No. 125959

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OMEGA MOON, Defendant-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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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REPLY BRIEF FOR DEFENDANT-APPELLANT

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. The U.S. Supreme Court in *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct. 1390 (2020), provided that common-law rights ratified under the Sixth Amendment must be preserved. Looking at the text and history of the trial oath, a sworn jury is one of those rights that the Framers thought vital and that should be preserved under the Sixth Amendment. The Administrative Office of the Illinois Courts, in line with the significant majority of states, provides a specific trial oath to be administered to jurors instructing them to issue a "true verdict according to the law and evidence." It is only the trial oath and not the *voir dire* oath that can authorize jurors to try a case and render a verdict, and it is only the trial oath that marks the bright-line demarcation of when jeopardy attaches. 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. See *Harris v. State*, 406 Md. 115, 129 (2008) (collecting cases).

A. This Court should not hold, as the State proposes, that it is "doubtful" that an accused has the right under the Sixth Amendment to have the jury properly sworn in with the trial oath.

There is no doubt the Sixth Amendment encompasses a right to a jury sworn with the trial oath. When asked to "define jury impartiality, for constitutional purposes," the U.S. Supreme Court found that,"the Constitution presupposes that a jury selected...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). Contrary to the U.S. Supreme Court's clear stance that the U.S. Constitution presupposes

an impartial jury to be sworn, the State relies on *Williams v. Florida*, 399 U.S. 78, 98-102 (1970), to propose that the "Sixth Amendment right to a trial oath...is doubtful," because the Framers did not intend to constitutionalize every aspect of the common-law right to a jury trial. (St. Br. 19) The issue in *Williams*, however, was whether the Sixth Amendment's right to a trial by jury required 12 persons; following a textual and historical analysis, the court found that the requirement of a 12-person jury amounted to a "historical accident." *Williams*, 399 U.S. at 98-102 . Unlike the rule fixing a jury at twelve, the swearing requirement has always born a clear and logical relationship to the jury's role as factfinder and is at the core of the constitutional right to a jury trial. (Op. Br. 8-12)

The State improperly uses *Williams* to give the inaccurate impression that the U.S. Supreme Court is in the business of slimming down the right to a jury trial by weeding out common-law features of that right that were actually ratified into the U.S. Constitution under the Sixth Amendment. (St. Br. 19) We need only look to the U.S. Supreme Court's decision in *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct. 1390 (2020), issued just last year, to see that the Court actually aims to preserve common-law features that the Framers thought vital enough to include in the U.S. Constitution. Although relied upon in Moon's opening brief, the State fails to mention *Ramos* in the entirety of its brief. (Op. Br. 11)

In *Ramos*, the U.S. Supreme Court abrogated its holding in *Apodaca v. Oregon*, 406 U.S. 404 (1972), that the Sixth Amendment right did not require conviction by a unanimous jury. *Ramos*, 140 S. Ct. at 1391. The *Apodaca* plurality had concluded, relying on *Williams*, that the requirement of juror unanimity was unnecessary to "the function served by the jury in contemporary society." *Apodaca*, 406 U.S. at 410. The *Ramos* Court repudiated this analysis and explained that the text and history of the Sixth Amendment showed that the Framers intended to preserve the vital common-law right to a unanimous verdict. *Ramos*, 140 S. Ct. at 1397.

The Court found that the *Apodaca* plurality improperly "subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment." *Id*. at 1401. The *Ramos* 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..." *Id.* at 1402.

Notably, in his dissenting opinion, Justice Alito noted that the *Apodaca* analysis was the same analysis that was undertaken in *Williams*—"that the Sixth Amendment did not preserve all aspects of the common-law right." *Ramos,* 140 S. Ct. at 1433 (Alito, J., dissenting) This is the same exact analysis being pushed forward by the State in this case when it relies on *Williams*. (St. Br. 19) However, the U.S. Supreme Court in *Ramos*, as explained above, expressly denounced this type of analysis when it abrogated *Apodaca*. It follows that the State's position and its reliance on *Williams* is also on unsound constitutional ground and this Court should reject the State's position that an accused's right to a sworn jury is "doubtful."

The U.S. Supreme Court has sought to retain the Framers' vision of rights they deemed vital enough to include in our U.S. Constitution. *See e.g.*, *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"). To the extent that the U.S. Supreme Court in *Williams* aimed to decouple the Sixth Amendment from common-law features ratified into the amendment by the Framers of the constitution, that case is an outlier and its mode of analysis outdated. *See Ramos*, 140 S. Ct. at 1391.

