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No. 89585-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

NOEL EVAN CALDELLIS,

Petitioner.

SUPPLEMENTAL BRIEF

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 ORIGINAL

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I. INTRODUCTION

Fearing for his safety as a group of people—some armed with weapons—rushed toward him, Noel Caldellis fired a gun in the air and then toward the attacking group. The latter shot struck and killed Jay Clements, who was dressed in black, holding a 40-ounce beer bottle down by his side, and running toward Caldellis.

In this PRP, Caldellis raises several claims challenging the integrity of his trial and the reliability of his “extreme indifference” murder conviction. The jury instructions, most significantly the “to convict” instruction, did not require jurors to find that Caldellis acted with subjective knowledge that his actions created a grave risk of death. Although the jury was instructed on self-defense for two closely-related assault charges (which were reversed on direct appeal and then dismissed), trial counsel failed to propose a self-defense instruction to the murder charge. During rebuttal argument, the prosecutor referenced Caldellis’s failure to testifying, implying that a defendant may choose not to testify because he is guilty. Finally, Caldellis alleged (and the State properly disputed) that several jurors (including the presiding juror) and the judge fell asleep for portions of trial, but the lower court failed to remand for an evidentiary hearing.

Each of these errors merit reversal. Mr. Caldellis’s jury was allowed to convict him based on less evidence than was constitutionally required and without considering a defense supported by the facts and law. The prosecutor’s comments penalized Caldellis for asserting his constitutional right to silence. If the judge or juror slept for significant portions of trial—facts that should be determined at an evidentiary hearing—then reversal is required without a showing of a reasonable likelihood of a different verdict.

II. STATEMENT OF THE CASE

The basic facts are undisputed. Caldellis went with several friends to a location expecting to observe a fight between two men. When Caldellis arrived, 25 to 30 people rushed from the house, some yelling profanities and racial slurs. Several of them immediately began fighting some of the people who had just arrived, including Caldellis. Caldellis heard members of the other group say to get guns and thought he saw someone with a gun. Caldellis shot in the air, briefly causing members of the opposing group to retreat. However, when the opposing group advanced again, Caldellis fired one shot horizontally, hitting and killing Jay Clements.

Additional facts are contained in the prior pleadings and in the respective sections below.

III. ISSUES PRESENTED

A.1. Did the extreme indifference instructions, most significantly the “to convict” instruction, fail to require the State to prove and jurors to find that Caldellis acted with subjective knowledge that his actions created a grave risk of death?

A.2. If so, was Caldellis denied his Sixth Amendment right to effective assistance of trial counsel (IATC) for failing to propose proper instructions?

A.3. And, was Caldellis denied his Fourteenth Amendment right to effective assistance of appellate counsel (IAAC) for failing to raise the error on direct appeal?

B. Does self-defense apply to extreme indifference murder? Was Caldellis denied his Sixth Amendment right to effective assistance of trial counsel (IATC) when

counsel failed to propose a self-defense instruction where the facts supported the instruction, but where counsel mistakenly believed the defense was not legally available?

C.1. Did the prosecutor's rebuttal argument improperly disparage Caldellis's failure to testify at trial?

C.2. If the prosecutor's comments constituted a fair response, was Caldellis denied his Sixth Amendment right to effective assistance of trial counsel (IATC) because no reasonably competent attorney would open the door to allow a negative inference from a defendant's silence at trial?

C.3. Was Caldellis denied his Fourteenth Amendment right to effective assistance of appellate counsel (IAAC) when this issue was not raised on direct appeal?

D and E. When a post-conviction petitioner alleges that the judge and several jurors slept through portions of his trial is any additional showing required to merit an evidentiary hearing for either/both claims? What showing is required for reversal?

IV. ARGUMENT

A.1. THE INSTRUCTIONS DID NOT REQUIRE PROOF OF ALL OF THE ELEMENTS OF THE CRIME.

A.2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE PROPER INSTRUCTIONS.

A.3. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSIGN ERROR TO THE DEFICIENT JURY INSTRUCTIONS.

