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# CONVICTED BY A SLEEPING JURY: HARMLESS ERROR OR A CHALLENGE TO THE INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM?

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## I. INTRODUCTION

I saw it. So what. Let him sleep. You guys picked the jury. I didn't.<sup>1</sup>

This was the judge's closing remark near the end of trial after it was brought to his attention on five separate occasions that a juror had been sleeping.<sup>2</sup> The court did not warn the juror of his conduct and did not remove the juror.<sup>3</sup> Instead, the accused was convicted by a sleeping juror.<sup>4</sup>

### A. *The Problem with Sleeping Jurors*

Sleeping jurors are a major problem in our criminal justice system that is impossible to ignore.<sup>5</sup> Having been described as one

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1. *State v. Majid*, 914 N.E.2d 1113, 1114 (Ohio Ct. App. 2009). The defendant in this case was dancing shirtless at a bar until the owner asked him to leave. *Id.* The owner then went into his office, got a gun, and went outside. *Id.* While outside, the defendant approached the bar owner and told him that he had something for him. *Id.* In response, the bar owner fired "warning shots" toward the defendant, and the defendant responded by firing shots into the bar. *Id.* The jury ultimately convicted the defendant of one count of murder and two counts of attempted murder. *Id.* Because the defendant had a prior conviction, the new charges made him eligible for the death penalty. *Id.*

2. *Id.* There was extensive evidence on the record that at least one juror slept through eyewitness testimony as well as other portions of the trial. *Id.* The juror was found to have been snoring with his mouth agape. *Id.* at 1116.

3. *Id.*

4. *Id.* On appeal, the conviction was reversed and remanded for a new trial. *Id.* at 1117. The appellate court believed the extensive evidence of sleeping, including sleeping during eyewitness testimony, was pervasive juror misconduct and plain error that cannot be overlooked in any trial. *Id.* at 1116.

5. *See, e.g., Sean Carter, Hey, Juror-Juror!*, 38 A.B.A.J. 7, 1 (2005) (quoting a study conducted by Vanderbilt University law professor Nancy King where sixty-nine percent of 562 state and federal judges had seen at least one juror sleeping during trial). The author stated he was shocked that the number was not higher. *Id.* The article discusses the prevalence of

of the cornerstones of the American judicial system,<sup>6</sup> the right to a trial by jury certainly requires that jurors are awake during trial.<sup>7</sup> It has been declared that the chief function of the jury is to safeguard citizens against arbitrary law enforcement,<sup>8</sup> but it can be argued that a sleeping juror has not heard all the evidence. Thus, rendering a judgment despite that fact would be subjecting the defendant to some level of unfairness,<sup>9</sup> similar to the type of unfairness that juries are meant to guard against.<sup>10</sup>

This Comment explores how sleeping jurors challenge the integrity of the judicial process. Part II will touch on the history of jury trials and examine case law on sleeping jurors. Emphasis will be placed on a claim of juror misconduct, and how the court requires a showing of prejudice for remedial action to be taken. Prejudice, in this instance, is shown by establishing that the outcome of the trial would have been different if a juror had been paying attention instead of being asleep.

Part III will analyze sleeping juror cases, emphasizing the

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sleeping jurors and possible solutions to the problem. *Id.* Stating that sleeping jurors are “a major problem in our courts”, the author agrees with the proposition that a defendant is entitled to jurors who have heard all the evidence. *Id.* He goes on to state that, “[t]he proper administration of justice requires jurors who are awake throughout the entire proceeding.” *Id.* Although he uses humorous analogies to make his point, the author suggests allowing jurors to have food and drinks, to stand up, and to have a midday stretch to prevent sleeping in the jury box. *Id.*

6. John W. Clark III et al., *Juror Stress: An Examination of a Jurisprudence Epidemic*, 6 CRIM. L. BULL. 3, 1 (2008).

7. *See, e.g., State v. Yamada*, 122 P.3d 254, 262 (Haw. 2005) (Acoba, J., dissenting) (stating, “[a] slumbering juror is not a competent one.”); *Whiting v. State*, 516 N.E.2d 1067, 1067 (Ind. 1987) (recognizing that juror misconduct can be the basis for a valid claim that the right to a fair jury trial has been denied); *Commonwealth v. Keaton*, 628 N.E.2d 1286, 1289 (Mass. App. Ct. 1994) (affirming the importance of the right to a jury trial and recognizing that if a juror sleeps through testimony, a criminal defendant’s fundamental right to a fair trial may be abridged).