This Court's aim, as the U.S. Supreme Court's aim in *Ramos*, should likewise be to preserve rights the Framers thought vital enough to be included in the U.S. Constitution. The right to a sworn jury is one of those rights and it is fundamental and at the core of an accused's constitutional right to an impartial jury under the Sixth Amendment. When considering the etymological roots of the word "jury," along with its history, it is 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." *See Ramos*, 140 S. Ct. at 1391 (finding that "unanimity" requirement in the Sixth Amendment could have been "removed as surplusage because the right was so plainly understood to be included in the right to trial by jury."*)*

While the State is incorrect in denying the trial oath's place as an integral part of the modern-day jury (St. Br. 21), the State's recitation of the history of the trial oath and trial by jury is not necessarily inconsistent with Moon's. (St. Br. 19-23) The State's own historical research provides that the modern English jury system was already in place sometime between 1154 and 1189 (St. Br. 20), long before the time the Sixth Amendment was ratified into the U.S. Constitution in 1791. *See Ramos*, 140 S. Ct. at 1396 (finding that it was under the backdrop of the modern day jury system that James Madison drafted the Sixth Amendment, and the amendment was ratified in 1791.) In *Ramo*s, the Court explained that the English modern day jury system and the requirement of unanimity of all 12 jurors in determining innocence or guilt was present "in 14th century England." *Ramos*, 140 S. Ct. at 1395.

Indeed, even one of the cases relied on by the State recognized that the oath was integral

to the concept of the jury at the time of the Founding:

> The oath has been integral to the factfinding process since ancient times, and there is no disputing Turrietta's assertion that it was an accepted feature of a properly constituted jury at common law.... Given that the oath predated the development of the modern jury system, it is difficult to imagine the jury gaining legitimacy as a factfinding body without a swearing requirement.

United States v. Turrietta, 696 F.3d 972, 979–80 (10th Cir. 2012). Relying on the U.S. Supreme Court's now-repudiated reasoning in *Williams*, however, the court in *Turrietta* concluded that this did not matter: "Turrietta's emphasis on the common-law history of the oath is misplaced. No longer can we assume that features once implicit in the very concept of the jury have constitutional stature." *Id.* at 977.

Under *Ramos*, the common-law history matters. To the extent the State suggests that the trial oath was not integral to the final impanelment of the jury in a criminal trial at the time the Sixth Amendment was ratified, the State is incorrect. (St. Br. 21)

B. The State's assertion that Illinois does not prescribe a particular version of the trial oath ignores the Petit Juror Handbook furnished by the Administrative Office of the Illinois Courts, which, consistent with the vast majority of states, ensures that the jury selected to try a case will be composed of "fair and impartial persons," by having them swear or affirm to "render a *true verdict* according to the *law and evidence*."

The State proposes that there is no national consensus on the content of the trial oath because the trial oath is not tied to an accused's fundamental right to an impartial jury. (St. Br. 13) It goes on to state that this Court also does not prescribe any specific form of the trial oath. (St. Br. 13)

The State's position ignores that the Administrative Office of the Illinois Courts has issued a "Petit Juror Handbook" providing that, 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*." *Petit Juror Handbook* (available at http://illinoiscourts.gov/CircuitCourt/Jury/Juror.asp

(retrieved July 27, 2021)) (emphasis added); (Op. Br. 13) The "director of the Administrative Office of the Illinois Courts (AOIC), is appointed by the supreme court, reporting directly to the chief justice." *Jones v. State Farm Mut. Auto. Ins. Co.*, 2018 IL App (1st) 170710, ¶ 33; Ill. S. Ct. R. 30(b); see also Ill. Const. 1970, art. VI, § 16. "The inherent power of courts to make suitable rules consistent with constitutional safeguards is universally recognized. 14 Am.Jur. page 355, par. 151. Such rules are adopted to facilitate the work of the court and have the force of law." *People v. Lobb*, 17 Ill. 2d 287, 299 (1959).

