

IN THE  
SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_

BURTON LEE SMITH

Petitioner,

VS.

ADMINISTRATOR NEW JERSEY STATE PRISON, et al.

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

SUBMITTED BY:

Burton Lee Smith #662094/307963E  
New Jersey State Prison  
P.O. Box 861  
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**QUESTIONS PRESENTED**

- 1.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that He was not Denied His State and Federal Constitutional Rights to the Effective Assistance of Counsel when His Trial Attorney Failed to Move for a Severance of Defendants for Trial pursuant to Bruton v. United States.
- 2.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that the Trial Court Did Not Err by Failing to Adequately Instruct the Jury Pursuant the N.J.R.E. 404(B) Regarding the Testimony Elicited at Trial from Detective Ricci Involving the Co-Defendant's Fear of the Petitioner Arising out of a previously Existing Restraining Order.
- 3.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that His Constitutional Rights were not Violated when the Trial Court Erred by Failing to Sponte Instruct the Jury Regarding the Petitioner's Photograph which was part of the Photographic Array Shown to the Victim which was Characterized by Him as Constituting a "Mug Shot".
- 4.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that His Constitutional Rights were not Violated when a Sleeping Juror was Allowed to Continue Sitting and Ultimately Deliberate on Petitioner's Guilt.
- 5.) Whether the Third Circuit Court of Appeals Erred in Denying Petitioner a Certificate of Appealability on His Claim that His United States 6th Amendment to Confrontation were not Violated.

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**LIST OF PARTIES**

The Petitioner is Mr. Burton Lee Smith, acting pro se, and is a prisoner presently confined at New Jersey State Prison in Trenton, New Jersey.

The respondents are Steven Johnson former Administrator of New Jersey State Prison, and the Burlington County Prosecutor's Office.

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**OPINIONS BELOW**

The United States District Court for the District of New Jersey denied petitioner's petition for a writ of habeas corpus in an opinion on May 15, 2019. **(See Appendix - Ex-1)**

The United States Court Of Appeals for the Third Circuit filed an order on March 25, 2020, denying petitioner's petition for a Certificate of Appealability. **(See Appendix - Ex-45)**

The United States Court Of Appeals for the Third Circuit filed an order on June 11, 2020, denying petitioner's petition for a Rehearing En Banc. **(See Appendix - Ex-47)**

**STATEMENT OF JURISDICTION**

The United States District Court For the District Of New Jersey denied Petitioner's petition for writ of habeas corpus on May 15, 2019, and on the United States Court of Appeals for the Third Circuit filed an order on March 25, 2020, denying Petitioner's petition for a Certificate of Appealability and a petition for a Rehearing En Banc were denied on June 11, 2020. This Court has jurisdiction under 28 U.S.C.A. §1254(1) to review the Circuit court's decisions on a writ of certiorari.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The **VI Amendment** which states, "that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The **XIV Amendment** which states, "that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridges the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### STATEMENT OF THE CASE

James Spates was a cook at Popeye's in Hillside, New Jersey and was working on the afternoon of March 6, 2009, when he left the store to cash a check at the Garden State Check Cashing store about a block and a half away. After leaving the store, he stopped and began separating his money from that of his sister's, putting his sister's money in his wallet and his own money in his pocket. As he was doing so, he was attacked; someone grabbed him and told him to "get in the truck."

Spates saw something shiny in the assailant's hand and told him that "I'm not going no f-ing where. I'm not getting in no truck with you . . ." He attempted to grab the object, assuming it was "a gun or something," and that the assailant "wanted my money." During the struggle, Spates' arm was "cut pretty deep." He attempted to "shake away" from his assailant but kept getting hit, although he was not aware he was being stabbed. When he realized he was being stabbed repeatedly, he left his money and wallet on the ground since "my life is not worth no \$270.00 . . ."

After grabbing those items, the assailant entered the front passenger seat of a black Ford Explorer with a temporary North Carolina license/registration tag. As he told Spates he did not care if he looked at the license plate; Spates did so before returning to Popeye's.