8. REID HASTIE ET AL., *INSIDE THE JURY* 1 (Charlotte Pieters et al. eds., The Lawbook Exchange 2002) (1983).

9. *See, e.g., State v. Wiggins*, 507 A.2d 518, 523 (Conn. App. Ct. 1986) (addressing the jury after it was brought to his attention that a juror may have been asleep during trial). The judge stated, “It’s extremely important . . . that the jurors be fully aware of everything that goes on in the courtroom at all times. If the person should miss anything, it’s not fair to the accused, it’s not fair to the state, it’s not fair to either party.” *Id.*; HENRY WILCOX, *FRAILTIES OF THE JURY* 27 (Fred Rothman ed., Legal Literature Co. 1985) (1907) (announcing that a jury box is not a place to sleep). The author recognized that many try and succeed quite well while others sit half asleep. *Id.* Some even claim that things said to them are afterward recalled unconsciously in making up their judgment. The author finds this contention hard to believe. *Id.*

10. *See United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (stating that the right to a jury trial was designed to guard against tyranny and oppression).

prejudicial impact they have on the integrity of the judicial process. It will compare different ways trial judges exercise their discretion in dealing with sleeping jurors, showing the range of discretion being utilized as well as a pattern of circumstances where a juror is more likely to be dismissed for sleeping during trial. Part IV proposes implementing new procedures to address the issue of sleeping jurors both before it becomes a major issue at trial and after an appeal.

## II. BACKGROUND

### A. *The History Behind Jury Trials*

Article III of the Constitution insists that “[t]he trial of *all* crimes, except in cases of impeachment, shall be by jury . . . .”<sup>11</sup> The Framers continued to imply the importance of the jury trial in our criminal justice system in the Sixth Amendment where it states, “[i]n *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”<sup>12</sup> Although many criminal cases today do not go to trial as a result of our plea bargaining system,<sup>13</sup> the text of the Constitution clearly states “*all*.”<sup>14</sup> The use of the word implies that the Framers intended for juries to play a significant role in our justice system.<sup>15</sup>

In eighteenth-century Anglo-American law, a trial by jury, with roots dating back to ancient Greece,<sup>16</sup> was the routine method for disposing of cases.<sup>17</sup> Today, with approximately 150,000 jury trials being held in the United States each year,<sup>18</sup> its importance

11. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

12. U.S. CONST. amend. VI (emphasis added).

13. JOHN H. LANGBEIN, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, in *THE JURY TRIAL IN CRIMINAL JUSTICE* 6, 7-8 (Douglas D. Koski ed., Carolina Academic Press 2003).

14. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI (emphasis added).

15. See HASTIE ET AL., *supra* note 8 (recognizing America’s unique position among all nations for the central role of the jury trial in its criminal justice system).

16. *Id.* at 2 (noting the history of jury trials and the absence of guidance on the proper form of the jury today). The author notes the language in the Constitution that deals with jury trials and makes the observation that there is no reference made to the proper size of the jury, the decision rule, or the selection procedure. *Id.* He goes on to conclude that, as a result of a lack of guidance on those issues, a considerable amount of variety in jury procedures exists across states and in criminal and civil trials. *Id.* This supports the notion that juror misconduct in the form of a sleeping juror is also dealt with in a variety of different ways.

17. LANGBIEN, *supra* note 13, at 7. The article discusses the discrepancy between the jury trial promised in the Constitution and the jury trial that our criminal justice system uses today. *Id.* Emphasis is on the fact that a large amount of cases get disposed of through plea bargaining despite the mandate that all trials be by jury. *Id.*

18. Clark et al., *supra* note 6 (describing the importance of the jury in the

in the process of administering justice in our society cannot be denied. The notion that the jury system is one of the greatest attributes of modern democracy and a central element in the American concept of justice is not debatable. Although a significant amount of research on the jury system exists,<sup>19</sup> juror misconduct has not been as closely addressed. When jurors are found to have been sleeping during trial, courts address the issue under a plain error analysis.<sup>20</sup>

Juror misconduct can encompass many different types of inappropriate behavior.<sup>21</sup> When a juror has slept during trial, the misconduct is deemed inattentiveness.<sup>22</sup> Juror inattentiveness is a broad category of jury misconduct that includes jurors writing notes, reading books, working on cross-word puzzles, and, of course, even sleeping.<sup>23</sup> By dealing with a sleeping juror in the same way as a juror who has written a note during trial, the nature of one being asleep is ignored. Fatigue not only impairs memory and judgment, but a recent study also suggests that it significantly impairs moral judgment.<sup>24</sup> One cannot say the same

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American judicial system as an introduction into an examination of stress experienced by jurors as a result of their jury duty).