Nor does the State address the District Court Judge's Benchbook, which like the oath provided in Illinois' Petit Juror Handbook, directs federal judges to swear in the jury to "render *a true verdict according to the law and evidence*..." Fed. Judicial Ctr., *Benchbook for U.S. District Court Judges* 269 (6th ed. Mar. 2013) (emphasis added) (Op. Br. 12-13) Both the oaths mentioned directly above align with the rest of the country's consensus that the trial oath consists of swearing in the jury to issue a true verdict based on the law and evidence of the case. (Op. Br. 12-13)

Of at least 42 states that have codified the trial oath to be administered to a petit jury, appellate counsel provided 40 of the codified oaths in the opening brief.[1] (Op. Br., A-28-36); *See* Kathleen M. Knudsen, *The Juror's Sacred Oath: Is There A Constitutional Right to A Properly Sworn Jury?*, 32 Touro L. Rev. 489, 490, 495 (2016) (providing that 42 states have codified the trial oath). The State points to 17 states that do not specifically reference deciding a case based on the "laws" within their codified trial oaths. (St. Br. 13-14) Of those 17 states, Oklahoma and Delaware provide criminal oaths to be administered through their local rules as well; those rules *do* provide that jurors must decided the case based on the *law and the*

[1]The opening brief incorrectly cites to the 40 codified oaths as beginning on "A-4." See (Op. Br. 12, n. 2) However, the list of codified oaths from the 40 different states actually begins at "A-28."

evidence.[2] Eleven of the 17 states[3] pointed to by the State still require that the jury be sworn to issue a "true verdict" or "fair verdict" or "truly try" the case according to the "evidence." Additionally, the remaining 23 states[4] are in virtual unison in requiring that the jury swear to deliver a "true verdict" according to the "law" and "evidence." And, the State concedes that the common-law jury oath at the time of the Founding consisted of instructing the jurors to give a "true verdict" according to the "evidence." (St. Br. 22-23) (citing William Blackstone, *Commentaries*, *365)

Moon maintains that the differences in the oaths pointed to by the State amount to moderate differences. Swearing in the jury with the essential concepts of solemnity, that they render a decision based on the *evidence and the law*, and that they render a fair or *true verdict* is consistent across jurisdictions. *See The Juror's Sacred Oath* at 495-96; (Op. Br. 12-13)

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[2] Oklahoma's local rules provide that juries in criminal trials shall be administered with the following trial oath: "Do you, and each of you, solemnly swear/affirm that you will well and truly try the issues submitted to you in the case now on trial and reach a *true verdict, according to the law and evidence* presented to you, (so help you God?)/(this you do affirm under the penalties of perjury)?" https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=80993 (last visited July 30, 2021) (emphasis added); The Delaware Court website provides that trial oath shall instruct jurors to, "*apply the law* without fear or favor, will put out of mind and heart every extraneous matter, and will *"a true verdict give according to the evidence*." https://courts.delaware.gov/superior/pdf/petitjury_handbook.pdf (last visited July 30, 2021) (emphasis added)

[3] Idaho, Massachusetts, Mississippi, Montana, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Wyoming. *See* (Op. Br., App. A-28-36)

[4] Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Mexico, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, and Wisconsin. *See* (Op. Br., App. A-28-36)

C. This Court should reject the State's renewed attempt to inject confusion into the law and blur the clear bright-line rule establishing when jeopardy attaches in criminal cases.

The State proposes its most audacious departure yet from the bright-line rule of when jeopardy attaches when it proposes flipping the rule on its head by suggesting that jeopardy can attach just the same when jurors are administered the *voir dire* oath. (St. Br. 25-26) In *People v. Martinez*, 2013 IL 113475, ¶¶17, 31, this Court accepted the State's position that the attachment of jeopardy in a jury trial was flexible and that jeopardy could attach by means other than when the jury was impaneled and sworn. In *Martinez*, a jury was impaneled and sworn with the trial oath; the State opted not to participate in the trial and presented no evidence against defendant. *Id.* at ¶¶ 7-8. The trial court granted the defense's motion for a directed finding and dismissed the charges against defendant. *Id.* at ¶¶ 8-9. The State proposed that it could retry defendant because jeopardy never attached as defendant was never "in danger of being found guilty of any offense" due to the State opting not to present any evidence against defendant at the jury trial. *Id.* at ¶¶17, 31. This Court agreed with the State and rejected the defendant's request to follow the bright-line rule that jeopardy attaches when the jury is impaneled and sworn. *Id.* at ¶¶ 31, 35, 37-38. The matter was remanded to the trial court for further proceedings allowing the State an opportunity to prosecute defendant on the same charges. *Id.* at ¶¶ 42-45.