The State charged Mr. Caldellis with first-degree murder under the "extreme indifference" prong, RCW 9.32.030(1)(b). The instructions provided to Caldellis's jury

did not contain all of the elements of that crime. Most importantly, the “to convict” instruction omitted the *mens rea*, *i.e.*, subjective awareness of risk.

The Instructions Violated Caldellis's Due Process and Jury Trial Rights

Due process of law requires the State to prove each element of a crime beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 713-14, 887 P.2d 396 (1995); U.S. Const. amend. VI; XIV; Wash. Const. art. I, §§ 3, 22. Implicit in this principle is the requirement that jury instructions list all of the elements of the crime, since failure to list all elements would permit the jury to convict without proof of the omitted element. *State v. Linehan*, 147 Wn.2d 638, 653-54, 56 P.3d 542 (2002). It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove every essential element of an offense beyond a reasonable doubt. *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

This Court has further consistently held that a “to convict” instruction must contain every element of the crime charged. *State v. Johnson*, 180 Wash.2d 295, 306, 325 P.3d 135 (2014); *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). A to-convict instruction “must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. DeRyke*, 149 Wash.2d 906, 910, 73 P.3d 1000 (2003) (quoting *State v. Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997)). Even where the omitted element is arguably present in another instruction, the jury is not required to search the other instructions to find an element of the crime. *State v. Emmanuel*, 42 Wash.2d 799, 817–21, 259 P.2d 845 (1953).

The Instructions Were Deficient

RCW 9A.32.030(1)(b) provides that a person commits extreme indifference murder when “(u)nder circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person.” Extreme indifference murder requires proof of a subjective knowledge his act is extremely dangerous, and his indifference to the consequences. *State v. Barstad*, 93 Wash.App. 553, 562, 970 P.2d 324 (1999) (citing numerous cases). See also *State v. Madarash*, 116 Wash.App. 500, 511, 66 P.3d 682 (2003) (“...in order to act with extreme indifference to human life, a person must know that his or her behavior creates a grave risk of death to another.”).

An accurate and complete “to convict” instruction should provide:

1. That on or about [date], the defendant created a grave risk of death to another person;
2. That the defendant knew of and disregarded the grave risk of death;
3. That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
4. That [victim] died as a result of defendant's acts.

This is exactly what WPIC 26.06 provides.

Mr. Caldellis’s jury was given a “to-convict” instruction that did not include the subjective knowledge requirement:

1. That on or about the 3rd day of September, 2006, the defendant discharged a firearm;
2. That the conduct of the defendant created a grave risk of death to another person;
3. That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
4. That Jay Daniel Clements died as a result of defendant’s acts.

Caldellis's "to convict" instruction omits the mental element that he "knew and disregarded" the "grave risk of death" his actions allegedly created. The instruction given by the trial court only required jurors only to find that Caldellis's conduct *created* a grave risk of death, not that Caldellis *knew* his conduct created a grave risk of death.

In any event, a trial court's failure to include the correct mental state element in the "to convict" instruction is not rendered harmless by subsequent definitional instructions. *State v. Aumick*, 126 Wn.2d 422, 432-33, 894 P.2d 1325 (1995) (trial court's failure to include intent in the elements of attempt instruction was not rendered harmless by other instructions referring to intent). Instead, a jury has a right to regard the "to convict" instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction. *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002).

Instruction No. 5, focused on conduct, not *mens rea* by defining "conduct which creates a grave risk of death" without requiring proof of a subjective awareness of a high risk of death through his actions and corresponding indifference. Instead, it defined "aggravated recklessness," as a recklessness that creates a "very high degree of risk." In order to find any *mens rea* instruction Caldellis's jury would have to look to the definition of reckless following the manslaughter instruction. However, that definition is also incorrect because it requires only subjective awareness of a risk of a "wrongful act" occurring, not a grave risk of death.