When Spates entered the store, his boss told him to lie down; the police and ambulance were summoned. Patrolman William Blakey of the Hillside Police Department was at the intersection

of Liberty and Long Avenues in the parking lot of Popeye's around 3:30 p.m. when the store manager came out and told him one of his employees had been stabbed and was inside. Blakey went inside and observed Spates lying on the floor covered with blood. Spates told the officer he had been leaving a check cashing place a short distance away when an individual robbed him. He described his assailant as a black male with dreads, who had left in a dark-colored Ford Explorer.

Spates was taken to University Hospital in Newark by ambulance and treated for stab wounds to his abdomen, two stab wounds to his arm and a stab wound to his back. He received numerous stitches and was released approximately a day and a half later.

Meanwhile, Detective Michael Ricci went to the Garden State Check Cashing store and spoke with the manager, who indicated his video surveillance system had captured the stabbing. After the officer watched the video, a "BOLO" was sent out describing the vehicle and the assailant.

As a result of information received from the Union Police Department the next day, Ricci and other officers set up surveillance at Garden State Motor Lodge on Route 22 in Union regarding a vehicle matching the description. When three females and a male entered the vehicle, it was boxed in by the police and all occupants were removed at gunpoint.

Christina Rourk-Moore was removed from the driver's seat and the Petitioner was removed from the front passenger seat. Two rear female occupants were also removed. When police frisked

Petitioner, they found a folding knife in his rear pocket. A DNA test were which matched Mr. Spates's blood.

Rourk-Moore gave consent to search the vehicle and a motel room in which she staying. A hooded sweatshirt was eventually removed from the vehicle at headquarters. The two rear seat passengers were released and not charged after giving statements.

Spates was questioned by the police at the hospital on March 7. He was shown various photographs and, after viewing one of the photographs, indicated it looked like his assailant. He further indicated he was "not really sure" and "would need to see him in person." The photograph was that of the petitioner. However, Spates identified the Petitioner in court, indicating there was "no doubt in my mind." He further identified the jacket taken from the vehicle as having been worn by his assailant.

Detectives Ricci subsequently spoke with Rourk-Moore in the early morning hours of March 8. After being shown the surveillance video, she identified the vehicle depicted therein as belonging to her and acknowledged driving it. She indicated she had been waiting to receive money for a money transfer and had no idea any assault or robbery was going to take place. She initially denied in being in the vehicle or at the scene of the assault. However, in her ensuing statement, she indicated he denial was based upon her fear of the Petitioner, for whom she had a restraining order, and that he would hear her give incriminating statement to the police while at headquarters.

The jury, however, found petitioner guilty of all charged offenses. Thereafter on July 16, 2010, Petitioner was sentenced

to an aggregate sentence of 50 years with an 85% parole disqualifier pursuant to the No Early Release Act.

In March of 2016, the Petitioner filed a petition for a writ of habeas corpus. The petition raised eight grounds: **GROUND ONE:** The Petitioner was Denied His Right to a Fair Trial as a Result of Prejudicial Testimony Elicited by Co-counsel During Cross-Examination of Detective Michael Ricci Arising out of the Trial Court's Ruling Permitting the State to Reopen Its Case to Present Testimony from Him; **GROUND TWO:** The Trial Court Erred by Failing to Adequately Instruct the Jury Pursuant the N.J.R.E. 404(B) Regarding the Testimony Elicited at Trial from Detective Ricci Involving the Co-Defendant's Fear of the Petitioner Arising out of a previously Existing Restraining Order; **GROUND THREE:** The Trial Court Erred by Failing to Sponte Instruct the Jury Regarding the Petitioner's Photograph which was part of the Photographic Array Shown to the Victim which was Characterized by Him as Constituting a "Mug Shot"; **GROUND FOUR:** The Sentence Imposed was Manifestly Excessive Manifestly Excessive; **GROUND FIVE:** Petitioner's Right to Trial by an Impartial Jury was Violated when a Sleeping Juror was Allowed to Continue Sitting and Ultimately Deliberate on Petitioner's Guilt; **GROUND SIX:** The Trial Court Erred in Violating Petitioner's 6th Amendment Right to the United States Constitution and the Constitution of New Jersey, U.S. Const. Amend. VI., New Jersey Const. Art. I, Para. 10. The Trial Court in Violating the Constitution Clause of the Fourteenth Amendment; **GROUND SEVEN:** The Trial Court Erred when it Allowed the Prosecutor to Allow a Photographic Line-up Statement

