So help you God."

Me. Rev. Stat. tit. 15, § 1254

17. **Massachusetts:**
The following oath shall be administered to the jurors for the trial of all criminal cases which are not capital:
You shall well and **truly try** the issue between the commonwealth and the defendant, (or the defendants, as the case may be,) **according to your evidence**; so help you God.

Mass. Gen. Laws Ann. ch. 278, § 4 (West)

18. **Michigan:**
The following oath shall be administered to the jurors for the trial of all criminal cases: "You shall well and truly try, and **true deliverance** make, between the people of this state and the prisoner at bar, whom you shall have in charge, **according to the evidence and the laws** of this state; so help you God."

Mich. Comp. Laws Ann. § 768.14 (West)

19. **Minnesota:**
To petit juries in criminal cases:
"You each do swear that, without respect of persons or favor of any person, you will well and truly try, and **true deliverance** make, between the state of Minnesota and the defendant, **according to law and the evidence** given you in court. So help you God."

Minn. Stat. Ann. § 358.07 (3) (West)

20. **Mississippi:**
You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, or under its direction, during the present term, and **true verdicts give according to the evidence.** So help you God.

MS R RCRP Rule 18.5

Petit jurors shall be sworn in the following form:
"You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, during the present term, and **true verdicts give according to the evidence.** So help you God."

Miss. Code. Ann. § 13-5-71 (West)

21. **Montana:**
As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ...., the plaintiff, and ...., the defendant, and **render a true verdict according to the evidence.**

Mont. Code Ann. § 25-7-207 (West)

22. **Nebraska:**
When all challenges have been made, the following oath shall be administered: You shall well and truly try, and **true deliverance** make, between the State of Nebraska and the prisoner at the bar (giving his name), so help you God.

Neb. Rev. Stat. Ann. § 29-2009 (West)

23. Nevada:
When the jury has been impaneled, the court shall administer the following oath: Do you and each of you solemnly swear that you will well and truly try this case, now pending before this court, and a **true verdict render according to the evidence given**, so help you God.

Nev. Rev. Stat. Ann. § 175.111 (West)

24. New Hampshire:
The following oath shall be administered to petit jurors in criminal cases: You solemnly swear or affirm that you will **carefully consider the evidence and the law presented** to you in this case and that you will deliver a **fair and true verdict** as to the charge or charges against the defendant. So help you God.

N.H. Rev. Stat. Ann. § 606:2

25. New Jersey:
"Do you swear or affirm that you will try the matter in dispute and **give a true verdict according to the evidence**?"

N.J. Stat. Ann. § 2B:23-6 (West)

26. New Mexico:
Do you swear or affirm that you will arrive at **a verdict according to the evidence and the law** as contained in the instructions of the court?

NM R CR UJI 14-123

27. North Carolina:
You do solemnly swear (affirm) that you will truthfully and without prejudice or partiality try all issues in civil or criminal actions that come before you and **give true verdicts according to the evidence**, so help you, God.

N.C. Gen. Stat. Ann. § 11-11

28. North Dakota:
To a Jury. Do you solemnly swear that you will **consider all the evidence in this case**, follow the instructions given to you, deliberate **fairly and impartially** and **reach a fair verdict**? So help you God.

N.D. R. Ct. 6.10 (2)

29. Ohio:
In criminal cases jurors and the jury shall take the following oath to be administered by the trial court or the clerk of the court of common pleas, and the jurors shall respond to the oath "I do swear" or "I do affirm": " Do you swear or affirm that you will diligently inquire into and carefully deliberate all matters between the State of Ohio and the defendant (giving the defendant's name)? Do you swear or affirm you will do this to the best of your skill and understanding, **without bias or prejudice**? So help you God."

Ohio Rev. Code Ann. § 2945.28 (West)

30. Oklahoma:
The jury consists of twelve persons except that in misdemeanors it shall consist of six persons, chosen as prescribed by law, and sworn or affirmed well and truly to try and true deliverance to make between the State of Oklahoma and the defendant whom they shall have in charge, and **a true verdict to give according to the evidence**.

Okla. Stat. Ann. tit. 22, § 601 (West)

The jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and **a true verdict give, according to the law and the evidence**.

Okla. Stat. Ann. tit. 12, § 576 (West)

31. Oregon:
Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and **a true verdict give according to the law and evidence** as given them on the trial.

Or. R. Civ. P. 57 (E)

32. Pennsylvania:
(A) After all jurors have been selected, the jury, including any alternates, shall be sworn as a body to hear the cause.
(B) The following oath shall be administered:

"You do solemnly swear by Almighty God [and those of you who affirm do declare and affirm] that you will well and truly try the issue joined between the Commonwealth and the defendant(s), and **a true verdict render according to the evidence.**"

Pa. R. Crim. P. 640

33. Rhode Island:
"You swear (or, affirm) that you will well and truly try and **true deliverance** make between the state of Rhode Island and Providence Plantations and the prisoner (or, defendant) at the bar **according to law and the evidence** given you: So help you God. (Or: This affirmation you make and give upon peril of the penalty of perjury.)"

R.I. Gen. Laws Ann. § 9-10-20 (West)

34. South Dakota:
As soon as the jury is completed, the following oath shall be administered to the jurors.
Do you, and each of you, swear or affirm that you will fairly hear the matters in dispute and **render a verdict according to the evidence** and the instructions of the court, so help you God?

S.D. Codified Laws § 15-14-11

35. Texas:
When the jury has been selected, the following oath shall be administered them by the court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will **a true verdict render according to the law and the evidence**, so help you God".

Tex. Code Crim. Proc. Ann. art. 35.22 (West)

36. Utah:
Juror Oath. When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and **render a true verdict according to the evidence** and the instructions of the court.

Utah R. Crim. P. 18 (g)

37. Vermont:
You solemnly swear that, without respect to persons or favor of any man, you will well and truly try and **true deliverance make**, between the State of Vermont and the prisoner at the bar, whom you shall have in charge, **according to the evidence given you in court and the laws** of the State. So help you God.

Vt. Stat. Ann. tit. 12, § 5804 (West)

38. Washington:
The jury shall be sworn or affirmed well and **truly to try** the issue between the State and the defendant, **according to the evidence** and instructions by the court.

CRR CrR 6.6

When the jury has been selected, an oath or affirmation shall be administered to the jurors, in substance that they and each of them, will well, and truly try, the matter in issue between the plaintiff and defendant, and **a true verdict give, according to the law and evidence** as given them on the trial.

Wash. Rev. Code Ann. § 4.44.260 (West)

39. Wisconsin:
The jurors selected to try the issues in the action or proceeding shall take an oath or affirmation to try the issues submitted to them and, unless discharged by the court, to **give a verdict according to the law and the evidence** given in court.

Wis. Stat. Ann. § 756.08 (1) (West)

40. Wyoming:
As soon as the jury is selected an oath or affirmation shall be administered to the jurors providing, in substance, that they and each of them will well and truly try the matter in issue between the state of Wyoming, plaintiff, and the named defendant, and **render a true verdict according to the evidence.**

Wyo. Stat. Ann. § 7-11-107 (West)

No. 125959
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- OMEGA MOON, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 1-17-0675. There on appeal from the Circuit Court of Cook County, Illinois , No. 14 DV 74336. Honorable Caroline Kate Moreland, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

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Ms. Omega Moon, C/O Last Known Address, 4915 Homerlee Ave, Apt 2F, East Chicago, IN 46312

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 1, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Alicia Corona
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