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| SUPREME COURT, STATE OF COLORADO<br><br>Ralph L. Carr Judicial Center<br>2 East 14th Avenue<br>Denver, CO 80203<br><br>Certiorari to the Court of Appeals<br>Case Number 2016CA441 | |
| Petitioner<br>ELLIOT J. FORGETTE<br><br>v.<br><br>Respondent<br>THE PEOPLE OF THE<br>STATE OF COLORADO | |
| Megan A. Ring<br>Colorado State Public Defender<br>JACOB B. MCMAHON<br>1300 Broadway, Suite 300<br>Denver, CO 80203<br><br>Phone Number: (303) 764-1400<br>Fax Number: (303) 764-1479<br>Email: PDApp.Service@coloradodefenders.us<br>Atty. Reg. #48784 | Case Number: 2021SC236 |
| **REPLY BRIEF** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

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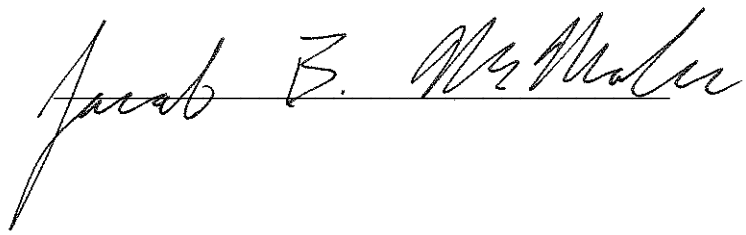

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### I. The record does not show the intentional relinquishment of Mr. Forgette's personal right to be tried by a jury. The issue is preserved.

According to the State, "[t]he record demonstrates that defense counsel waived any claim concerning Juror B's inattentiveness." AB p.12; *id.* p.21. As discussed below, inattentiveness is not unconsciousness. But as to preservation, the record does not show the intentional relinquishment of Mr. Forgette's right to be tried by a twelve-person jury.

The State argues for implying a waiver from silence: "[T]he record compels the conclusion that counsel chose not to object or ask for any further relief because of potential strategic reasons for not doing so." *Id.* p.27; *see id.* pp.28-29 (speculating about things defense counsel "may have" been thinking). But trial consists of countless strategy calls, and the State can always imagine sly reasons to explain what the record does not show. Waiver is not shown through record silence and the possibility of strategic thinking, however.

This Court's precedent holds that waiver "is the intentional relinquishment of a known right or privilege." *People v. Rediger*, 2018 CO 32, ¶39 (emphases and quotations omitted). The record does not show the intentional relinquishment of Mr. Forgette's jury right.

The State instead contends, "Defendant never asserted before the trial court that a sleeping juror violated his right to a 12-person jury." AB p.10; *id.* p.13 ("He did not assert that his right to a 12-person jury was implicated."). The trial court thus "had no idea that defendant believed his right to a 12-person jury had been infringed." *Id.* p.40.

Defense counsel contemporaneously alerted the trial court that a juror was sleeping, but the State's basic contention—that a failure to assert is waiver—would collapse waiver into forfeiture. Forfeiture is "'the failure to make the timely assertion of a right,'" but "[t]he requirement of an intentional relinquishment of a known right or privilege" distinguishes waiver. *Rediger*, ¶40 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

If a waiver occurs, the record must establish its existence and scope, but the State uses record silence to argue that defense counsel intentionally waived *everything*. "Defense counsel's failure to ask for a specific remedy or to object ... waived *any* claim ...." AB p.18 (emphasis added); *see id.* p.26 ("[C]ounsel decided not to object or pursue the issue ...."); *id.* pp.32-33 ("[S]he dropped the issue ...."). Where the party asserting waiver fails to identify any particular waiver in the record, the opposing party should not be deemed to have waived all claims.

The State seeks extension of *Stackhouse v. People*, 2015 CO 48, beyond the public-trial right. The State does not defend *Stackhouse* as correct under *Olano* or this Court's later waiver decisions, nor does the State answer Mr. Forgette's arguments for cabining *Stackhouse* as a relic of pre-*Olano* waiver law, *see* OB pp.13-14. The retreat from specialized preservation rules continues. *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1712-14 (2022) (adhering to *Olano*). This Court need not overrule *Stackhouse* here, but *Stackhouse* should not be extended.

