No. 22-6753 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Andrew Mark LaMar — PETITIONER
(Your Name)

vs.

State of Colorado — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of the State of Colorado
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andrew Mark LaMar # 113997
(Your Name)
Fremont Correctional Facility (FCF)
FCF-Box 999
(Address)

Canon City, CO 81215
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

On direct-collateral review:

WHETHER PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIAL WAS VIOLATED DUE TO JUROR MISCONDUCT. U.S. CONST. AMENDS. VI, XIV.

And,

WHETHER PETITIONER'S RIGHT AGAINST DOUBLE JEOPARDY WAS VIOLATED DUE TO SUA SPONTE DECLARATION OF MISTRIAL ABSENT MANIFEST NECESSITY. U.S. CONST. AMEND. V.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Court of Appeals court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was 11/07/22. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment right to a fair and impartial jury

Fourteenth Amendment

Fifth Amendment

STATEMENT OF THE CASE

I. Introductory Remarks

The underlying appeal concerns summary dismissal of a pro se petition for post-conviction relief. On appeal, I submitted an Opening Brief which argued error as to the procedural posture in which the district court relied upon for its summary dismissal, absent merit review.

The People submitted their Answer Brief by addressing for the first time on appeal the merits, contending, principally, that I am not entitled to post-conviction relief for each of the post-conviction claims I asserted for they were without merit.

Because the Answer Brief addressed the actual merits of the claims raised in the first instance, I submitted a Reply Brief addressing each of their contentions in turn; firmly insisting that several of the claims not only possessed merit, but should have been properly reviewed by the district court, namely, the issue of a *sleeping juror*, which required further fact development.

On appeal, Judge Harris issued the Opinion for the Court, affirming the district court Orders. However, the Opinion addressed each of the seven claims contained in the post-conviction petition, though it ignored the legal support I had cited supporting the issues, of which I made reference to, specifically and without ambiguity. The appellate court's apparent cursory reading of the claims resulted in the conclusion that each of the post-conviction claims were meritless. I contend that had the Opinion considered the law objectively, the outcome would be

different.

I took considerable umbrage with the Opinion's treatment of this particular issue, by arguing in a Petition for Rehearing that claim: six [*sleeping juror*] [Op. at pp. 13-15], was decided in a manner that completely missed the mark. As such, the instant petition contends that the claim addressed in the Opinion as claims six requires closer scrutiny by this Court.

At the very least, the issue should have been remanded back for further fact-development, with regard to the perception the prosecutor had with the sleeping juror.

Nevertheless, I beseech this Court to grant *certiorari* to review the following issue.

II. ***Issue:***

The trial Court violated Petitioner's Right to a Fair and Impartial Trial by failing to intervene or otherwise inquire into the nature of juror misconduct when the prosecution informed the judge, *ex parte*, that a juror was nodding off and causing a distraction with the other jurors amid the defense's cross examination of a critical witness. U.S. Const. Amends. VI, and XIV; Colo. Const. Art. II, §§ 16, 23 and 25.

A. Record Facts and Argument

Here, amid trial on the second day of my cross-examination of the victim, the prosecutor approached the bench, *ex parte* and unbeknownst to me, the following colloquy occurred:

[PROSECUTOR]: "I think that we have a juror who's nodding off, first row, third from the right, and all the other jurors are noticing it. I think-I don't know how the court wants to handle it, but I think that we ought to do something about it."

[JUDGE]: "Actually, um, re-approach."

[PROSECUTOR]: "Do you think you have...."

[DEFENDANT]: "I'm trying to regroup. I had some notes and can't find them. It's just the follow-up. There is some impeaching questions. Is that, um-I'm sorry, there is-there are some impeaching questions that I had taken notes."

[JUDGE]: "you need until at least noon?"

[DEFENDANT]:"At east, but if you need to take a break, I would like to have maybe 30 minutes."

[JUDGE]: "all right."

[TR. 44/25/07, pp. 85:21-86:19-24]

Since I was not privy to this colloquy because I was at the lectern during my cross-examination and shuffling through notes, only then I was called to attention

by the judge and asked if I "need[ed] until at least noon," to continue with the examination.