In order for the instructions to accurately define the elements of the crime, the jury

would have had to perform surgery on the instructions, taking bits and pieces from here and there. For example, jurors would need to reconstruct the instructions to read that aggravated recklessness (instruction 5) is established where the defendant knows of and disregards a ~~substantial~~ (instruction 8) very high degree of risk (instruction 5) ~~that a wrongful act may occur~~ (instruction 8) of a grave risk of death (instruction 4).

This Court has never upheld a conviction where the instructions so completely fail to guarantee that the jury has not convicted based on less proof than is constitutionally required.

Caldellis Need Only Show a Reasonable Likelihood that Jurors Read the Instructions to Require Less Proof than Actually Required

The omission of an essential element from the jury instructions is harmless only when it is clear that the omission did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002). An instructional error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds. *See id.* at 341-43

The evidence regarding Caldellis's mental state was far from uncontroverted. Caldellis's mental state was the primary disputed fact in this case, which is precisely why the trial court gave a lesser included instruction. Caldellis's actions occurred as he and other arrived at the scene of what quickly became a melee where 25 to 30 people rushed from a house, some yelling profanities and racial slurs. RP 257, 351, 447, 890, 1219. He did not arrive with the intent to use force. RP 325 – 326, 505, 1233, 2793. But, Caldellis almost immediately found himself in the middle of a chaotic scene when someone ran up

to attack him. RP 449 - 450, 1242. At the same time, Caldellis heard talk that the people attacking him and his friends had guns. RP 1075, 1095, 1242, 1289. It was during these quickly developing and dangerous events that Caldellis pulled out and fired his gun—first into the air and then horizontally. RP 453, 489, 514.

The facts certainly do not present an overwhelming case that Caldellis knew of and disregarded the fact that his actions created a grave risk of death. As a result, the instructions created an unacceptable risk that Caldellis's jury convicted based on less proof than was actually required.

Caldellis Was Denied Rights to Effective Assistance of Trial and Appellate Counsel

Caldellis also raises related ineffective assistance of trial (IATC) and appellate (IAAC) counsel claims.

To establish ineffective assistance of counsel the defendant must establish that his attorney's performance was deficient and he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Hendrickson*, 129 Wash.2d 61, 77–78, 917 P.2d 563 (1996). Deficient performance is performance falling “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wash.2d 322, 334–35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690–91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wash.2d 66, 72, 758 P.2d 982 (1988).

The State will likely argue that because the WPIC was not amended until 2008, that trial and appellate counsel were not deficient. This Court rejected that same argument in *State v. Kylo*, 166 Wash.2d 856, 215 P.3d 177 (2009), and instead held with proper research, counsel should have determined that the WPIC did not accurately state the requirements of the law. “Failing to research or apply relevant law was deficient performance here because it fell ‘below an objective standard of reasonableness based on consideration of all the circumstances.’” *Id.* at 867 (citation omitted).

Barstad was decided in 1999—long before trial. The WPIC was amended in 2008, before the appeal was decided. There can be no reasonable tactical decision to remove an element of proof from the State’s ledger, especially where that element is the critical element at issue in the trial. *Kylo*, 166 Wash.2d at 869. Defense counsel sought to prove that Caldellis’s actions were the result of fear of serious injury which equaled manslaughter, at most. Eliminating the “knew of and disregarded” requirement from the murder count only served to minimize the differences between those two crimes. Thus, it would have been very much in Caldellis’s favor for counsel to propose an instruction consistent with the law. See *Declarations of Ray McFarland* attached to PRP. Likewise, there was no reason—tactical or otherwise—for appellate counsel to fail to raise this issue. Caldellis was prejudiced by the IATC because there is a reasonable likelihood that a different instruction would have resulted in a different verdict. He was prejudiced by the IAAC because reversal would have resulted if appellate counsel had assigned error to the erroneous instruction.

In the end, however this claim is configured one thing is clear: reversal is required.

B. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE SELF-DEFENSE INSTRUCTIONS ON THE MURDER COUNT.