19. JOHN KLEINIG & JAMES P. LEVINE, *JURY ETHICS, JUROR CONDUCT AND JURY DYNAMICS* (John Kleinig & James P. Levine eds., Paradigm Publishers 2006); HASTIE ET AL., *supra* note 8; WILCOX, *supra* note 9.

20. *People v. Jones*, 861 N.E.2d 276, 278 (Ill. App. Ct. 2006) (reviewing an appeal based on a sleeping juror under plain error); *People v. Gonzalez*, 900 N.E.2d 1165, 1172 (Ill. App. Ct. 2008) (holding that the trial court's failure to take any remedial action when it knew that a juror had slept through a portion of trial was not plain error).

21. See Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 324 (2005) (listing several different types of juror misconduct). This article analyzes the different forms of juror misconduct and classifies the types of jurors that are most likely to engage in improper behavior. *Id.* at 345. The author creates five categories of jurors: stealth jurors, activist jurors, impaired jurors, biased jurors, and evasive jurors. *Id.* These categories are used to understand the reasons jurors misbehave. *Id.* at 344-45. The article concludes by noting that a guilty verdict that has been tainted by juror misconduct may be immune from judicial review. *Id.* at 351.

22. *Kaminski v. Bremner, Inc.*, 281 S.W.3d 298, 305 (Ky. Ct. App. 2009).

23. *E.g.*, George L. Blum, Annotation, *Inattention of Juror from Sleepiness or Other Cause as Ground for Reversal or New Trial*, 59 A.L.R.5TH 1, Part III (1998) (analyzing cases dealing with the different types of inattention recognized by courts).

24. See Robert Stickgold & Peter Wehrwein, *Sleep Now, Remember Later*, NEWSWEEK, Apr. 27, 2009, at 56. (discussing sleep studies that show that sleep deprivation impairs the ability to integrate emotion and cognition to guide moral judgments). Although a juror may not be faced with sleep deprivation, the basic argument was that when a person is tired, their overall mental ability can be impaired. *Id.* From this, it can be inferred that when jurors are falling asleep during trial, it is because they are tired, and therefore, their ability to render a verdict thereafter may be impaired.

about momentarily reading a book or writing a note.

### B. *Sleeping Jurors' Current Treatment*

In the Illinois appellate court case *People v. Gonzalez*,<sup>25</sup> the trial judge noticed a sleeping juror, and at the conclusion of the first day of trial he stated, "it appeared to me from my observations that one of the jurors . . . may have fallen asleep during some of the proceedings. I was concerned about that, and that's why we have alternates. . . . If the lawyers want to make motions, we'll consider them."<sup>26</sup> When asked if anyone else saw the juror, the defense counsel confirmed the judge's observation noting, "she was definitely out for a while."<sup>27</sup> The defendant was ultimately convicted of first degree murder despite the sleeping juror.<sup>28</sup> On appeal, the defendant argued that the trial court should have at least questioned the sleeping juror about her inattentiveness,<sup>29</sup> but the appellate court rejected this contention after reviewing the issue for plain error.<sup>30</sup>

### C. *The Problem with Prejudice*

Under a plain error analysis, a reviewing court may consider a forfeited error when the evidence supporting the defendant's guilt is close, or when the error is so serious that it compromises the fairness of the defendant's trial and challenges the integrity of the judicial process.<sup>31</sup> If the evidence supporting his guilt is close, the defendant must show that he was prejudiced by the error.<sup>32</sup> Prejudice may be satisfied by showing that, because the juror was asleep during trial, the scales of justice were tipped against him.<sup>33</sup> Showing that a juror missed essential parts of a trial may also be an adequate showing of prejudice,<sup>34</sup> although courts differ on whether this finding is actually necessary in any given case.<sup>35</sup> A

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25. *Gonzalez*, 900 N.E.2d 1165. The appellate court held that the trial court's failure to take any remedial action when it knew that a juror has slept through a portion of trial was not plain error. *Id.*

26. *Id.* at 1171-72. Neither attorney made a motion regarding the sleeping juror after the judge brought it to the court's attention. *Id.* at 1172.

27. *Id.* at 1171.

28. *Id.* at 1168.

29. *Id.* at 1172.