Justice Burke dissented and explained that, "[]i]mplicit in the majority's holding is the notion that impaneling and swearing the jury had no legal significance, which is contrary to well-established principles regarding double jeopardy."*Martinez*, 2013 IL 113475*,* ¶ 57 (Burke, J., dissenting) She went on to point to the well-established authority supporting her position and stated that this bright-line rule serves to safeguard an accused's 'valued right' and constitutional guarantee against double jeopardy:

> jeopardy attaches when the jury is impaneled and sworn. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *Serfass v. United States*, 420 U.S. 377, 388 (1975); *People v. Henry*, 204 Ill.2d 267, 283 (2003); see also *Downum v. United States*, 372 U.S. 734 (1963).

Id. at ¶ 59.

The U.S. Supreme Court granted *certiorari* and Justice Burke's position prevailed:

> The Illinois Supreme Court misread our precedents in suggesting that the swearing of the jury is anything other than a bright line at which jeopardy attaches***And contrary to the Illinois Supreme Court's interpretation, *Serfass* creates not the slightest doubt about when a "trial" begins. The Illinois Supreme Court's error was consequential, for it introduced confusion into what we have consistently treated as a bright-line rule: A jury trial begins, and jeopardy attaches, when the jury is sworn. We have never suggested the exception perceived by the Illinois Supreme Court—that jeopardy may not have attached where, under the circumstances of a particular case, the defendant was not genuinely at risk of conviction.

Martinez v. Illinois, 572 U.S. 833, 839 (2014)

Ironically, the State now relies on the U.S. Supreme Court's decision in *Martinez* to again attempt to inject confusion into the bright-line rule of when jeopardy attaches in a jury trial by proposing this Court to find that jeopardy may attach just the same when the jury is administered the *voir dire* oath instead of the trial oath. (St. Br. 25-26) Just last year, however, in *People v. Gaines*, this Court rejected the State's invitation to adopt a double jeopardy rule inconsistent with this Court's and the U.S. Supreme Court's precedent:

> the State also encourages this court revisit its holding in *People v. Jackson*, 118 Ill. 2d 179 (1987)... Relevant here, *Jackson* rejected an argument that jeopardy does not attach to a guilty plea until a sentence has been imposed and a judgment of conviction has been entered. *Jackson*, 118 Ill. 2d at 188. ***** We see no reason to depart from *Jackson*. In the context of a guilty plea, a formal finding of guilt or the imposition of a sentence is not necessary for jeopardy to attach.

People v. Gaines, 2020 IL 125165, ¶¶ 15, 31. This Court should again reject the State's request that it adopt something other than the bright-line rule that jeopardy only attaches in a jury trial when the jurors are impaneled and sworn with the trial oath.

Critically, the State fails to address *Wedalowski*, where the court found that, 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." *United States v. Wedalowski*, 572 F.2d 69, 74 (2d Cir. 1978) (quoting *Serfass*, 420 U.S. at 388); (Op. Br. 18) Nor does it address *Green* or *Hoffler,* where the courts also found that 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); *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.) (Op. Br. 18)

Illinois maintains a clear bright-line for when jeopardy attaches under the three main procedural mechanisms under which criminal proceedings are undertaken–a bench trial, a jury trial, and a guilty plea. *See Gaines*, 2020 IL 125165, ¶25 ("In Illinois, jeopardy attaches in a jury trial when the jury is empaneled and sworn. In a bench trial, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. Finally, jeopardy attaches to a guilty plea when the guilty plea is accepted by the trial court.) (Internal quotations and citations omitted). This bright-line rule of when jeopardy attaches has been echoed by the Illinois legislature's codification of the rule against double jeopardy:

> (a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if that former prosecution:
>
> * * *
>
> (3) was terminated improperly *after the jury was impaneled and sworn* or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court. 720 Ill. Comp. Stat. Ann. 5/3-4. (emphasis added)

The rule of when jeopardy attaches has been clearly defined. This Court should again reject the State's new vision of jeopardy inconsistent with this Court's and the U.S. Supreme Court's well-established precedent.