The State correctly notes that a waiver does "not require defense counsel to put her strategic reasoning on the record." AB p.32. The record need not disclose the *why*—the reason for a waiver—but it must establish *what* was waived.[1]

[1] The record will sometimes reveal the why, such as where the defendant pursues a claim of ineffective assistance of counsel and builds the separate record necessary for that claim. For example, the State cites *Lamar v. Graves*, 326 F.3d 983 (8th Cir. 2003), and *Welch v. United States*, 807 A.2d 596 (D.C. 2002), *see* AB pp.20, 44-45, but in *Lamar*, "[c]ounsel testified that he withheld his objection because he did not mind if a juror missed part of the state's presentation." 326 F.3d at 986. In *Welch*, trial counsel testified that his client notified him of a sleeping juror, but counsel did not see the juror sleeping himself. 807 A.2d at 603. Although the trial judge found that at least one juror slept, it was "unclear whether defense counsel knew this at the time." *Id.*

In this case, arising on direct appeal, there is no waiver on the record and no similar evidence of defense counsel's thinking. Further, there is no strategy in presenting evidence to a sleeping factfinder, and the record shows the juror slept during defense counsel's cross-examination of witnesses. *See* OB pp.2-3.

A statement along the lines of, "I waive, or my client waives, this or that," can suffice, but no magic words are required. Waivers can be implied, but even then, the record must establish the contours of the waiver, i.e., what claim, right, or privilege was waived. *See Cardman v. People*, 2019 CO 73, ¶18 n.6 ("If there is evidence in the record that defense counsel made a conscious decision to forego raising *a claim* for strategic or other reasons, we will not hesitate to find an implied waiver." (emphasis added)). For instance, in *People v. Janis*, 2018 CO 89, the defendant excused herself from the courtroom using procedures worked out in advance so she could waive "her right to be present." *Id.* ¶¶8-11. This Court concluded that the record showed she knowingly, intelligently, and voluntarily waived precisely that right by executing those procedures, and no formal advisement was necessary to make the waiver effective. *Id.* ¶¶23, 26-34.

In *Richardson v. People*, 2020 CO 46, the record showed defense counsel "intentionally relinquished his right to challenge" a juror who happened to be married to the presiding judge, where "[t]he trial judge even seemed to invite defense counsel to exercise a peremptory challenge as to" her. *Id.* ¶26. Trial courts do not typically invite peremptory challenges to particular jurors, but the circumstances were unusual, and the defense's declination of the trial court's offer meant the record

showed the challenge was waived. Thus, where this Court has found waiver, the record revealed what was waived.

Here, the record shows no intentional relinquishment of Mr. Forgette's jury right by defense counsel. And in any event, a waiver would require Mr. Forgette's personal participation, and the record shows no such waiver. *See* OB pp.35-39. The State does not appear to dispute that Mr. Forgette would need to personally participate in a waiver of his right to a twelve-person jury, but the State disputes that this right was implicated here. AB p.21 & n.2.

The State attempts to draw *Richardson* closer to this case by arguing that issues of juror "qualifications" are traditional matters for defense counsel. *Id.* pp.19-20, 23, 25-27. But selecting among eligible jurors, the issue in *Richardson*, is not akin to having a selected juror fall asleep. The selection phase entails picking the best jurors available, even if that includes the judge's spouse. *See Richardson*, ¶26 n.2 (observing the jury convicted on lesser charges and partially acquitted). Selection is about *which* twelve people make up the jury. If a selected juror later falls asleep, however, the problem is more fundamental because, as discussed below, the sleeping juror abandons his post and deprives the defendant of his right to a jury of twelve.

The trial court can cure that error by swapping an alternate juror for the sleeper. By ensuring only conscious jurors are eligible to convict, the trial court protects the defendant's right to a twelve-person jury since all the voting jurors heard the evidence. The court could also declare a mistrial, but it might prefer to rectify the sleeping-juror prejudice by lesser means. Curing the prejudice from a sleeping-juror error is only possible, however, if the court investigates the extent of the problem and determines whether it is feasible to catch the juror up through a stipulation, re-presenting evidence, or other means. However it happens, ensuring that all jurors eligible to convict heard the evidence cures the sleeping prejudice and restores the jury to its full complement of twelve conscious factfinders.