Introduction

Along with the murder of Jay Clements, Mr. Caldellis was charged with assaulting two other individuals. The jury was instructed on self-defense on the assault counts. Those convictions were reversed because the jury was also instructed that Caldellis did not have a duty to retreat. The Court of Appeals held:

Caldellis was in a place where he had a right to be, the trial court instructed the jury on self-defense, and the jury could have concluded that flight was a reasonably effective alternative to his conduct. Therefore, we reverse the second degree assault convictions.

State v. Caldellis, 151 Wash.App. 1012 (2009). In contrast, Caldellis's jury was not instructed that self-defense applied to the murder count. Trial counsel admitted that he did not propose an instruction because he did not understand self-defense legally applied because "Caldellis did not intentionally shoot Jay Clements." See *Declaration of McFarland*, ¶ 10.

The lower court summarized the facts as follows: "Caldellis told the police he did not intentionally shoot the victim. Caldellis said he initially fired two shots into air. When that tactic did not succeed in forcing the Brier party to retreat, Caldellis fired into the crowd, not aiming at anyone in particular." *Order Dismissing PRP*, p. 9. It is important to add that an objective factfinder could easily conclude that Caldellis reasonably feared death or bodily injury when he fired the shots, including the fatal shot.

This issue turns on whether self-defense is legally available in an extreme indifference murder case. If it is, counsel's failure was deficient and Caldellis was prejudiced because there is a reasonable likelihood that at least one juror would not have voted to convict as charged.

Self-Defense Applies to Extreme Indifference Murder

A self-defense instruction must be given when the defendant produces some evidence of self-defense. *State v. Janes*, 121 Wash.2d 220, 237, 850 P.2d 495 (1993). The threshold burden is low. *Id.* Self-defense and defense of another are complete defenses to both murder and manslaughter charges. *State v. Negrin*, 37 Wash.App. 516, 519–21, 681 P.2d 1287, *rev den*, 102 Wash.2d 1002 (1984).

Like manslaughter, extreme indifference murder requires recklessness. Extreme indifference murder requires proof that the defendant knowingly engaged in conduct creating a grave risk of a non-justifiable death. Use of force is lawful when the defendant reasonably believes he is about to be injured or killed, so long as the force used is not more than necessary. RCW 9.16.020. Recklessly killing and killing in self-defense are two factually contradictory possibilities. One cannot have the *mens rea* of recklessness if he reasonably believes his life is in danger and responds with reasonable and necessary force. As such, self-defense is an element-negating defense.

This was not a case of accident. Caldellis may not have intended to kill Clements, but he did not accidentally discharge his gun. As a result, *State v. Brightman*, 155 Wn.2d 506, 525, 122 P.3d 150 (2005), does not apply. In contrast to this case, Brightman's theory of the case was that he was using reasonable force to defend himself

against the victim by striking him with the butt of a gun. As a result, the gun accidentally went off, killing the victim. Thus, Brightman's theory of the case involved self-defense, followed by excusable homicide. Brightman did not present evidence to show that the homicide was *justifiable*. In contrast, Caldellis presented evidence that he shot at the advancing group in self-defense, striking and killing a member of that violent group. It was reasonable for Caldellis to believe that the group would act in a unified way.

The “transferred intent doctrine” provides that when person shoots at intended victim with specific intent to kill, he is guilty even if he kills an unintended victim. *State v. Elmi*, 166 Wash.2d 209,207 P.3d 439 (2009). Where self-defense is a viable defense, this Court should hold that the defense extends to unintended victims. In other words, this Court should join numerous other states and recognize the doctrine of transferred self-defense. *See Holloman v. State*, 51 P.3d 214, 221 (Wy. 2002) (transferred intent “applies equally to carry the lack of criminal intent to the unintended consequences and thus preclude criminal responsibility.”). *See also People v. Conley*, 713 N.E.2d 131, 136 (Ill. App. Ct. 1999); *State v. Owens*, 601 N.W.2d 231, 236-37 (Neb. 1999); *People v. Morris*, 491 N.Y.S.2d 860, 862 (N.Y. App. Div. 1985); *People v. Mathews*, 154 Cal. Rptr. 628, 631 (Cal. Ct. App. 1976); *Pinder v. State*, 27 Fla. 370, 8 So. 837 (1891). Applying self-defense to unintended victims has been recognized for many years. In *Williams v. Commonwealth*, 228 Ky. 322, 14 S.W.2d 1077 (1929), the Kentucky court held that when the defendant was assaulted by a party of four acting in concert, he was entitled to defend himself not only against the primary attacker, but against anyone acting in concert with the primary attacker.