without Recorded Words Exchanged Between the Witness and the Officer Conducting the Identification Procedure, either by Tape Recordings or Written Statements at the Initial Time of Identification Procedure; **GROUND EIGHT:** Petitioner was Denied His State and Federal Constitutional Rights to the Effective Assistance of Counsel when His Trial Attorney Failed to Move for a Severance of Defendants for Trial pursuant to Bruton v. United States, and He is Therefore Entitled to a New Trial.

The district court denied the petition for a writ of habeas corpus. Smith v. Johnson, No. 16-1373 (MCA), slip opinion (May 15, 2019). Petitioner filed a notice of appeal and a petition for a certificate of appealability (COA). On March 25, 2020, the Third Circuit denied the petition for a COA. On June 11, 2020, the Third Circuit denied a petition for rehearing and rehearing En Banc.

## **REASONS WHY CERTIORARI SHOULD BE GRANTED**

### **Point I**

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that His Trial Counsel was Ineffective, and the Third Circuit's Decision to Affirm is Likewise Erroneous.

In order to obtain a certificate of appealability (COA), a petitioner need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

The well-known standard of Strickland v. Washington governs this claim. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Under this standard, petitioner must show that trial counsel's performance was deficient and the deficient performance prejudiced the defense.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must meet the two-prong test of establishing both that: (1) counsel's performance was deficient and he or she made errors that were so serious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; (2) the defect in performance prejudiced petitioner's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 687, 694, 104 S.Ct. at 2064, 2068. See also, State v. Loftin, 191 N.J. 172, 198 (2007); accord State v. Allegro, 193 N.J. 352, 366-67 (2008); State v. Castagna, 187 N.J. 293, 314-15 (2006).

The benchmark for judging ineffective assistance of counsel claims is whether counsel's conduct changed the outcome of the trial. Strickland, supra; United States v. Cronic, 466 U.S. 648 (1984); Fritz, supra, adopting the Strickland and Cronic standard.

The Petitioner contended that trial counsel was ineffective for failing to move for severance of Petitioner's trial, based on the fact that after both sides rested their case, Co-counsel made a motion for a mistrial as a result of an improper impression left in the jury's minds arising out of the State's opening statement in which he told the jury the Co-defendant had lied to the police in her initial statement by denying any knowledge of the incident in question, thereafter acknowledging owning and being in the vehicle in which the Petitioner fled the scene. The prosecutor had made no reference to the Co-defendant's initial statement during the course of the trial, his opening statement in which he characterized the Co-defendant as a liar lacked a factual foundation in the trial record.

Over Co-counsel's objection, the court permitted the State to reopen its case to elicit testimony from Detective Ricci regarding the Co-defendant's initial statement.

During cross-examination of Ricci by Co-counsel, irrelevant and prejudicial inflammatory testimony was elicited. Immediately prior thereto, defense counsel had objected to the admission of such testimony in which the Co-defendant essentially maintained that her conduct and actions occurred as a result of her fear of the Petitioner. Which took place in the following exchanges:

**Q.** And did she indicate to you that she had lied in her first statement to you?

**A.** Yes, she did.

**Q.** Did she tell you why?

**A.** She knew that the - the defendant was in the next room and she was afraid he could hear her.

Based on the fact this was a joint trial, and counsel for Rourk-Moore had the obligation to defend his client, the following exchanges took place on his cross-examination of Detective Ricci:

**Q.** Did you ask her, "So to clarify, you gave a statement earlier, why didn't you tell us the truth then?" Did you ask her that on --

**A.** Yes. Yes, I did . . .

**Q.** And what was her response to that?

**A.** "Answer: Because he was opposite the room I was in and I thought he could hear me. And" -

**Q.** Now you asked her then a little bit later on that same page, "But getting back to the first statement, you didn't tell us the truth because you thought he could hear what you were saying?" Did you ask her that?