If there is no alternate juror available, as was true here, the court must secure the defendant's personal waiver as to the violation of his jury right before the court (1) excuses the sleeping juror and continues trial with fewer than twelve jurors or (2) moves on without investigating and curing the sleeping incident. The defendant may prefer to proceed with fewer jurors. *See, e.g.*, *People v. Baird*, 66 P.3d 183, 189-90 (Colo. App. 2002); *People v. Chavez*, 791 P.2d 1210, 1211 (Colo. App. 1990). Or the defendant may prefer to keep trial moving instead of stopping to investigate an incident he does not view as prejudicial, in which case there should be a waiver on the record. *See, e.g.*, *People v. Williams*, 315 P.3d 1, 64-65 (Cal.

2013) (securing defendant's on-the-record waiver of claims relating to juror's sleeping to that point). Other times, the defendant may insist the sleeping juror hear the missed evidence. Ultimately, whether to accept the risk of conviction by a sleeping juror should be the defendant's choice. Here, the trial court did not investigate the sleeping incidents or discuss them with Mr. Forgette, *see* OB p.39, but it accepted a guilty verdict from a factfinder whom the court knew spent a portion of trial unconscious.

The record does not show a waiver under this Court's precedent, but the State draws in gamesmanship concerns to argue for waiver. *See* AB p.33. Mr. Forgette pointed out that there is little danger of sandbagging because, unless defense counsel raises the issue, the fact that a juror slept will likely escape documentation in the record. *See* OB p.20. The State notes that here "it was the *prosecutor* who first raised the issue of the sleeping juror." AB p.33. She gets only partial credit.

The prosecutor here let the juror sleep during defense counsel's cross-examination. She did not request a bench conference to remedy the situation; the court called up the lawyers to discuss scheduling, and then the prosecutor mentioned a juror had been sleeping "for about the last five minutes." (TR 10/7/15 AM pp.90-91.)

This incident, and the State's cited cases, illustrate the reality of prosecutorial gamesmanship. In *United States v. Krohn*, 560 F.2d 293 (7th Cir. 1977), the prosecutor waited until "[i]mmediately before the jury retired to deliberate" to inform the court and defense counsel "that one of the jurors had given the appearance of having been asleep during parts of the trial." *Id.* at 297; *see* AB pp.29-30, 45.

In *Samad v. United States*, 812 A.2d 226 (D.C. 2002), one of the prosecutors reported, during lunch on the second day, that a juror "appeared to have been sleeping during 'pretty essential testimony to the case.'" *Id.* at 229. At the end of the day, the other prosecutor said the same juror slept during the afternoon. *Id.* The prosecution later sought removal of a different juror, claiming after the fact that he slept during closing arguments. *Id.* at 230; *see* AB pp.10-11, 43, 45.

In *Hardin v. State*, 956 N.E.2d 160 (Ind. Ct. App. 2011), defense counsel requested a bench conference on the second day of trial to point out an actively sleeping juror, and it was then that the prosecutor revealed, "That's the same one that slept through everything yesterday," which was news to defense counsel. *Id.* at 161-62; *see* AB pp.30-31. These examples of prosecutors belatedly pointing out sleeping jurors suggest that, in other cases, the issue is observed but not raised.

Prosecutors are caught between wanting to win and playing fairly. As a matter of sovereign justice, constitutional compliance, and long-term legitimacy, the

government should want to prove its cases to only conscious factfinders. Prosecutors are "sworn to uphold the constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendant." *De Gesualdo v. People*, 364 P.2d 374, 378 (Colo. 1961); *see Berger v. United States*, 295 U.S. 78, 88 (1935) (noting obligation "to govern impartially" is as compelling as obligation "to govern at all"); *see also Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005) (discussing prosecutors' "higher ethical responsibility than other lawyers").