30. *Id.*

31. *Jones*, 861 N.E.2d at 278-79.

32. *Id.* at 454; *see also* *Chambers v. State*, 590 N.E.2d 1064, 1066 (Ind. 1992) (declaring that the defendant must show that the juror's action actually resulted in prejudice to establish reversible error).

33. *Jones*, 861 N.E.2d at 279 (describing a standard for prejudice). "[T]he error alone severely threatened to tip the scales of justice against him." *Id.*

34. *E.g.*, *Blum*, *supra* note 23, at 20. Assuming the defendant has shown that a juror has been asleep, the lack of attention must result in prejudice such that the juror did not follow some essential part of the proceedings. *Id.*

35. *Compare* *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000)

defendant facing up to life in prison would most likely argue that the entire trial is essential, but many times, a determination of prejudice depends upon who observed the juror sleeping<sup>36</sup> or how the trial court phrased the extent of the sleeping in the record.<sup>37</sup>

The problem is that courts place the burden of proving prejudice from a sleeping juror on the defendant.<sup>38</sup> Exactly how does a defendant uncover what impact a sleeping juror had on the outcome of his case? According to one scholar, the sleeping jurors will just go along with the jurors who managed to stay awake during the presentation of the evidence.<sup>39</sup> Most likely, this argument would be considered speculation if asserted on appeal, but the truth is that the effect of a sleeping juror cannot be ascertained. One of the key components of the modern jury system

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(reasoning that the lack of evidence showing that the sleeping juror missed large portions of the trial or that the portions missed were particularly critical was a basis for concluding that the defendant was not denied a fair trial when the judge noticed a juror sleeping on two occasions), *and* *United States v. Tierney*, 947 F.2d 854, 868 (8th Cir. 1991) (finding no prejudice, the court reasoned that the defendant had not shown that the jury ignored any particularly important items at trial), *with* *People v. Evans*, 710 P.2d 1167, 1168 (Colo. App. 1985) (holding that the trial court erred by holding a juror in contempt of court for sleeping while refusing to grant a new trial based on an absence of prejudice).

36. *See* *United States v. Barrett*, 703 F.2d 1076, 1082-83 (9th Cir. 1983) (rejecting the notion that who observed the sleeping juror is irrelevant). The court stated:

[U]nlike . . . cases where the allegation of a sleeping juror is raised by the defendant, here, the trial judge was apparently informed by the juror himself that he had been sleeping during trial. In view of the juror's own statement, . . . [the court] has no basis for accepting the judge's bare assertion that no juror has been asleep during trial.

*Id.* at 1083.

37. *Compare* *Jones*, 861 N.E.2d at 280 (holding that the trial judge should have reopened *voir dire* after observing that a juror was "half sleep during almost the entire proceeding."), *with* *Gonzalez*, 900 N.E.2d at 1175 (holding that the defendant failed to prove plain error despite the trial judge's remark that it appeared that "one of the jurors may have fallen asleep during some of the proceedings.").

38. *See* *United States v. Tierney*, 947 F.2d 854, 868-69 (8th Cir. 1991) (determining that the defendant's general assertion that jurors slept through critical parts of the defense's evidence was too vague to establish prejudice).

39. *See* Bill Haltom, *Ladies and Gentlemen of the Jury, Please Wake Up! It's Happy Hour!*, 44 TENN. B. J. 32, 33 (2008) (describing himself as a veteran trial lawyer, where, through his experience, it is best for lawyers not to wake a sleeping juror because they will get angry). This article was written in response to a Tennessee law that disqualifies jurors from jury duty who are drunk or who have been drunk during the term of the court then sitting. *Id.* There was an article written that suggested that the law may be amended. *Id.* The author identifies the problem of sleeping jurors and pokes fun at the idea that if the drunken juror law gets amended, not only will there be sleeping jurors, but there will be drunken ones as well. *Id.* at 34.

is the element of secrecy that surrounds jury deliberations.<sup>40</sup> “As a general rule, no one . . . has a ‘right to know’ how a jury, or any individual juror, has deliberated or how a decision was reached.”<sup>41</sup> Surprisingly, this component of the jury system is never mentioned during a prejudice analysis involving sleeping jurors.