After all, the State does not contest that the *voir dire* oath and the trial oath are distinct and serve different functions in the process of obtaining a jury.(Op. Br. 14-16) The *voir dire* oath serves to ensure that potential jurors will answer truthfully all questions related to their qualifications as jurors. *Wedalowski*, 572 F.2d 6 at 74. The trial oath is specifically designed to instruct jurors to be impartial as they try the case. *People v. Pribble*, 72 Mich.App. 219, 224 (1976). Under Illinois' Petit Juror Handbook, which the State does not address, the AOIC explains this same 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 July 27, 2021)).

The State's position is further undermined by its failure to address Illinois' constitutional right to waive a jury, and how that absolute right is also delineated by the jury being administered the trial oath. *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.") This Court should maintain course with the well-established law and reject the State's proposal to find that jeopardy may also attach under the *voir dire* oath because without the jury being sworn in 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. (Op. Br. 16-19)

In a last-ditch effort to avoid the issue of when jeopardy attaches altogether, the State suggests that "whether jeopardy attached is not relevant in any event." (St. Br. 26) However, the bright-line rule that jeopardy attaches when the jury is impaneled and sworn directly impacts the analysis of whether denying an accused such as Moon their Sixth Amendment right to

a sworn jury amounts to structural error. *See Harris v. State*, 406 Md. 115, 131 (2008) (explaining that, because jeopardy does not attach when the jury is not sworn with the trial oath, the harmless error principle is inapplicable in a criminal case where the accused has been convicted by an unsworn jury.) The State's insistence that defendants are in no danger of being tried twice rings hollow in light of its failure to address *Spencer v. State*, 281 Ga. 533, 534-35 (2007), where the court held that even an *acquittal* by an unsworn jury could not prevent the State from prosecuting defendant a second time for the same offense. The State's proposition that Moon's constitutional right against double jeopardy is not directly impacted here is unpersuasive. (St. Br. 26-27) (Op. Br. 17, 21-22) Thus, this Court should reject the State's unsupported position that jeopardy should not impact the analysis here.

D. The State does not dispute that the significant majority of states to have addressed the issue have found that a conviction by a jury that has not been administered the trial oath is structural error, and it fails to address the leading case issued by Maryland's supreme court, which Moon relies on significantly.

Critically, the State fails to address *Harris v. State*, 406 Md. 115, 125-27 (2008), where Maryland's supreme court reversed defendant's conviction finding it was structural error to be tried by a jury not administered the trial oath. (Op. Br 21-22) The *Harris* court 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. 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. Also, the court in *Harris* conducted an historical analysis of the right to a sworn jury and found that the right stems from "a long-standing common law requirement." *Harris*, 406 Md. at 124. The court noted that when the jury "began to assume a form more recognizable to us under the reign of King Henry II," it was a "sworn jury." *Id*, at 125 (quoting *Owens v. State*, 399 Md. 388, 408-09 (2007))

The State also fails to address *People v. Pelton*, 116 Cal. App. Supp 789, 791 (1931),

where the court found that "an entire failure to swear the jury cannot be waived in any manner or under any circumstances"); and *Commonwealth v. Robinson*, 317 Pa. 321, 323 (1935), where the court found that,"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."

The State does not contest that the majority of states that have addressed this issue have found that a conviction by a jury never sworn with the trial oath is an error that requires automatic reversal. Instead, the State explains that many of the courts from the different states relied on by Moon, "provide that the swearing in of the jury is 'jurisdictional' or otherwise necessary for a '*legal jury*' that is *'authorized' to convict*." (St. Br. 18) (emphasis added) (citing *Ex Parte Benford*, 935 So.2d 421, 429-30 (Ala. 2006); *Spencer v. State*, 281 Ga. 533, 534 (2007); *State v. Mitchell*, 199 Mo. 105, 108 (1906); *Brown v. State*, 220 S.W. 3d 552, 554 (Tex. App. 2007); *State v. Moore*, 57 W.Va. 146, 148 (1905)); (Op Br. 22)

This attempt by the State to distinguish the cases relied on by Moon serves to highlight that the error of failing to swear in a jury to try the case is of such a serious nature that other states have deemed the error as a jurisdictional defect. (St. Br. 18) This actually supports Moon's position that a jury is not authorized to try a case until it is impaneled and sworn. After all, Moon has relied on *Serfass v. United States*, 420 U.S. 377, 391–92 (1975), which found that "[b]oth the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a *trier having jurisdiction to try the question of the guilt or innocence of the accused*. Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." (emphasis added) (internal quotations omitted); (Op. Br. 17)

Moon now asks this Court to find that a conviction by a jury never authorized to try the case amounts to structural error.(Op. Br. 19-22) "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." *People v. Thompson*, 238 Ill. 2d 598, 608 (2010); *See also Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (finding structural errors affect "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.") The State acknowledges structural error is second-prong plain error in Illinois, and it requires automatic reversal. (St. Br. 9) Thus, Illinois is not without its own specific legal authority and procedural mechanism that would warrant the automatic reversal of this serious error.