Despite their "duty to refrain from using improper methods to produce a conviction," *People v. Nardine*, 2016 COA 85, ¶34, prosecutors have a short-term tactical interest in letting jurors sleep because a case is easier to prove when there are fewer minds critically assessing the evidence. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) (noting "a single juror's vote to acquit is enough to prevent a conviction"). This is not a legitimate government interest, but prosecutors' willingness to pocket advantageous constitutional violations shows why this Court should not rely on the State's gamesmanship concerns to expand waiver doctrine. Defense counsel's pointing out a sleeping juror is inconsistent with waiver, and, if she fails to do it, the issue will often escape the record.

The State fears the structural-error rule will create "a roadmap for a 'heads I win, tails you lose' strategy," AB p.34, but that is only possible where prosecutors and trial courts are willing to note sleeping jurors on the record and move on. Remedying the problem or securing a waiver extinguishes the claim, and the structural-error rule will ensure trial courts properly respond when a juror falls asleep.

The State's approach to waiver requires the defense to micromanage the trial court into ensuring compliance with elementary protections of constitutional criminal procedure. When electing a jury trial, however, defendants should not have to specify twelve *conscious* jurors. Under the State's approach, if defense counsel alerted the trial court that a hearing-impaired juror's headset was no longer working, the trial court would have no obligation to remedy the situation, and defense counsel would waive, by failing to specifically request, remedies like turning up the volume, resetting the headset, trying a different unit, or having witnesses speak up. Pointing out the glaring procedural defect is enough to preserve the issue if it creates a record for appellate review and affords the trial court an opportunity to focus on the problem and avoid or redress the error. *See Martinez v. People*, 2015 CO 16, ¶¶13-14; *see also Vigil v. People*, 300 P.2d 545, 547 (Colo. 1956) (requiring parties to state

grounds for objection with specificity, "unless the reasons for an objection are obvious").

Trial courts must ensure constitutional trials. The parties can weigh in on how the trial court responds, but the trial court has a duty to exercise its discretion when it finds that a juror slept. *Cf. People v. Melendez*, 102 P.3d 315, 320 (Colo. 2004) (explaining trial courts have a duty to inquire into alleged sequestration violations). As it stands, some trial courts take seriously their responsibility of upholding the defendant's core rights, *see, e.g.*, *State v. Yant*, 376 N.W.2d 487, 489 (Minn. Ct. App. 1985) (recounting that trial court pointed out sleeping-juror problem and said, "I'm not a bit chicken about this stuff, this is important stuff .... [T]he man is in danger of going to prison"), but other courts show disturbing indifference, *see, e.g.*, *State v. Majid*, 914 N.E.2d 1113, 1114 (Ohio Ct. App. 2009) (recounting that, after parties pointed out sleeping juror, the trial court remarked, "I saw it. So what. Let him sleep. You guys picked the jury. I didn't."). A structural-error rule ensures trial courts appropriately investigate sleeping-juror problems. *See* OB p.26 (proposing rule).

Here, despite the trial court's lack of interest in responding, the parties pointed out that a member of Mr. Forgette's jury repeatedly fell asleep during the presentation of evidence. (TR 10/7/15 AM pp.90-91; TR 10/7/15 PM pp.77-79.)

Not only was there no waiver by defense counsel or Mr. Forgette, the issue is preserved because the parties contemporaneously called the trial court's attention to the sleeping juror. The trial court had an adequate opportunity to respond, and the record allows for this Court's review. *Martinez*, ¶14. Because the record does not show a waiver, the division erred by refusing to address the merits of the sleeping-juror claim.

## II. The record refutes the State's claim that the jury listened to the evidence because the record establishes that a convicting juror slept during the presentation of evidence, and unconsciousness makes it impossible for a sleeping juror to assess the evidence.

The State asserts, "The record shows that 12 individuals were sworn-in as jurors, 12 individuals *listened to the evidence at trial*, and 12 individuals returned a guilty verdict against defendant[.]" AB p.14 (emphasis added); *see also id.* p.18 ("[Juror B] *heard the evidence* and voted to convict ...." (emphasis added)). But the record does not support the State's assertion that the jury listened to the evidence.