In *Wilkes v. State*, 103 Tex.Cr.R. 209, 280 S.W. 787 (1926), the court held that when the defendant and a companion were attacked by two people, the defendant had a right to defend against either.

The same rule applies in Washington. This Court should reverse.

- C.1. THE PROSECUTOR INVITED JURORS TO INFER GUILT FROM CALDELLIS'S FAILURE TO TESTIFY VIOLATING HIS FIFTH AMENDMENT GUARANTEE THAT SILENCE CANNOT BE VIEWED UNFAVORABLY.
- C.2. IF TRIAL COUNSEL INVITED THE RESPONSE, COUNSEL WAS INEFFECTIVE.
- C.3. APPELLATE COUNSEL WAS INEFFECTIVE BY NOT ASSIGNING ERROR TO THIS COMMENT.

Introduction

A prosecutor comments on a defendant's invocation of his right not to testify if the prosecutor's remarks were manifestly intended to urge the jury to draw an adverse inference from the defendant's silence that he or she is guilty, or if "a jury would naturally and necessarily construe the prosecutor's remarks as inviting such an impermissible inference." *United States v. Thompson*, 422 F.3d 1285, 1299 (11th Cir.2005)

During rebuttal, the prosecutor argued that defense counsel "forgot" a "big" reason "for Noel Caldellis not testifying." RP 3275-76. "I can think of one more, can you?" *Id.* Although defense counsel objected, he withdrew the objection. *Id.* The "big" reason suggested by the prosecutor must have been obvious to some, if not all of Caldellis's jurors: Caldellis did not testify because he was guilty. Caldellis's silence harbored his guilt.

The issues arising from this comment on Caldellis's failure to testify are:

1. Was the prosecutor's suggestion that a defendant's failure to testify is indicative of guilt harmful where the comment was deliberate; came at the end of the case; and where no special curative instruction was given?
2. If trial counsel invited the comment, was counsel ineffective?
3. Was appellate counsel ineffective for failing to raise the issue on appeal?

The Right to Silence at Trial Cannot be Penalized

"[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and ... the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964). The Court explained soon after *Malloy*:

[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' ... which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

Griffin v. California, 380 U.S. 609, 614 (1965) (quoting *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964) (citations omitted).

The Fifth Amendment forbids any prosecutorial comment on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965). In *Griffin, supra*, the defendant, who did not testify, was found guilty by a jury of first-degree murder. The prosecution emphasized to the jury in closing argument that the defendant, who was with the victim just prior to her demise, was the only person who could provide information as to certain details related to the murder, and yet, he had "not seen fit to take the stand and deny or explain." *Id.* The Supreme Court reversed and held that a comment on the right to not testify:

...is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id., at 614 (citations omitted).

In *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976), the United States Supreme Court stated that “*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.” *See also Lakeside v. Oregon*, 435 U.S. 333, 338 (1978).

The rule permits a fair response. However, a fair response cannot suggest to jurors that they are allowed to use silence as indicative of guilt. For example, the United States Supreme Court in *United States v. Robinson*, 485 U.S. 25 (1988), held, in a federal criminal prosecution, that the prosecuting attorney could comment on the defendant's decision not to testify because the comment was a “fair response” to defense counsel's “closing argument that the Government had not allowed respondent to explain his side of the story.” *Robinson*, 485 U.S. at 26. In other words, the prosecutor could point out the opportunity to testify, but could not suggest that defendant's failure was probative of guilt. In this case, the prosecutor invited jurors to conclude that Caldellis did not testify because he was guilty. The prosecutor's comments went beyond any *fair* response.