My contention has been that the Judge's inaction and passive concealment was improper on its face. The Opinion admitted that "it might have been better practice for the court to notify" me [Op. at p. 15, ¶ 38], but faulting me for having speculated as to whether the juror had been asleep for a long period of time [Op. at p. 15, ¶ 36]. Here, the appellate court's reliance upon ***People v. Herrera***, 1 P.3d 234 (Colo. App. 1999), for the proposition that "[u]nder these circumstances, we cannot conclude that the trial court abused its discretion by failing to declare a mistrial *sua sponte*," *id.* at 240, is misplaced. To suggest that it was "reasonable under the circumstances" [Op. at p. 15, ¶ 38] for the court not to have inquired into or took remedial action, misses the point the Division in ***Herrera*** made with regard to the inattentive juror that the court had admonished to pay attention, though, defense counsel "complained to the court that he had seen one juror sleeping" he "did not move for a mistrial." And that, "neither the prosecution nor the court witnessed any sleeping jurors" defense counsel did ask the court "to admonish the jury to pay attention" and the court did so. *Id.*

Because I was not informed about this inattentive juror, and that the prosecution thought it was substantial enough to bring it to the court's attention, *ex parte*, even suggesting that the court do something; it stands to reason the court

ipso facto abused its discretion by failing to discuss this with me, let alone conduct a *voir dire* of the identified juror, or to take any other remedial steps to determine if that juror was fit to deliberate, thereby making a determination of whether the juror should be replaced with an alternate.[2]

On appeal, the finding that it did not appear the "juror was actually asleep" [P. at. P. 14, ¶ 36], but rather the prosecutor had only observed the juror "nodding off" is completely unreasonable. The fact that it was a distraction enough to the other jurors, causing the prosecutor to act, even so far as to suggest that the "we ought to do something about it" clearly evinces more than just "nodding off." Thus, this issue should be taken on with respect to the fact that the trial judge did nothing to make that determination. *See* ***People v. King***, 121 P.3d 234, 241 (Colo. App. 2005) (reviewing a trial court's factual determination that a juror was not sleeping during trial for abuse of discretion).

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[2] In ***People v. Tunis***, 318 P.3d 524, 530-31 (Colo. App. 2013), the court noticed that one of the jurors seemed to be having trouble staying awake during trial. The trial court stated, "[I]t is observable that his head falls. He appears not to be awake." When the court indicated that it was inclined to release the sleeping juror, defense counsel requested that the court question the juror about whether he was sleeping. The court did so, and the juror indicated that he was having trouble staying awake and admitted to nodding off during the trial. The court then released the juror and replaced him with an alternate. Defendant moved for a mistrial based on being denied a jury of his choice, and the court denied the motion. On appeal it was held that the trial court's decision to replace the sleeping juror was not an abuse of discretion. Cf. ***United States v. Holder***, 652 F.2d 449, 451 (5th Cir. 1981) ("Holder's counsel did not request replacement of that juror by an alternate. Holder has not shown that he was prejudiced by the court's action.").

B. Legal Support and Analysis

The right to trial by jury guarantees a defendant a fair trial by an impartial jury. See ***Irvin v. Dowd***, 366 U.S. 717, 722 (1961) (right derives from Sixth Amendment). A criminal defendant's right to an impartial jury arises from both the Sixth Amendment and principles of due process. ***Ristaino v. Ross***, 424 U.S. 589, 595 n.6 (1976).

A necessary corollary of the right to an impartial jury is the right to a jury in which all of the members are physically and mentally competent. See ***Tanner v. United States***, 483 U.S. 107, 126 (1987). A defendant could be deprived of the Fourteenth Amendment right to due process or the Sixth Amendment right to an impartial jury if jurors fall asleep and are unable to fairly consider the defendant's case. *See* ***United States v. Freitag***, 230 F.3d 1019, 1023 (7th Cir. 2000) ("However, a court is not invariably required to remove sleeping jurors, and a court has considerable discretion in deciding how to handle a sleeping juror.").