During the morning incident, when the prosecutor reported Juror B had been sleeping "for about the last five minutes," the trial court undertook a break but no inquiry. (TR 10/7/15 AM p.91:1-3.)

When the defense raised the afternoon incident, the court found Juror B was actively sleeping. (TR 10/7/15 PM p.78:1-24.) The court revealed that, when it looked over to find Juror B asleep, it "tapped the microphone, which *usually* works."

(*Id.* p.78:8-10 (emphasis added).) The court did not say it was giving the parties notice of the sleeping incidents prompting mic tapping. The court added it had "probably been 15 minutes since [it] looked over at him." (*Id.* p.78:15-16.) The court's law clerk indicated Juror B had been "watching five minutes ago." (*Id.* p.78:18-19.)

The record thus shows a convicting juror slept during the presentation of evidence, but the record does not reveal for how long. The trial court did not confront merely "a statement that a juror was asleep during proceedings." *People v. Forgette*, 2021 COA 21, ¶14; *see* AB pp.35-36. The trial court found for itself that the juror was sleeping, but the full extent of Juror B's sleeping is unknown because the trial court took no further investigative or corrective action.

The State does not seem to dispute the trial court's finding that a convicting juror slept but says it was for "only" between five and fifteen minutes. AB p.32; *see id.* p.13 (claiming dozing lasted "for less than 10 minutes on two occasions"); *id.* p.43 ("Juror B was possibly sleeping during trial for approximately five minutes on each occasion."); *id.* p.44 ("The record reflects the juror was asleep for, at most, approximately five minutes on each occasion during the end of cross-examination of two witnesses."). The State claims that "the record demonstrates that the juror did not miss a substantial part of trial." *Id.* p.42. Elsewhere, the State says, "[T]here

is no evidence that the juror missed large or critical portions of the trial." *Id.* p.44 (quoting *State v. Sanders*, 750 N.E.2d 90, 107 (Ohio 2001)).

Despite its claim, refuted by the record, that this jury heard the evidence, the State seems to understand the jury right as requiring only twelve people at the beginning and end of trial. *See* AB p.12 ("Twelve jurors were sworn-in on defendant's jury and 12 jurors returned a guilty verdict."). A division of the court of appeals recently rejected similar reasoning.

In *People v. Taylor*, 2021 COA 133, there were twelve jurors at the beginning of trial but not at the end because the trial court used section 18-1-406(7), C.R.S., to remove a holdout juror so the remaining eleven people could return a guilty "verdict." *Taylor*, ¶¶2-13. In removing the juror, the trial court rejected as "rote" an interpretation of the constitutional jury guarantee that "twelve means twelve, beginning, middle, and end," *id.* ¶26 (alterations omitted), but another word is "inviolate," Colo. Const. art. II, § 23; *see People v. Rodriguez*, 112 P.3d 693, 709 (Colo. 2005).

On appeal, the *Taylor* division declared the law unconstitutional and rejected the trial court's reasoning that "the constitutional right to have twelve jurors 'at the start' of a trial does not encompass a right to have twelve jurors 'at the end.'" *Taylor*, ¶¶24-25. Allowing conviction by eleven "conflict[ed] with the state constitutional

right to twelve jurors recognized in *Rodriguez*." *Id.* ¶24. "[T]he right to be tried by a twelve-person jury," the division explained, "is not vindicated simply because twelve jurors are selected to serve; such right is effectuated only when twelve jurors complete the trial and deliberate to a conclusion in the case." *Id.* ¶28. *Taylor* properly applied section 23 to strike down the law because, absent a waiver from the defendant, the constitution requires twelve jurors throughout the trial. The State does not address section 23 or *Rodriguez*.

The State argues "an inattentive juror is not an absent juror," AB p.12; *see id.* p.14 (contending this case does not implicate right to twelve-person jury); *id.* p.18 ("Juror B remained part of the jury."), but this Court should reject the State's plea to count sleeping jurors. Through comparisons to "daydreaming, doing a crossword puzzle, or scrolling Twitter," *id.* p.14, the State equates sleeping with mere inattentiveness. The State even contends jurors would not violate their oaths by sleeping "for only a brief part of trial." AB p.11; *see id.* p.18 ("[A] sleeping juror *may* be problematic .... (emphasis added).); *cf.* COA AB p.12 ("No attorney would believe that it was proper for a juror to sleep during a portion of the trial.").

