

ATTACHMENT A.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

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Appellate Counsel Wanda H. Carter was ineffective in failing to raise ineffective assistance of trial counsel for failing to object to sleeping jurors, not being removed or questioned and failing to object when the trial judge addressed the issue.

During trial proceedings after the jury instructions were given before deliberations, the trial judge explained that he had sent all 13 jurors back:

Court: Now, the reason I sent all 13 of them back is because I noticed one of the jurors had dozed a time or two. I do not think that that juror — it did not amount to a *State v. Hurd* inquiry as far as I am concerned. I think that — I don't think that he was dozing. I think it may have been a classic case of resting his eyes. But I'm here for comment if anybody wants to make a comment on that.

Mr. Gasser: We'd leave it to this court's discretion.

Mr. Strickland: I've been resting my eyes off and on this entire week your honor.

Court: Okay, Mr. Shuper.

Mr. Shuper: No objection your honor.

(App.p.1328, line 1-p.1329 line 7.)

In *Hurd*, the court held that after noticing that juror had nodded off during jury charge in criminal trial, trial judge was required to either determine whether juror was in fact asleep, recharge entire jury or replace juror, and trial judge failure to do so constitutes reversible error. See, *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (1996).

Here, the record shows that Judge Pleicones initially found as a fact that he did "...noticed one of the jurors had dozed [off] a time or two." Therefore Appellant asserts that under *Hurd*, after noticing that juror had nodded off, the trial judge was required to do a factual determination whether

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juror was in fact asleep, or replace the juror and trial judge's failure to do so constituted reversible error. The trial judge abused his discretion, and trial counsel was ineffective for not objecting.

In criminal cases, "the right of trial by jury shall be preserved inviolate." S.C. Const. Art. 1 § 14. See also, U.S. Const. Art. 3 § 2 and Amend. 6. A "defendant has a constitutional right to be tried by competent jurors," which implies a tribunal both impartial and mentally competent to afford a hearing." Tanner v. United States, 483 U.S. 107, 134, 107 S.Ct. 2739, 2755, 97 L.Ed.2d 90 (1987) (Marshal, J. dissenting) (citing Jordan v. Massachusetts, 225 U.S. 167, 32 S.Ct. 651, 56 L.Ed. 1038 (1912)) Consistent with these principles, "A juror who has not heard all of the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict." Peoples v. Valerio, 141 A.D.2d 585, 529 N.Y.S. 2d 350, 351 (1988).

Now, as demonstrated above by the Appellant, there was evidence provided by the record, that does show that trial judge did indeed noticed that at least one juror (Appellant claims there were _3 jurors that) "had dozed a time two." And although the trial judge stated: "I think it may have been a classic case of resting his eyes," this statement under Hurd, was not a factual determination as to whether juror was in fact asleep, in light of the trial court's failure to question the juror. Thus Appellant asserts that in the absence of any questioning of the juror(s), the trial judge's statement "I think ...it may have been..." was only an assumption or speculation to the juror(s) attentiveness, state of mind and competency. A violation of Appellant's U.S. Const. Right Art. 3 § 2, Amend. 6... A "defendant has a constitutional right to be tried by [competent] jurors," which implies a tribunal both impartial and [mentally competent] be afford a hearing." Tanner, *supra*, Jordan, *supra*.

In addition see, e.g. A.G. Barnett, Annotation, inattention of Juror from sleepiness or other cause as Ground for Reversal or New Trial, 88 A.L.R.2d 1275 (1963). In a number of cases where the appellate courts affirmed trial judges even though they did not replace juror who allegedly fell asleep, the trial judge questioned the juror as to whether he was attentive, or in cases involving

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instructions, recharged the entire jury. *Id.* Thus, we hold that "it is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified," and "the court must not speculate...but must ascertain the juror's state of mind and must place reasons for excusing or retaining the juror on the record," Valerio, 529 N.Y.S.2d at 351. State v. Reevey, 159 N.J. Super 130, 387 A.2d 381 (App.Div(1978 Cf. State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973) (stating that "[i]t is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair and impartial").

Here, Appellant contends, it is clear that judge Pleicones was not sure himself that the juror(s) was unbiased, fair, impartial and mentally competent to afford a hearing, by the statements that; (1) he noticed, juror had dozed off repeatedly" a time or two," (2) "I think ... it may have been a classic case of resting his eyes. But I'm here for comment if anybody wants to make a comment on that." And (3) also from the fact that he made an issue of sending all 13 jurors back for deliberation.