If jury misconduct substantially affected the rights of a defendant to a fair and impartial trial, the defendant may be entitled to a new trial. ***Evans***, 710 P.2d at 1168. And with respect to the juror misconduct issue, I was denied my Sixth Amendment right to have the case decided by twelve attentive jurors, and thus, the trial court abused its discretion by failing to apprise me of the putative sleeping juror, nor inquire into the nature of the juror misconduct. See, e.g., ***Commonwealth v.***

McGhee, 25 N.E.3d 251 (Mass. 2015) (Holding that when a juror advised the judge that another juror had been sleeping during the trial; the judge's failure to conduct a *voir dire* of the identified juror, or to take any other steps to determine if that juror was fit to deliberate, was a structural error that necessitated a new trial.).

Despite the fact that I made reference to the afore-mentioned legal and factual reasoning, both before the post-conviction and appellate courts, neither of these cases or the argument I made in Reply was considered in the Opinion. Therefore, I rightfully challenge the appellate court's determination as unreasonable in light of these assertions. In the current case, I have essentially framed the post-conviction court's failure to *voir dire* the allegedly sleeping juror as a due process violation—denying my "right to be tried by competent jurors," which "'implies a tribunal both impartial and mentally competent to afford a hearing.'" ***Tanner***, 483 U.S. at 134 (Marshall, J., dissenting) (quoting ***Jordan v. Massachusetts***, 225 U.S. 167, 176 (1912)).[3] I argue that the failure of the trial court to question the sleeping Juror deprived me of this guaranteed right to "mentally competent" jurors and, therefore, amounted to an abuse of discretion.

Initially, I argue that the court of appeals failed to apply the precedent set in ***People v. Evans***, 710 P.2d 1167 (Colo. App. 1985), where unlike here, a juror

[3] The majority opinion in *Tanner* cites the same language from *Jordan*. See ***Tanner***, 483 U.S. at 126.

apparently slept during defense counsel's closing arguments. The trial court was so advised by the bailiff but made no inquiry and took no action prior to the verdict. After the verdict was rendered, the trial court commenced contempt proceedings against the juror. A division of the court of appeals reversed the conviction. *Id.* at 1168. Hence, it is clear from the record in my case, that the trial court knew or acknowledged that a particular juror had slept through material portions of the trial, but did nothing to address issue. That alone should warrant reversal. The Opinion left that open for speculation, which is improper in view of the law. Had I at least known about it then, I could have asked for an alternate juror or some other remedy. *See* ***Spunaugle v. State***, 1997 OK CR 47, 946 P.2d 246, 253 (Okla. Crim. App. 1997) (reversing trial court's denial of defendant's motion to replace juror with alternate where trial judge stated on the record that juror had "dozed during parts of the trial"); ***People v. South***, 177 A.D.2d 607, 576 N.Y.S.2d 314, 314-15 (N.Y. App. Div. 1991) (ordering new trial upon evidence that juror had slept through testimony and court's charge and upon trial court's acknowledgment that juror had closed her eyes during charge); ***Evans***, 710 P.2d 1167, at 1168 (ordering new trial where trial court knew that juror was sleeping during defense's closing argument).

Proof that a juror was sleeping or otherwise unconscious would appear to cast grave doubt on the integrity of the verdict. See, e.g., ***Commonwealth v. Villalobos***, 84 N.E.3d 841 (Mass. 2017) (Holding that the trial judge's failure to

conduct a *voir dire* in response to the prosecutor's reports that some jurors fell asleep during the trial, casts "serious doubt that the defendant received the fair trial to which he is constitutionally entitled," and that "[t]he serious possibility that a juror was asleep for a significant portion of the trial" is a structural error and can never be considered harmless."); ***Commonwealth v. McGhee***, 25 N.E.3d 251 (Mass. 2015) (Holding that when a juror advised the judge that another juror had been sleeping during the trial; the judge's failure to conduct a *voir dire* of the identified juror, or to take any other steps to determine if that juror was fit to deliberate, was a structural error that necessitated a new trial.); ***People v. Jones***, 861 N.E.2d 276 (Ill. App. 2006) (judge who observed juror appear to be half asleep during trial required to make further inquiry and failure to do so mandated new trial).