The point of the twelve-person jury is twelve minds on the case, not twelve bodies in twelve seats. Some juror inattentiveness is unavoidable—different jurors have different capacities for processing information, and we all have better and

worse days. Sleeping jurors have *no* capacity to process the evidence. For comparison, a juror dependent on a listening device is more than distracted when the device stops working; she is cut off from the case and functionally no longer part of the jury because she cannot perceive and assess the evidence. The factfinder's ability to decide what evidence is reliable and important and what evidence to disregard presumes that the factfinder heard all the evidence. A sleeping factfinder disregards evidence arbitrarily and cannot rationally assess the case against the constitutional burden protecting the defendant from conviction. There is no reason to tolerate convictions by sleeping factfinders, and sleeping, unlike an idle thought, is particularly disturbing to spectators and demeaning of the defendant's interests. *See* OB p.29. The right to a jury of twelve people means twelve conscious people, beginning, middle, and end. Because jurors cannot perform their function when unconscious, sleeping jurors do not count. This record shows Mr. Forgette was not tried by a jury of twelve because one of the jurors who voted to convict him slept during trial. Contrary to the State's claim, that juror did not listen to the evidence because it was not possible for him to do so while unconscious.

## III. This Court should reverse.

This Court should hold that Colorado appellate courts must reverse felony convictions where the trial court took no investigative or corrective action despite

finding that one or more of the twelve jurors who voted to convict the defendant slept during the presentation of evidence. *See* OB pp.4, 26. This rule applies here.

Although the State disputes preservation, its suggestion for abuse-of-discretion review of the underlying merits is correct. *See* AB p.9. The trial court has substantial discretion in responding to a sleeping-juror problem, and its exercise of that discretion should be reviewed deferentially, but a trial court abuses its discretion by finding that a juror slept and simply moving on with trial. After finding that a juror slept, the trial court must investigate the extent of the problem and either cure that prejudice or secure a waiver to proceed. The trial court's response here leaves an appellate record that shows a factfinder was unconscious for an unknown period. No branch of the government should have an interest in retaining such a conviction.

The State disputes that this error is structural because "any prejudice can be readily ascertained," AB p.11, but that is true only if the trial court acts, and the structural-error rule only applies when the trial court fails to respond.

This error is structural. Trial by jury is the framework, and a jury in felony cases means twelve people. When sleeping, a person cannot perform the role of juror so a sleeping juror compromises the trial's framework by setting up trial by eleven. Absent the defendant's agreement, however, a felony trial by fewer than

twelve is not fair. The State fails to refute that the structural-error rationales articulated in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017), apply here. *See* OB pp.28-33.

The State contends this case falls outside the structural error rule because "the trial court was actively monitoring Juror B," AB p.39 n.5, but monitoring the juror does not cure the prejudice from sleeping incidents the court earlier found. Here, the trial court's monitoring efforts simply established other sleeping incidents were going uninvestigated: "I think he is with us sometimes. I've been trying to keep an eye on him, and I certainly have tapped the microphone, which usually works." (TR 10/7/15 PM p.78:8-10.)

This Court should adopt the structural-error rule Mr. Forgette proposes so trial courts properly investigate sleeping-juror problems contemporaneously and so appellate courts do not affirm convictions where the record shows a convicting juror spent an unknown portion of trial unconscious.

The proposed rule is narrower than Massachusetts's approach because it requires the trial court to find that a juror slept. In *Commonwealth v. McGhee*, 25 N.E.3d 251 (Mass. 2015), the trial court received a report that a juror was asleep, but the court declined to investigate because it had not itself observed any sleepiness. *See id.* at 255-56; *Commonwealth v. Alleyne*, 54 N.E.3d 471, 478 (Mass. 2016)

(discussing *McGhee*). The Supreme Judicial Court held this was structural error: "Because the judge conducted no further inquiry to determine *whether* and, if so, when the identified juror was sleeping, there is serious doubt that the defendant received the fair trial to which he is constitutionally entitled." *McGhee*, 25 N.E.3d at 257 (emphasis added) (quotations omitted). Here, the "whether" question is settled because the trial court made a finding Juror B slept during the presentation of evidence. (TR 10/7/15 PM p.78:4-23.) This Court should hold that its failure to take further investigative or corrective action is structural error.