Here, the trial judge failed to conduct a probing and tactful inquiry on the sleeping juror(s) to determine if they were qualified or unqualified, thus being left to only Speculate to the juror(s) state of mind. And trial counsel was ineffective for failing to object, especially when the trial judge asked if counsel had any comment on the matter. Trial counsel failed to safeguard Appellant's Constitutional Rights by failing to object and allowing the Appellant to be tried and convicted by jurors who had not heard all the facts of the case because they were asleep and were unqualified and incompetent to render a verdict, and by a trial judge who, under Hurd, Valerio and Holland, failed to do his duty and assure himself [by] questioning the juror(s), to conduct a factual determination whether juror(s) was in fact qualified or unqualified and competent.

By failing to object to the sleeping juror(s), trial counsel was ineffective because his performance fell below the standard of objective reasonableness for attorneys, and this resulted in (1), prejudice to Appellant because he was tried by unqualified and incompetent jurors, which

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negatively affected the outcome of the case. And (2) trial counsel's error prejudiced Appellant because there's a reasonable probability that but for counsel's error, he may not have been convicted had this juror(s) been removed or questioned as required. (See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984) (establishing federal standard for ineffective assistance of counsel). Williams v. Taylor, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389, 416 (2000) (holding that analysis of the prejudice prong should focus solely on whether there was a reasonable probability that but for counsell's errors, the result of the proceeding would have been different).

Therefore, in light of these facts, above Appellant contends that trial counsel's error played a serious role in or had a "substantial and injurious effect" on the jury's decision-making process, which negatively affected the outcome of Appellant's case. In Brecht, the Supreme Court held that errors are not harmless when they have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 133 S.Ct. 1710, 1722, 123 L.Ed.2d 353, 373 (1993) (internal citations omitted). Also, See United States v. Doninquez Benitez, 542 U.S. 74, 82n. 7, 124 S.Ct. 2333, 2339n. 7, 159 L.Ed2d 157, 167n. 7 (2004) holding that using the Brecht standard means that the government has "the burden of showing that constitutional trial error is harmless". Sanders v. Cotton, 398 F.3d 572, 582 (7th Cir. 2005) (holding that the harmless error rule was waived because the state did not raise it in district court).

Further, the Appellant has a fundamental constitutional right to be tried by "competent" jurors, Tanner, supra, and he was not. Therefore, Appellant contends that because of the seriousness and nature of trial error, any alleged default of a state procedural rule is not an adequate reason to deny Appellant a belated Appeal on a constitutionally meritorious ineffective assistance of trial counsel claim. Appellant contends that the state rule is unfair and frustrates (interferes with) the enforcement of his federal rights, and therefore, it is not an adequate reason to bar review of his claim (see, Hoffman v. Arave, 236 F.3d 523, 531 (9th Cir. 2001) ("[I]f a state procedural rule

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frustrates the exercise of a federal right, the rule is 'inadequate* to preclude federal courts from reviewing the merits of a federal claim"); Jackson v. Shanks, 143 F.3d 1313, 1318-19 (10th Cir. 1998) (determining the state procedural rule that claims not raised on direct appeal are procedurally barred cannot be applied to ineffective assistance of counsel claims because doing so would "deprive [petitioner] of any meaningful review of the ineffective assistance of counsel claim").

Here, Appellant's claim(s) are claims of ineffective assistance of counsel, and therefore procedural bar cannot apply, (see, e.g. Murray v. Carrier, 477, U.S.478, 106 S.Ct. 2639, 91 L.Ed.2d 379 (1986) (holding that a habeas petitioner may avoid procedural default by showing that counsel's performance was [constitutionally ineffective]. Also, for example, in Kimmelman v. Morrison, 477 U.S. 365, 384-865 106 S.Ct. 2587-88, 91 L.Ed2d 305, 325-26) the court refused to rule on the defendant's motion to suppress evidence because counsel's motion was untimely. The defendant nonetheless ultimately obtained a hearing on the merits of the suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion.

Now, in response to the PCR Court's Order, in which the PCR judge stated: "Applicant . . . has failed to set forth any evidence to support these claims. There was no testimony to support the allegation (App. P.1496 PARA. 4)." However, Appellant would move to show from the records, that the PCR Court decision rejecting Appellant's claim was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (28 U.S.C. §2254 (d) (2) (2006)).