The appellate court in *Gonzalez*<sup>42</sup> rejected the defendant’s claim that his case was analogous to that of *People v. Jones*,<sup>43</sup> where a conviction was reversed due to a sleeping juror.<sup>44</sup> The appellate court in *Jones* held that because the trial judge stated on the record that a juror appeared to have been “half asleep during almost the entire proceeding,” the court abused its discretion by not reopening *voir dire* to ensure that the defendant received a fair trial.<sup>45</sup> The court noted that the defendant did not need to show that the sleeping juror missed any essential parts of the trial because the judge’s observation was enough;<sup>46</sup> further inquiry into the issue would have been repetitive.<sup>47</sup> The *Gonzalez* appellate court made a distinction between the statements on the record in each case. In *Jones*, the controlling statement was that a juror was “half asleep during almost the entire proceeding.”<sup>48</sup> In *Gonzalez*, the appellate court focused on the trial court’s remark that the juror “may have fallen asleep during some of the proceedings.”<sup>49</sup>

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40. See *United States v. Olano*, 507 U.S. 725, 737 (1993) (calling the secrecy of jury deliberations a “cardinal principle” and the “cornerstone” of the modern jury system).

41. *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997); see also FED. R. EVID. 606(b) (stating a juror may not testify as to any matter occurring during the jury’s deliberations).

42. *Gonzalez*, 900 N.E.2d 1165.

43. *Id.* at 1174. The court distinguishes *Jones* by stating that the focus in that case was on the trial judge’s failure to take any action throughout the trial despite the judge’s awareness that a juror was half asleep during almost the entire proceeding. *Id.*

44. *Jones*, 861 N.E.2d at 280.

45. *Id.*

46. See *id.* (rejecting the state’s argument that the defendant must also show that the challenged juror failed to follow some important or essential part of the trial). The court did not make a distinction between the amount of trial missed, for example, the length of time, and the nature of the portions of the trial that were missed. *Id.*

47. See *id.* (stating that there is no point to a rule that would compel the defendant to duplicate what the court already knew). It can be inferred from this holding that prejudice was presumed in this case because the court placed heavy emphasis on the length of time the juror was asleep without mentioning what exactly was going on during trial at the time. *Id.* at 278-80.

48. *Id.* The question of what the judge meant when he said “half asleep” was never brought into the court’s analysis when it looked at the language in the record. *Id.* The case does not make clear whether “half asleep” is the same as dozing or nodding off.

49. See *Gonzalez*, 900 N.E.2d at 1175 (emphasizing the judge’s response to the sleeping juror). The court stated, “[g]iven the trial court’s remark that the juror ‘may have fallen asleep’ during some of these proceedings, it is unclear



The *Gonzalez* court seemed to focus on the uncertainty in the word “may”<sup>50</sup> while ignoring the holding in *Jones*,<sup>51</sup> which stated, “given the possibility of a juror [having slept through] ‘almost the entire proceeding,’ . . . .”<sup>52</sup> The court also ignored the responses the judge received after asking if anyone else had seen what he saw.<sup>53</sup> In both cases, the judge brought the sleeping juror to the court’s attention,<sup>54</sup> and neither judge took remedial action beyond alerting the attorneys of their observation.<sup>55</sup> The fact that one case was reversed and the other was not illustrates the range of trial court discretion Illinois courts have exercised on this issue.

Illinois courts traditionally yield to the trial judge’s singular position of assessing and determining the impact of juror misconduct.<sup>56</sup> Because the court has considerable discretion in deciding how to handle a sleeping juror,<sup>57</sup> the judge’s assessment

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what . . . portion of Serrano or Rayo’s testimony the juror missed.” *Id.* Both Serrano and Rayo were eye witnesses to the murder the defendant was charged with. *Id.*

50. *See id.* at 1176 (discussing the trial court record). The appellate court noted that the record indicated that a juror “may have fallen asleep” during the early portion of the defendant’s trial when two or three witnesses testified. *Id.*

51. *See id.* at 1175 (creating a presumption that the sleeping juror remained attentive during eleven additional witness testimonies based on the fact that there was no further mention of the sleeping juror). The court presumed that the attorneys and the judge paid closer attention to the juror after the judge brought the sleeping juror to the court’s attention. *Id.* This presumption was made despite the judge’s assertion that he was not going to *sua sponte* do anything about the sleeping juror, and that he was going to leave it to the attorneys to make a motion. *Id.* at 1175, 1171-72.

52. *Jones*, 861 N.E.2d at 280 (emphasis added).