The State's cases are distinguishable and unpersuasive. Some do not involve sleeping-juror problems. *See United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006); *United States v. Simmons*, 961 F.2d 183 (11th Cir. 1992) (per curiam); *State v. Anstrom*, 117 Wash. App. 1005 (2003) (unpublished). *See* AB pp.20-21, 46.

The State's reliance on *Ciaprazi v. Senkowski*, 151 F. App'x 62 (2d Cir. 2005) (unpublished), is misplaced. *See* AB pp.28-29. In that federal habeas proceeding, the issue was trial counsel's alleged ineffectiveness "for failing to object to the trial court's handling of an alternate juror's allegation that another juror had slept through portions of the trial." 151 F. App'x at 63. State law in New York addressing the replacement of jurors depended on whether deliberations had begun, and the record left unclear when the report of sleeping occurred relative to deliberations. *Id.*; *see*

*id.* at 64 (noting further that "the evidence that the juror was actually dozing [was] thin"). *Ciaprazi* thus amounts to no more than a conclusion that the state court did not act "unreasonably in failing to find counsel constitutionally ineffective for declining to request an inquiry." *Id.* at 64.

Because defense counsel here prompted the trial court to find that a juror was sleeping, this case is quite unlike *United States v. Batista*, 684 F.3d 333 (2d Cir. 2012). *See* AB pp.10, 28, 37. In *Batista*, the prosecution suggested that the defense request the removal of a supposedly sleeping juror, but defense counsel said of the juror, "Every time he saw me, he seemed fine." 684 F.3d at 340-41 & n.12. *Batista* is also unlike this case because the trial court there "interviewed the juror at least once." *Id.* at 340; *see also* AB pp.9-10 (citing *United States v. McKeighan*, 685 F.3d 956 (10th Cir. 2012), where the record did "not establish that jurors were actually asleep," *id.* at 974).

The State looks to *United States v. Freitag*, 230 F.3d 1019 (7th Cir. 2000), for the notion that "[i]f sleep by a juror makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a fair trial, the sleeping juror should be removed from the jury." *Id.* at 1023; *see* AB p.16-17, 44. But neither *Freitag* nor the State explains how a sleeping juror can perform his duties or do anything but undermine the trial's fairness. *Freitag* is also distinguishable because

defense counsel there "waited nearly a week before alerting the district judge," which compromised the court's chance to respond. 230 F.3d at 1023-24; *see id.* at 1023 (noting prosecutor's view that juror merely closed his eyes on one occasion).

The State also looks to *United States v. Fernandez-Hernandez*, 652 F.3d 56 (1st. Cir. 2011), and *Welch v. United States*, 807 A.2d 596 (D.C. 2002), *see* AB p.36-37, 44-45, but these cases merely cited *Freitag* without explaining why some sleeping is tolerable or how a sleeping juror can still provide the defendant a fair trial. *Fernandez-Hernandez*, 652 F.3d at 74-75; *Welch*, 807 A.2d at 603-04.

In *State v. Williams*, 235 S.E.2d 86 (N.C. App. 1977), where, like here, a juror fell asleep during cross-examination of a prosecution witness, the appellate court rejected the defendant's claim that he was impermissibly convicted by an eleven-person jury, but it did so by accepting the absurd notion that sleeping jurors count: "The 'sleeping juror' had been duly impaneled along with the other eleven and the twelve duly returned a verdict of guilty in open court." *Id.* at 87; *see* AB p.15.

*Williams* is not persuasive, and its correctness under North Carolina law is questionable. In *State v. Hudson*, 185 S.E.2d 189 (N.C. 1971), the Supreme Court of North Carolina reversed for "a fatal defect appearing upon the face of the record" that neither party raised. The problem was the defendant and defense counsel "waived trial by twelve" after a juror became ill and was excused, but that could not

be done: "It is elementary that the jury provided by law for the trial of indictments is composed of twelve persons; a less number is not a jury." *Id.* at 192. The verdict was "a nullity despite defendant's failure to assign his conviction by eleven jurors as error." *Id.* at 193. *Williams* declined to apply *Hudson*. *See* 235 S.E.2d at 87.