If the Comments Constituted a Fair Response, Then Trial Counsel was Ineffective

However, assuming *arguendo* that the comment was a fair response, then trial

counsel was unmistakably deficient by making an argument that permitted the prosecutor to penalize Caldellis's exercise of his right to silence.

Caldellis exercised his personal, fundamental right to remain silent. When he did so, the Constitution guaranteed that he would not be penalized for exercising that right. After exercising a right for which there can be no penalty, Caldellis's attorney both gave jurors reasons why a defendant may choose not to testify and then withdrew his objection to comments by the prosecutor telling jurors that guilt was an inference from Caldellis's silence. Defense counsel's comments, subsequent failure to object and strike the comment, his failure to move for a mistrial, and his failure to request a curative instruction resulted in a trial where jurors were told something that the Constitution guaranteed Caldellis would not to happen.

Because the transcript reveals the error and because no competent counsel would invite the inference of guilt from silence, it was also ineffective of appellate counsel to fail to raise the issue.

Caldellis was Prejudiced

The final issue is whether the prosecutorial misconduct prejudiced Caldellis.

This Court has held that when a prosecutor flagrantly or apparently intentionally commits misconduct, this Court will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. *State v. Monday*, 171 Wash.2d 667, 257 P.3d 551 (2011). If the issue had been raised on direct appeal, the State would likewise be required to show harmlessness beyond a reasonable doubt.

The facts do not provide this Court such assurance. First, "improper suggestions

[and] insinuations” of counsel representing the government “are apt to carry much weight against the accused when they should properly carry none.” *Berger v. United States*, 295 U.S. 78, 88 (1935). The prosecutor's argument is all the more problematic given that it occurred in rebuttal and was not followed by a special cautionary or curative instruction. *United States v. Martinez-Medina*, 279 F.3d 105, 120 (1st Cir. 2002). The prosecutor’s remarks asking jurors to consider another obvious reason why a defendant might not testify was among the last remarks heard by the jury. As jurors were about to begin deliberations, the prosecutor asked jurors to consider Caldellis’s silence as indicative of guilt. Counsel’s withdrawal of his objection may have signaled the inference that he did not disagree.

Most importantly, the prosecutor did not merely comment on the petitioner's exercise of his Fifth Amendment right to refrain from testifying; the prosecutor cast aspersion on his choice by holding the right to refrain from self-incrimination up as a shield for guilt. That is strictly forbidden.

If reversal is the remedy in cases where the prosecutor merely comments on silence, it surely is required in a case where the prosecutor invites the jury to draw an adverse inference from silence.

- D. WHERE A JUDGE SLEEPS FOR A SIGNIFICANT PART OF TRIAL REVERSAL IS REQUIRED.
- E. WHERE ONE OR MORE JURORS SLEEP FOR A SIGNIFICANT PART OF TRIAL REVERSAL IS REQUIRED.

Introduction

There are situations where the reliability of a trial becomes so questionable that

the defendant need not show that he was actually prejudiced. For example, prejudice is presumed when counsel for a criminal defendant sleeps through a substantial portion of the trial because such conduct compromises the reliability of the trial, and thus no separate showing of prejudice is necessary. Caldellis urges adoption of that standard for cases involving a sleeping judge and/or jurors.

Sleeping Trial Participants Undermine the Integrity of the Entire Proceedings

Under the Sixth and 14th Amendments to the U.S. Constitution, a criminal defendant in a jury trial is entitled to a fair and impartial jury. *Morgan v. Illinois*, 504 U.S. 719 (1992); *Duncan v. Louisiana*, 391 U.S. 145 (1968). Therefore, if any member of a jury engages in behavior that prevents a defendant from receiving a fair and impartial trial, that misconduct must be corrected; otherwise, the trial is unconstitutional.

The right to a trial by jury requires jurors who are awake during trial. *Kelley v. State*, 805 So.2d 88 (Fla. App. 2002) (remand for hearing on issue of sleeping juror and impact thereof after post-conviction applicant made facially valid showing that juror slept through significant portions of the trial). A verdict returned by a jury that includes one or more jurors who slept through portions of trial is a judgment that undermines the guarantees embedded in the jury system.