Because the Opinion faulted me for having speculated about whether the juror was actually asleep and for how long, was improper with regard to the trial judge's inaction. Had the judge inquired into this, and made me privy to the issue, I could then, perhaps, demonstrate that the Juror sleeping affected my right to a fair trial, for instance, that the length of time the Juror was asleep and the portions of the trial he slept through, which conceivably deprived me of the right to a fair and impartial jury. ***Freitag***, 230 F.3d at 1023.

Because of the trial court was in error, and the Opinion ignored it, I thus contend that it must not be left up to speculation. ***Butters v. Wann***, 147 Colo. 352, 357, 363 P.2d 494, 497 (1961)

Issue: Two

Petitioner's Right against Double Jeopardy Infringed when the trial court declared a Mistrial, *sua sponte*, absent a finding of "Manifest Necessity" or whether other reasonable alternatives are no longer available. U.S. Const. Amends. V; Colo. Const. Art. II, § 18.

A. Record Facts and Argument

As acknowledged in the Opinion [Op. at pp. 5-7], with regard to the record facts, in which the factors considered by the trial court were:

- Defense counsel's objection.
- Five hours of deliberation was not inordinately long.
- There was only one count and only one contested issue-Consent.

The appellate court reasoned that based upon the numerical count (polling of the jury), perceivably their "collective agreement," that unanimity was not possible; and the single contested issue, the court did not abuse its discretion [Op. at p. 6].

In essence, I assert that this reasoning runs afoul of the following precedents announced by this Court, and that the appellate court's failure to adhere to them constitutes a valid basis for granting certiorari review.

I argue, principally, that the appellate court misapprehends the "single contested issue" given that there was a lessor included offense instruction, which required an additional charge to the jury. *See* ***People v. Lewis***, 676 P.2d 682, 687 (Colo. 1984). The court's reasons for declaring a mistrial were not substantial enough to warrant a finding of "manifest necessity". *See* ***People v. Berreth***, 13 P.3d 1214 (Colo. 2000). Nor did the trial and appellate court take heed to justice Coat's admonishment when no "other reasonable alternatives are no longer available," ***Berreth***, 13 P.3d at 1217, then can manifest necessity be found for purposes of declaring a mistrial.

Despite my having alerted these citations and legal reasoning in the reply brief, the appellate court simply ignored it, hence the foregoing petition.

B. Legal Support and Analysis

The Colorado double jeopardy jurisprudence tracks that of the United States Supreme Court. ***People v. Schwartz***, 678 P.2d 1000, 1011 (Colo. 1984). A defendant has a right not to be tried for the same crime twice and to have the trial completed by a particular tribunal. ***Arizona v. Washington***, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). "Taking all the circumstances into consideration," a trial court may declare a mistrial when "there is a manifest necessity . . . or the ends of public justice would otherwise be defeated." ***United States v. Perez***, 22 U.S. 579, 580, 6 L. Ed. 165 (1824); *see also* § 18-1-301(2)(b) (adopting manifest necessity standard).

REASONS FOR GRANTING THE PETITION

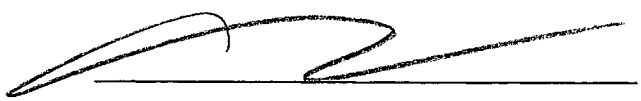
This state's appellate court practices a form of leger-demain by burying its shoddy decisions in unpublished opinions, as this Court can see.

How can the appellate court rest its loose reasoning upon an assertion that "while it would be better practice" to have informed me of a sleeping juror, and in the same breath fault me for not addressing whether or not this sleeping juror actually slept or not? It boggles the mind that an issue like that can be ignored...

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



A. Mark LaMar # 113997

Date: ~~12/10/22~~ Jan. 27, 23