E. The analysis in the few contrary cases runs counter to the U.S. Supreme Court's decision in *Ramos v. Louisiana*, 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.

The few state decisions relied on by the State, *People v. Cain*, 489 Mich. 108 (2015); *People v. Arellano*, 125 N.M. 709 (1998); and *State v. Vogh*, 179 Or. App. 585 (2002), failed to give serious consideration to the history and constitutional nature of the error and to the double jeopardy ramifications. Such analysis, or lack there of, runs counter to the U.S. Supreme Court's 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. The State fails to mention *Ramos* in its brief, let alone address the required analysis laid out by the U.S. Supreme Court. Instead of looking to the history of the Sixth Amendment right to an impartial jury, the *Cain*, *Arellano*, and *Vogh* courts engaged in the exact type of analysis that the Court in *Ramos* denounced when it overturned *Apodaca*. *Ramos*, 140 S. Ct. at 1391. The *Ramos* Court struck down the analysis in *Apodaca* and explained that it improperly "subjected the ancient guarantee of a unanimous jury verdict to its own *functionalist assessment*." *Id.* (emphasis added).

In *Cain*, the court found that the analysis of the trial oath required "discerning the purposes

and goals of the juror's oath," *Cain*, 498 Mich. at 121, and held that the purpose of the oath could be achieved by alternative means–other court instructions that served the functional equivalent of the oath. *Id.* at 121-27. In *Arellano*, 125 N.M. 709, 711, the court found that, "[a]lthough the court did not administer the oath...the jury understood the spirit of the oath" because it was provided with the functional equivalent of the oath through the *voir dire* procedures and jury instructions. The *Vogh* opinion expressly found that, "[m]uch of [the oath's] formalism has since given way to a more *functional approach*." *Vogh*, 179 Or. App. At 593 (emphasis added) The *Vogh* court improperly reasoned, "[w]e 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." *Vogh*, 179 Or. App. at 596. The type of analysis engaged in by these three state courts was expressly rejected by the U.S. Supreme Court in *Ramos*, and it should also be rejected by this Court.

Finally, in *Turrietta*, also relied on by the State (St. Br. 17), the court's analysis focused on trial counsel's strategic harboring of the error and did not actually address whether the right to a sworn jury was constitutional in nature: "We need not decide whether the right to trial by jury necessarily encompasses a right to a sworn jury." 696 F.3d at 977. And, as explained above, the *Turrietta* court recognized that the oath requirement "was an accepted feature of a properly constituted jury at common law," but incorrectly thought that this fact did not matter. *Id.* at 979.

The cases relied on by the State are outliers that employ a mode of analysis rejected by the Supreme Court in *Ramos*. They should not be followed.

F. Complying with the Sixth Amendment requirement that a verdict be rendered only by a jury sworn to the trial oath does not give an accused a "windfall," but only what she is entitled to under the Constitution.

The State asks this Court to deny Moon her constitutional right to a sworn verdict based on an insinuation – not even an accusation – that Moon's attorney purposely did not bring the error to the court's attention but instead kept it in his back pocket for later use. (St. Br. 23)[5] It is undisputed that Moon, herself, had nothing to do with the failure to administer the trial oath to the jury. And the State's troubling insinuation that her attorney behaved unethically was never brought to the trial court by the actual ASAs at trial. At the hearing on Moon's motion for a new trial, the court specifically declined to make a finding that counsel intentionally harbored the error: "I'm not saying the defendant purposely didn't do that, but there was no objection." (R. 362) Instead, the trial judge admitted that she had erred in failing to properly swear in the jury with the trial oath and noted that neither the defense nor the State objected to the error. (R. 357-58, 364) The trial judge expressed that she was taking "full responsibility for [the] error." (R. 364)

Indeed, in the trial court, the State made no mention of counsel intentionally harboring the issue and, in fact, the State conceded that it was structural error to not administer the jury with the trial oath. (R. 356) It is inconceivable that the State would have conceded its entire position had there been any indication that trial counsel tactically harbored the issue.