The court in *State v. Yant*, 376 N.W.2d 487 (Minn. Ct. App. 1985), rejected the defendant's argument that failure to obtain his waiver violated his jury right "[u]nder the circumstances of [that] case." *Id.* at 491; *see* AB pp.15-16, 30. In *Yant*, unlike here, the trial court held an in-chambers discussion with the lawyers and the defendant to address the sleeping-juror problem. 376 N.W.2d at 489. The court proposed a switch, but the defense declined. *Id.* at 489-90. The appellate court "suggest[ed] that the better practice would have been for the court to question the jurors who were observed with closed eyes," but there was no reversible error because the record showed "[a]ppellant and his counsel were fully apprised of the potential jury misconduct and declined, even at the court's prompting during trial, to voir dire the jurors, seat their alternates or move for a mistrial." *Id.* at 490.

In *People v. Dunigan*, 831 N.W.2d 243 (Mich. App. 2013), the record established that one juror slept. *Id.* at 248-49; *see* AB p.20. The appellate court rejected the defendant's "bare assertion that the juror could not fairly and competently consider the charges against him and therefore was not qualified to give

a verdict," 831 N.W.2d at 249, but that assertion is correct. Sleeping jurors cannot assess the evidence. *Dunigan* is wrong, but it is also distinguishable because that defendant "fail[ed] to articulate how he was prejudiced," *id.*, whereas Mr. Forgette demonstrated these sleeping incidents occurred during defense counsel's cross-examination of prosecution witnesses, *see* OB pp.2-3, 34-35.

In *Hardin v. State*, 956 N.E.2d 160 (Ind. Ct. App. 2011), the parties claimed a particular juror slept, but the trial court did not so find. *Id.* at 164 ("Hardin has failed to demonstrate that the juror was in fact asleep and if so, for how long."). The appellate court also found a waiver, but the bench conference it quoted involving the trial court and counsel did not show, as it claimed, that "Hardin was aware of both the juror's alleged inattentiveness and the trial court's proposed remedy" of sending a beverage. *Id.* at 162-63.

The record in *State v. Sanders*, 750 N.E.2d 90, 107 (Ohio 2001), also did not establish that a juror slept. The trial court received a report that a juror "appeared to have fallen asleep," and "the judge told the jury he was keeping the courtroom temperature low 'because there's too much sleeping going on.'" *Id.* On appeal, the defendant argued "that the trial court should at least have examined the juror to determine whether she really was sleeping and what she missed." *Id.* The court rejected a per se rule requiring inquiry into every instance of alleged juror sleeping,

*id.*, but this Court should impose on trial courts such a duty of inquiry when, as here, they *find* that a juror slept during the presentation of evidence.

Instead of following the State's cases, this Court should reverse for structural error, but if this Court declines Mr. Forgette's proposed rule and accepts the State's invitation for plain-error review of the merits, *see* AB p.35 n.4, it should still reverse.

After *People v. Evans*, 710 P.2d 1167 (Colo. App. 1985), it was obvious, though it went without saying, that a juror's sleeping is "contemptuous of the seriousness" of the underlying criminal matter. *Id.* at 1168. It is also obvious that a sleeping juror cannot process the evidence. The prejudice here exceeds that of *Evans*, where a new trial was ordered because a juror slept during defense counsel's closing argument. *Id.* Here, the juror slept during the presentation of evidence as defense counsel contested the prosecution's case. This issue is preserved, but Mr. Forgette prevails even under plain-error review.

## CONCLUSION

This Court should reverse Mr. Forgette's conviction or reverse the division and remand for further proceedings.

MEGAN A. RING
Colorado State Public Defender

JACOB B. MCMAHON, #48784
Deputy State Public Defender
Attorneys for ELLIOTT J. FORGETTE
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on October 6, 2022, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on William G. Kozeliski of the Attorney General's office.