**A.** Yes, I did.

**Q.** And did she respond to that?

**A.** Yeah.

**Q.** And what was her response?

**A.** Answer was "Yeah."

**Q.** And on the next page did you ask her, "Okay. So you lied because you were afraid of him?"

**A.** I did.

**Q.** And what was her response?

**A.** Her answer was, "He was opposite of the damn window, You all."

**Q.** You indicated on direct and now on cross that Ms. Rourk-Moore indicated that the reason that she was not truthful in the first statement was because she was afraid of him, correct?

**A.** Yes.

**Q.** Was there another person in the next room?

**A.** Yes, there was.

**Q.** Was that Mr. Burton Smith?

**A.** Yes.

**Q.** And he - he was in the very next room to her, correct?

**A.** Yes.

Although Rourk-Moore did specifically name the Petitioner as the perpetrator of the robbery/assault, that is the inevitable conclusion the jury would have drawn from this testimony.

To violate Bruton, it is not necessary that the hearsay statement explicitly accuse the defendant; "it is the 'creation of the inference, not the specificity of the statements made,'

that determines whether the hearsay rule was violated." State v. Irving, 114 N.J. 427, 447 (1989)

Also in Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), the Court reviewed defendant's Sixth Amendment claim of ineffective assistance of counsel by failing to assert a Constitutional Amendment claim. Referring to its opinion in Strickland v. Washington, the Court noted that:

In order to prevail the defendant must show both that counsel's representation fell below an objective standard of reasonableness, Strickland, 466 U.S. at 688, 80 L.Ed.2d 674, 104 S.Ct. 2052, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, at 694, 80 L.Ed.2d 674, 104 S.Ct. 2052. Where defense counsel's failure to litigate a Fourth Amendment claim is meritorious and that the 'verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. [Emphasis supplied.]

Clearly, in failing to move for a severance of defendants in the Petitioner's circumstances, counsel's representation fell below an objective standard of reasonableness, as required by the first prong of the Strickland test. Furthermore, the prejudice suffered by Petitioner as a result of this failure was fifty years in prison.

Point II

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that His Constitutional Rights were not Violated as a Result of Prejudicial Testimony Elicited by Co-counsel During Cross-Examination of Detective Michael Ricci Arising out of the Trial Court's Ruling Permitting the State to Reopen Its Case to Present Testimony from Him, and the Third Circuit's Decision to Affirm is Likewise Erroneous.

After both sides rested their case, Co-counsel made a motion for a mistrial as a result of an improper impression left in the jury's minds arising out of the State's opening statement in which he told the jury the Co-defendant had lied to the police in her initial statement by denying any knowledge of the incident in question, thereafter acknowledging owning and being in the vehicle in which the Petitioner fled the scene. The prosecutor had made no reference to the Co-defendant's initial statement during the course of the trial, his opening statement in which he characterized the Co-defendant as a liar lacked a factual foundation in the trial record.

Over Co-counsel's objection, the court permitted the State to reopen its case to elicit testimony from Detective Ricci regarding the Co-defendant's initial statement.

During cross-examination of Ricci by Co-counsel, irrelevant and prejudicial inflammatory testimony was elicited. Immediately prior thereto, defense counsel had objected to the admission of such testimony in which the Co-defendant essentially maintained that her conduct and actions occurred as a result of her fear of the Petitioner.

Therefore, the trial court erred by ruling reference could be made by either the State or Co-counsel to the existence of a restraining order which had been obtained by Co-defendant against the Petitioner, in light of the fact it had subsequently been withdrawn. Specifically, to the extent the Co-defendant withdrew the restraining order, or was instrumental in having the restraining order dismissed with her consent, she could not possibly have been affected by the Petitioner, nor could her actions or conduct have been influenced by her interaction with him.