Moreover, the two Assistant Public Defenders who noted the error and eventually brought it to the attention of Moon's appointed counsel, Hareas and Spearman, owed no duty to Moon

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[5] This Court has previously recognized that this argument does not make sense: "It defies logic to suggest that defense counsel would decline to object to a possible trial error in the strategic hope that, once the defendant was convicted and sentenced, a reviewing court would conclude that the error was clear and the evidence was closely balanced and would order a new trial." *People v. Sebby*, 2017 IL 119445, ¶ 71. And, if it did make sense, it would apply equally to the prosecution in light of the fact that even an acquittal would not prevent a second trial. *Spencer v. State*, 281 Ga. 533, 534-35 (2007).

to make an objection on Moon's behalf. (Sup5 C. 4-6) (R. 358) Their failure in making trial counsel aware of the issue–which likely reflects a lack of communication or neglect, not deliberate gamesmanship as posited by the State (St. Br 23-25)–has nothing at all to do with Moon. Moon had no relationship with these attorneys, they were not Moon's agents, and the duty of legal representation owed to Moon lied with her appointed counsel alone. The State's suggestion that Hareas and Spearman owed Moon a duty to object to the trial court's error is foreclosed by *People v. Cole*, 2017 IL 120997, ¶¶ 42, 44, where this Court held:

> The fact that the trial court appoints the office of public defender to represent an indigent defendant, rather than appointing specific assistant public defenders, does not thereby transform the office of the public defender into a single entity for purposes of conflict of interest analysis. Similarly, the fact that the appointed public defender has supervisory authority over his or her assistant public defenders does not override an assistant public defender's undivided loyalty to his client.
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> *it is the assistant public defender appointed to represent a defendant who provides the legal services to that defendant*. The assistant public defender's loyalty to his office has not been deemed great enough to impute to him the conflicts of other assistant public defenders. (emphasis added)

Also, in proposing that Moon should be punished for her counsel's conduct and not be allowed to "reap a windfall," the State reduces an accused's Sixth Amendment right to a sworn impartial jury to a mere technicality; a slight error for which a criminal defendant can bare the brunt of any consequences. (St. Br. 25) However, "[i]mpartiality is not a technical conception. It is a state of mind." *Dennis v. United States*, 339 U.S. 162, 172 (1950) (internal quotations omitted). Notably, the State fails to address *Pribble*, where the court explained the content of 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...

People v. Pribble, 72 Mich.App. 219, 224 (1976). (Op. Br. 15) Nor does the State address

the study conducted in Illinois by Judge Amy J. St. Eve and Judge Charles P. Burns, which showed the critical impact that the specific content of an oath has on a juror and how an oath serves as the anchor that reminds them of their specific duties. (Op. Br. 15-16); 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, 78-82, 90 (2014).

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. The oath is critical to an accused's right to an impartial jury and to the structure of the trial itself. This Court should reject the State's position that a criminal defendant who asserts this right is attempting to "reap a windfall." (St. Br. 23)

If the State has evidence that an attorney acted unethically, there are proper ways to deal with an attorney's misconduct without sacrificing a defendant's constitutional rights and without punishing a defendant for the conduct of their counsel. *See People v. Peterson*, 2017 IL 120331, ¶ 113 ("the proper forum to resolve a claim that counsel has violated our Rules of Professional Conduct is the Attorney Registration and Disciplinary Commission, whose officers, acting as the agents of this court, administer the disciplinary functions that we have delegated to them."); *See also People v. Buckley*, 164 Ill. App.3d 407, 413 (2d Dist. 1987) (finding attorney guilty of civil contempt for refusing to advise court regarding the calculation of the running of the term under speedy-trial requirements.)

Here, the trial judge admitted that it was her duty to ensure the jury was properly sworn and also noted that the State had failed to object. (R. 357-58, 364) The prosecution made no argument and the court made no finding that trial counsel acted unethically. The court's error was structural and this Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, Omega Moon, defendant-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 reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 19 pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OMEGA MOON, Defendant-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

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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 August 19, 2021, the Reply Brief 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 defendant-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 Reply Brief to the Clerk of the above Court.

/s/Alicia Corona
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