Appellant contends that there was evidence and testimony provided by the record and by Appellant's PCR counsel. First, as Appellant has previously demonstrated, the record does show that the trial judge admitted to noticing that juror "had dozed" [off repeatedly] "a time or two." (App. p. 1328-29). Secondly, Appellant provided a handwritten memorandum to the court (see, App. p. 1459 line 23 – p.1461 line 25; also, p.1442 line 4- p. 1443 line 20), which the court accepted and which the state did not object to, that clearly stated: "Appellant repeatedly brought this to trial

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counsel's attention throughout the trial" . . . (that jurors were dozing off) and that "Appellant argues that at least three (3) different jurors were sleeping during portions of the trial and the jury charge." Moreso, Appellant's PCR counsel testified that: "He (Appellant) also feels that trial counsel was ineffective for failing to object to sleeping jurors not being removed or questioned. It's his portion that during the trial of this case there were a number of juror – there was one or more jurors that – there were one or more jurors who were nodding off at various junctures during the trial, that he pointed that fact out to his attorney and that his attorney did nothing request a mistrial or take any other appropriate action in response to these sleeping jurors." (App. p. 1400, 11. 13-21). Trial counsel testified at the PCR hearing, and at the hearing neither did trial counsel nor the state refuted these claims, stated in the handwritten memorandum, that Petitioner personally complained [to] trial counsel and pointed out that jurors were sleeping.

Trial counsel's error prejudiced Appellant because he may not have been convicted had the juror(s) been removed or questioned as required. And the PCR court was incorrect in failing to find the violation occurred, since there were facts contained in the record and evidence presented at the hearing which supported Appellant's claim, thus, the court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings (28 U.S.C. §2254 (d) (2) (2006)).

Additionally, Appellant would also argue that state procedural rule is not "independent" of federal law. The state law is intertwined or connected with federal law, and not entirely separate from federal law (Ake v. Oklahoma, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53, 60-61 (1985); see also, Bryd v. Scott, 45 F.3d 876, 880 (5th Cir. 1994) (Finding that state court decision was "intertwined with federal law, and did not express clearly that its decision was based on state procedural grounds"). If judges have to necessarily answer questions about federal law in order to decide the question of state law, then the state law is intertwined or connected with federal law. For example, if the state procedural rule about timeliness says that when fundamental or constitutional

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errors are made the claim is not considered untimely and can be reviewed, then the state court judges have to decide questions of federal law — constitutional issue — before deciding if the state procedural rule applied to the case.

Appellant contends, since the trial error here is a fundamental constitutional error, then the state court would have to answer questions about federal law in order to decide the question of state law. See, LaCrosse v. Kernan, 244 F.3d 702, 706-07 (9th Cir. 2001) (holding that the state's "untimeliness" rule did not constitute "independent" state grounds because at the time Petitioner defaulted his claim, the rule had a "fundamental constitutional: error exception" that involved a ruling on federal law"). Also see, Jackson v. Leonardo, 162 F.2d. 81, 84-87 (2d Cir. 1998). In Jackson, the court of appeals held that the defendant's double jeopardy claim was procedurally barred, but granted relief on the defendant's claim that his appellate counsel was ineffective for failing to raise the double jeopardy claim. Here, the Appellant contends that he should also be granted relief/belated Appeal, because both his trial counsel, appellate counsel and PCR counsel were ineffective for not objecting to and/or raising Appellant's claim(s).

Appellate counsel's brief was only a dry summary of Appellant's case (see Tr. p. 1363-p. 1365) the brief contained absolutely no reference to evidence or to Trial Counsel's motion or objections, which shows that Appellate counsel failed to be active advocate for Appellant, (see People v. Stokes, 95 N.Y.2d 633, 638-39, 744 N.E.2d 1153, 1156, 722 N.Y.S.2d 217,220 (2001)(finding defendant's right to appellate counsel was not adequately safeguarded because the brief submitted by appellate counsel contained no reference to the evidence or to defense counsel's objections at trial and made clear that counsel did not act like an advocate on behalf of the client). Appellate counsel is to be an active advocate as opposed to that of amicus curiae. Appellant's appeal was not taken in good faith. Johnson v. United States, 352 U.S. 566, 77 S.Ct. 550 1 L.Ed2d 593 (1957).

Appellate Counsel failed to consult with Appellant on any important decision or concerns about the case, counsel failed to demonstrate a professional level of skill and knowledge to a duty of

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loyalty, and a duty to advocate the Appellant's cause, to serve her "client" to the best of her ability and safeguard his rights on appeal.

These basic professional standards could include, but are not limited to, "a duty of loyalty, a duty to avoid conflicts of interests, a duty to advocate the defendant's cause, the duty [to consult with defendant] on important decisions." Strickland v. Washington, supra.