The Petitioner contends in order for the testimony to be admissible under Fed. R. Evid. 404(b), **(1)** the evidence must have a proper purpose under Rule 404(b); **(2)** it must be relevant under Fed. R. Evid. 402; **(3)** its probative value must outweigh its potential for unfair prejudicial effect under Fed. R. Evid. 403; and **(4)** the court must charge the jury to consider the evidence only for the limited purpose for which it is admitted.

Under Fed. R. Evid. 404(b), the admission of other acts evidence for the purpose of showing that an individual has a propensity or disposition to act in a particular manner is prohibited and the Federal Rules of Evidence are clear and unambiguous: irrelevant and prejudicial evidence is inadmissible and the Petitioner's due process rights were violated when the trial court allowed the restraining order testimony to be admitted without limiting instructions, which violated the Petitioner's right to a fair trial.

... In State v. Kelly, 97 N.J. 178 (1984) it states: evidence may be excluded as unduly prejudicial when its "probative value is so significantly outweighed by its inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation' of the issues in the case.

This aspect of testimony was entirely gratuitous and should not have been permitted by the trial court.

It is also argued that inadmissible evidence and highly inflammatory statements came rolling in unimpeded at Petitioner's trial, without any hesitation by the prosecutor, or correction by the Trial Court. Indeed, at only one point when irrelevant but enormously prejudicial evidence and wholly inappropriate statements came before the jury did defense counsel object, and that objection was not at all specific. His failure to object, of course, did not relieve the prosecutor of his duty to comply with the Federal Rules of Evidence and, even more importantly, rules of fundamental fairness.

In Himelwright, although operating under an abuse of discretion standard of review, the conviction was reversed due to concerns that the government's emphasis on 404(b) evidence in its closing argument tainted the trial in two regards: **"First**, it had the potential for frightening the jury into ignoring evidence that otherwise might have raised a reasonable doubt . . . . **Second**, if the jury was persuaded that [the defendant] was violence-prone by character, it might have inferred that he intended violence in this particular instance. That inference is

precisely what Rule 404(b) prohibits." Himelwright, 42 F.3d at 786 n.8. See also United States v. Morley, 199 F.3d 129, 137-38 (3d Cir. 1999) ("This frontal assault upon the defendant's character is simply not appropriate under our system of laws, and the trial court abused its discretion in admitting it.") Plain error was committed here in the Petitioner's case as well.

As such, reasonable jurists could disagree with the district court's decision.

### Point III

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that His Constitutional Rights were not Violated when the Trial Court Erred by Failing to Sponte Instruct the Jury Regarding the Petitioner's Photograph which was part of the Photographic Array Shown to the Victim which was Characterized by Him as Constituting a "Mug Shot," and the Third Circuit's Decision to Affirm is Likewise Erroneous.

A special charge is necessary because the vagaries of eyewitness identification are well known, and the annals of criminal law are rife with the instance of mistaken identification. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 1933, 18 L.Ed. 1148, 1158 (1967). Under the plain error rule, a defendant must establish not only that there was error but that it was clearly capable of producing an unjust result. State v. Macon, 57 N.J. 325, 273 A.2d 1 (1971). In a case in which eyewitness identification is a significant issue, a jury is not properly instructed as to the evaluation of such testimony by a general charge on credibility. An identification instruction in a case where identification is a contested issue is certainly a material point, one that is "a fundamental and essential trial issue." State v. Green, 86 N.J. 281, 430 A.2d 914 (1981). The Court noted: "that [w]hen identification [i]s a "key issue" in a case as underscored by the fact that the jury had request a 'read-back' of the testimony in which she described the assailant." Id. at 287, 291. In the instance of an error in instructing the jury, the qualitative assessment under the plain error rule is different from situations in which other forms of