A judge is not a judge when s/he is asleep. *United States v. Mortimer*, 161 F.3d 240, 241 (3d Cir. 1998) (finding “the judge's absence from the bench” during closing argument amounted to “the judge [being] absent at a ‘critical stage’ “). Even if not called on by the trial participants to rule on contested issues, there are numerous obligations that

a judge cannot perform when s/he is asleep¹, including keeping watch on the attentiveness of jurors.

In his PRP, Caldellis presented competent, admissible evidence that his judge and some of his jurors slept through portions of his trial. The question posed is the proper evaluation of harm. According to the State and the single judge ruling below, Caldellis was required to show a reasonable likelihood of a different verdict absent the errors. That is, in almost every case, an impossible burden. How does a petitioner show the likelihood of a different verdict in a sleeping juror case, especially where he cannot ask jurors anything about their deliberations? How does he ever make such a showing when a judge is functionally absent from portions of trial? That should not be the proper inquiry for these constitutional violations.

Instead, Caldellis urges this Court to hold that where the evidence shows that a judge or jurors slept through substantial or significant portions of trial that prejudice is presumed. What constitutes “significant” or “substantial” will vary. Where, as here, a petitioner presents competent, admissible evidence that the judge and jurors slept multiple times during portions of the trial testimony an evidentiary hearing is warranted.

The caselaw regarding the evaluation of prejudice when defense attorney sleeps for a portion of trial is both more developed and analogous. In some cases, a Sixth Amendment violation may be found without inquiring into counsel’s actual performance

¹ For example, a judge must watch for attempts by spectators to influence jurors and/or witnesses; other extraneous influences on jurors; must protect the right to open proceedings; and be attendant to security issues.

or requiring the defendant to show the effect it had on the trial. *Musladin v. Lamarque*, 555 F.3d 830, 837-38 (9th Cir. 2009) automatic reversal is required where a defendant is denied counsel at a “critical stage”). In other words, counsel’s incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984) (“unconscious or sleeping counsel is equivalent to no counsel at all”). The question in that context is whether counsel was asleep for a “substantial portion of [a defendant’s] trial” or at a critical time during trial. *Javor*, 724 F.2d at 834. Caldellis urges adoption of the same test for a sleeping judge or jurors.

Because sleeping trial participants undermine the integrity of the proceedings, the focus should be on whether the violation was significant. *Judd v. State*, 951 So.2d 103 (Fla. App. 2007) (petitioner was entitled to an evidentiary hearing on his claim that trial counsel was ineffective in failing to object to the presence of a sleeping juror). *See also Javor*, 724 F.2d at 834-35 (“[A]n inquiry into the question of prejudice [from sleeping counsel] would require ‘unguided speculation’ and ‘would not be susceptible to intelligent, even handed application’ because an attorney’s absence prejudices a defendant more by what was not done than by what was done.”).

On the other hand, momentary sleep should not result in automatic reversal.

Caldellis has made a *prima facie* showing meriting an evidentiary hearing. At that hearing, the reference hearing judge should determine among other facts: (1) whether the judge or any jurors fell asleep; (2) if so, who and for how long; (3) during what portions

of trial; (4) how significant were these portions of trial; and (5) were there any adverse inferences that could be drawn against Caldellis from the sight of the judge sleeping.

At this stage, Caldellis is entitled to an evidentiary hearing. *In re PRP of Khan*, 184 Wash.2d 679, 692, 363 P.3d 577 (2015) (“Generously construing his arguments and based on our own review of the record, we find sufficient grounds to warrant a reference hearing on prejudice.”).

V. CONCLUSION

Based on the above, this Court should either reverse and remand for a new trial or for an evidentiary hearing.

DATED this 1st day of July, 2016

Respectfully Submitted

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Attached for filing please find Mr. Caldellis's supplemental brief, which has been served on opposing counsel through this email.

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