The Appellant asks, when appellate counsel had, at her ready disposal, not only preserved errors on record, but was also personally sent by Trial Counsel Robert Sneed, 20 or 30 significant potential claims, (See p.19 of Attachment B., lines 6-15; p. 20 line 24 – p.21 line 5) and failed to raise any of these "highly" arguable issues, or consult with her client, (the Appellant)...What other reasonable explanation could there have been for such poor, deficient and unprofessional service, as rendered here by Appellate Counsel, other than Appellate Counsel was ineffective and unconcerned about her indigent client's rights?

"An indigent criminal defendant is constitutionally entitled to an effective attorney in his 'one and only appeal as of right*," which usually occurs in a state court of appeals. Ettis v. Lucey, 469 U.S. 387, 389 105 S.Ct. 830, 836, 83 L.Ed2d 821, 830 (1985); Douglas v. California, 372 U.S. 353, 357-58, 83 S.Ct. 814, 816-17, 9 L.Ed2d 811, 814-15 (1963); Mason v. Hanks, 97 F.3d 887, 902 (7th Cir. 1996) ("[W]hen we are convinced that a petitioner might well have won his appeal on a significant and obvious question of state law that counsel omitted to pursue, we are compelled to conclude...that the appeal was not fundamentally fair and that the resulting affirmation of his conviction is not reliable.").

Furthermore, the Appellant asserts that his ineffective assistance of trial counsel allegation on the Constitutional violation that a juror was sleeping during trial, was ignored by PCR Counsel, despite the fact that this claim was "obvious on the record" (see, App. p. 1328-29), and despite the fact that claim was listed among the Appellant's amended PCR application allegations.

Now, although PCR counsel did inform the court [of] Appellant's "sleeping juror" allegation

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in her opening statement, as she listed all of his eleven allegations (see, App. p. 1400 lines 13-21) PCR Counsel failed to return to the allegation and actually argue it/explain its merits to the court. This fact is especially egregious in light of the fact that, this is the very same claim that was not objected to by trial counsel, ignored by appellate counsel Carter, and ignored yet again, by PCR Counsel who knew for certain that the Appellant sought to have it raised, (it was even ignored again by appellate counsel Eleanor Duffy Cleary on PCR appeal). Thus, each counsel either failed to ensure that all grounds were raised and/or failed to safeguard the Appellant's 14th Amendment Procedural Due Process Rights, and Rule 71.1 (g).

Therefore, Appellant asserts, that PCR Counsel was further ineffective in her assistance, for not only failing to adequately raise the Appellant's ineffective assistance of Appellate counsel allegation, and failing to file a Rule 59€ motion, but also for failing to adequately raise the exact same "sleeping jurors" allegation that the Appellant alleges Appellate Counsel Carter ignored. An allegation the Appellant adds, that is clearly stronger and carries more weight than all of his other allegations.

See, Matire v. Wainwright, 811 F. 2d 1430, 1438-39 (11th. Cir. 1987). For example, the eleventh circuit found ineffective assistance of counsel when Appellant Counsel ignored "a substantial, meritorious Fifth Amendment issue that was 'obvious on the record, and on which trial counsel expressly objected.'" Id. At 1438. Similarly Bell's appellate counsel omitted to brief a significant meritorious issue that was obvious on the record and instead pursued issues that the appellate court found lacked merit. Cf. Gray, 800 F. 2d at 646; Bell v. Jarvis, U.S. Court of Appeals, Fourth Circuit. December 2, 1999 198 F. ed 432.

Here, Appellant asserts the PCR Counsel ignored and failed to adequately raise and argue before the court the Appellant's allegation that trial counsel was ineffective for failing to object to sleeping jurors not being removed or questioned.

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Therefore, even though he requested it be raised, both Appellate Counsel Carter and PCR Counsel Shurling omitted to pursue Appellant's ineffective assistance of trial counsel, for failing to object to sleeping juror(s) not being removed or questioned allegation.

Appellate Counsel ignored two substantially meritorious issues; a defective indictment claim and a violation of Appellant's Six Amendment Constitutional Right to be tried by competent jurors claim ("sleeping jurors"), claims that were obvious on the record, (and one-defective indictment-on which trial counsel had expressed to be quashed), and instead pursued just one clearly and significantly weaker issue-severance.

In her brief, Appellate Counsel did raise the issue of severance, but failed to adequately argue the issue. In her Argument Appellate Counsel simply stated; "Robert James - Appellant - was prejudiced because guilt was most probably imputed to him via the case against Kenneth James. (Appellant's co-defendant) Kenneth James was prejudiced because as defense counsel argued: a severance would have allowed Kenneth James and counsel to "be masters of [their] own destiny as far as the selection of the jury, presentation of evidence and/or ..." (See, Tr. p.1365).