judicial error are assigned since the clear capacity to produce an unjust result is more likely in the case of an erroneous or insufficient instruction to the jury. State v. Vick, 111 N.J. 288, 566 A.2d 531 (1989). In prosecution, in which identity of assailant was a crucial issue, when giving identification charge, trial court was required to refer to in-court identification of defendant and his accomplice as well as her glaringly inconsistent out-of-court identification and her testimony as to which defendant did what. State v. Edmonds, 293 N.J. Super 113, 679 A.2d 725 (App. Div. 1996). See also, State v. Pierce, 330 N.J. Super 479 (App. Div. 2000). If a charge on identification was necessary, which it manifestly was, the abbreviated instruction which the trial judge gave was fundamentally inadequate under any circumstances. State v. Frey, 194 N.J. Super 326, 476 A.2d 884 (App. Div. 1984); State v. Middleton, 299 N.J. Super 22, 690 A.2d 623 (App. Div. 1997); State v. Walker, 322 N.J. Super 535, 731 A.2d 545 (App. Div. 1999) State v. Malloy, 324 N.J. Super 525 (App. Div. 2000).

"Difference between a court 'explaining the law in the context of the case', which is required, and 'a court commenting upon the credibility of the evidence'. See State v. Walker, Supra, Id. at 551. "Correct jury charges are essential for a fair trial." A jury charge "is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations". State v. Martin, 119 N.J. 2 (1990).

The abbreviated jury instruction that was given on identification was clearly flawed and erroneous, and trial

counsel's failure to object the all-to-thin charge on identification cannot be used talismanically as a basis for disregarding the trial court's error in omitting to give the jury proper guidance, through a complete instruction, on how to evaluate the identification evidence. In the circumstances of this case, the error was plain. See State v. Malloy, *supra*, at 536-37.

The Petitioner will rely on the case law and supporting facts submitted in His Lawyer's brief, along with the supporting facts submitted in pro-se brief of Post-conviction relief briefs.

As such, reasonable jurists could disagree with the district court's decision.

#### Point IV

The District Court Erred in Refusing to Issue a Certificate of Appealability on Petitioner's Claim that His Constitutional Rights were not Violated when a Sleeping Juror was Allowed to Continue Sitting and Ultimately Deliberate on Petitioner's Guilt, and the Third Circuit's Decision to Affirm is Likewise Erroneous.

A judge has the discretion to remove a juror who has been sleeping and substitute an alternate. See State v. Marchitto, 132 N.J. Super 511, 516-17 (App. Div.) certif. den. 68 N.J. 163 (1975); U.S. v. Cohen, 530 F.2d 43 (5th Cir.) certif. den. 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976).

In the Petitioner's case, a sleeping juror was brought to the attention of the trial judge by defense counsel and Co-defendant's counsel in the following:

**Mr. Kabak:** That juror, she's like nodding off. I know you're paying attention to her. I know you're watching, but she's - she's really not in the game here.

**Mr. McMahon:** Judge, at this point I'm, I don't see that at all.

**Mr. Kabak:** Maybe you're not paying attention to it, but everyone else is.

**Mr. Seltzer:** I'll make the record clear, also I have been paying attention, my clients been paying attention. He bumps me on my shoulder everytime she's closed her eyes, and she's not closing her eyes for a half a second. I know what a yawn is. She's - she's sleeping, and as far as her gender and ethnicity I couldn't care less. In fact - I'll just leave it at that. I certainty couldn't care anything at all about that issue, but he's making it clear, and he's certainty an African American, so its certainty not an issue of race or gender. He wants it to be

noted that she is not in the game. She's sleeping, yesterday and today.

**The Court:** Counsel, I been watching her. She has been sleeping.

The trial judge weighed in when he said, "Counsel, I been watching her. She has been sleeping."

Although counsel did not specifically request that the juror be removed, the mere fact that the situation was brought to the Court's attention, warrants action by the court. See U.S. v. Cohen, supra.

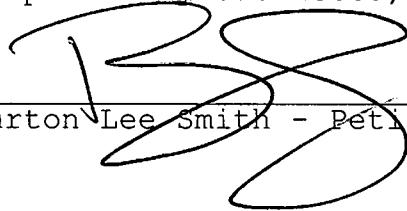
As such, reasonable jurists could disagree with the district court's decision.

**CONCLUSION**

The Court should grant the petition for a writ of certiorari and reverse the decision of the Third Circuit Court of Appeals.

Dated: September 8, 2020

Respectfully submitted,

  
Burton Lee Smith - Petitioner