This statement by Appellate Counsel is hugely vague. Counsel failed to explain, *in what way*, was this prejudice from the case against the co-defendant imputed to the Appellant? Appellate Counsel does not even attempt to give truly plausible example in which, some type or any type of guilt was imputed to the Appellant, via the case against his co-defendant.

Appellate Counsel's argument supplied no realistic justification or grounds for an issue of severance. Appellate Counsel's failure to raise any [arguable] issues in brief on direct appeal created presumption of prejudice, satisfying the prejudice prong of Appellant's claim of ineffective assistance of Appellate Counsel, in that Appellant was essentially left without representation on direct appeal. Delgado v. Lewis, 168 F.3d 1148 (9th Cir. 1999); U.S.C.A. Const. Amend. 6, Criminal Law Key 641.13(7).

Appellant contends that it was completely unreasonable for Appellate Counsel to ignore the

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two clearly stronger claims discussed above, in favor of the one significantly weaker issue she presented. (See, Moultrie v. U.S., District Court, D. South Carolina, Beaufort Division, May 15, 2001, 147 F.Supp.2d 405) ("Ineffective assistance of appellate counsel may be shown if defendant can prove that counsel emitted obvious and strong issues while pursuing significantly weaker issues." U.S.C.A. Const. Amend. 6); (U.S. v. Manson, U.S. Court of Appeals, 4th Circuit. December 18, 2014. 774 F.3d 824.) ("Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit: generally only when ignored issues are clearly stronger than those presented should the court find ineffective assistance for failure to pursue claims on appeal. U.S.C.A. Const. Amend. 6.); (Also, U.S. v. Baker, Court of Appeals, 4th Circuit. June 13, 2003. 719 F.3d 313; (Patrick v. State, S.Ct. South Carolina. March 11, 2002. 349 S.C. 203) ("•••appellate brief devoted only three short paragraphs to the issue, did not give any useful analysis, and cited only one case, the petition for rehearing did not note the issue with particularity,..."); (Bell v. Jarvis, U.S. Court of Appeal, 4th Circuit. December 2, 1999. 198 F.3d 432) (Counsel on direct appeal provided ineffective assistance in failing to pursue Sixth Amendment Public trial claim; claim was obvious on the record, and in view of the controlling Supreme Court and North Carolina precedent and the paucity of findings of fact made by the trial court, it was unreasonable of counsel to fail to argue the public trial claim on Appeal. U.S.C.A. Const. Amend. 6; Also, Matire v. Wainwright, 811 F.2d, 1438-39 (11th Cir. 1987).

The last fact that the Appellant argues here, is that, Appellate Counsel's sole reason for "simply mentioning" the issue of severance in her brief, was because counsel Knew she was required to raise an issue." And in doing so, she would then be able to claim that the Appellant's appeal was without merit, and thus, she would be justified in filing her petition to be relieved as Appellate Counsel.

Appellant asserts that, in light of the facts discussed herein, it clearly shows that Appellate Counsel's performance fell below the standard of objective reasonableness for attorneys, which

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negatively affected Appellant's direct appeal. Strickland, supra. Appellate Counsel's ineffective deprived Appellant of his Right to Due Process and Equal Protection Clause of the Constitution.

Harris v. Champion, 15 F.3d 1538 (10th Cir.1994). "The Supreme Court has held that, if a State has created Appellate Court as an integral part of the... system for finally adjudicating the guilt or innocence of a defendant." Griffin v. Illinois, 351 U.S. at 18, 76 S.Ct. at 590. The procedure used in deciding appeals [must] comport with the demands of the Due Process and Equal Protection Clauses of the Constitution, Id. at 1558.

Therefore, in conclusion, Appellant contends that, with several highly arguable issues at her disposal, either preserved in record or provided by trial counsel, Appellate Counsel was ineffective for failing to raise both of the Appellant's ineffective assistance of trial counsel claims discussed herein, and counsel lost a chance to argue claims that would have succeeded. And this failure resulted in prejudice to the Appellant since there is a "reasonable probability" the outcome of Appellant's direct appeal would have been different. Appellant's direct appeal was not taken in good faith and his constitutional rights were violated.

Appellant and his trial counsel, John B. Shupper, both testified at the PCR hearing. Judge Alison Renee Lee, denied and dismissed the application in a written order filed August 22, 2005. The order did not address the issue of ineffective assistance of Appellate Counsel and PCR Counsel did not file a motion to alter/amend judgment under SCRCP Rule 59(e).