53. After the judge’s statement that a juror “may have fallen asleep during some of the proceedings,” the judge asked if anyone saw what he did. *Gonzalez*, 900 N.E.2d at 1171. In response, the defense counsel stated, “Yes, she was definitely out for a while.” *Id.* The state’s response was, “Hey, it’s ok.” *Id.* The court never mentioned these responses in its analysis, although they were reflected in the trial court record.

54. *Id.*; *Jones*, 861 N.E.2d at 278. The judges in both cases also asked if anyone else had seen the sleeping jurors and counsel replied that they had; therefore, even though trial counsel was aware of the sleeping juror, neither brought it to the court’s attention before the judge. *Gonzalez*, 900 N.E.2d at 1171; *Jones*, 861 N.E.2d at 278.

55. *See Gonzalez*, 900 N.E.2d at 1171 (bringing up the sleeping juror issue, but stating that the court would not do anything about it now); *Jones*, 861 N.E.2d at 278 (explaining why the sleeping juror issue was brought up). The judge stated, “It’s my opinion that if a juror appears to be asleep, you should bring it to the Court’s attention. . . . [I]t’s not going to always be my job to do it. It’s not my case. I’m just here.” *Id.*

56. *People v. Grenko*, 825 N.E.2d 1222, 1226 (Ill. App. Ct. 2005); *Green v. Univ. of Chi. Hosp. & Clinics*, 631 N.E.2d 271, 275-76 (Ill. App. Ct. 1994).

57. *See, e.g., United States v. Wilcox*, 50 F.3d 600, 603 (8th Cir. 1995) (affirming the position that the decision of whether to remove a sleeping juror rests with the discretion of the trial court); *State v. Yant*, 376 N.W.2d 487, 490

of whether prejudice exists is reviewed only for an abuse of that discretion.<sup>58</sup> This standard is almost impossible to overcome.<sup>59</sup> Given the narrow abuse of discretion standard and the difficulty of showing error due to sleeping jurors on appeal, the defendant is left only to assert a claim against his attorney for ineffective assistance of counsel.

Ironically, ineffective assistance of counsel also embodies an element of prejudice that must be proven in order for the claim to be successful.<sup>60</sup> Prejudice in this context exists when the defendant can show that “but for the trial counsel’s . . . failure to alert the trial court to the existence of a sleeping juror, the outcome of [his] trial would have been different.”<sup>61</sup> This, again, raises the question: How does a defendant uncover what impact a sleeping juror had on the outcome of his case? When dealing with the similar issue of a sleeping counsel, the Ninth Circuit, in *Javor v. United States*,<sup>62</sup> declared that “an inquiry into the question of prejudice would require ‘unguided speculation’ and would not be susceptible to intelligent, even handed application.”<sup>63</sup> It seems as though only

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(Minn. Ct. App. 1985) (concluding that the duty to replace a sleeping juror with an alternate is within the discretion of the lower court).

58. See, e.g., *Freitag*, 230 F.3d at 1023 (discussing the considerable amount of discretion a court has in deciding how to handle a sleeping juror and concluding that the standard of review is abuse of discretion); *Yamada*, 122 P.3d at 258 (discussing the standard of review for juror misconduct); *Johnson v. State*, 620 So. 2d 679, 697 (Ala. Crim. App. 1992) (reviewing the defendant’s claim of jury misconduct resulting from a sleeping juror for a clear abuse of discretion), *rev’d on other grounds sub nom. Ex Parte Johnson*, 620 So. 2d 709 (Ala. 1993).

59. See *Yamada*, 122 P.3d at 265 (stating that to constitute an abuse of discretion, the court must have clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the significant detriment of a party). In this case, there was a strong dissent from a majority decision reversing a motion for a new trial when a juror slept through twelve minutes of defense counsel’s closing argument. *Id.* at 255. The court reasoned that the defendant still needed a separate showing of prejudice before a new trial should have been granted. *Id.* at 260. The dissent argued that a broad deference should be given to the court under an abuse of discretion standard. *Id.* at 265.

60. See, e.g., *People v. Escobedo*, 878 N.E.2d 767, 774 (Ill. App. Ct. 2007) (setting out the two part test for ineffective assistance of counsel and rejecting the defendant’s claim that there was a reasonable probability that the outcome of the trial would have been different had trial counsel alerted the court about the sleeping juror). The court concluded that the defendant failed to allege the required element of prejudice. *Id.*

61. *Id.*

62. *Javor v. United States*, 724 F.2d 831, 831 (9th Cir. 1984) (holding that the conduct of defense counsel who slept through a substantial portion of the trial was inherently prejudicial and thus no separate showing of prejudice was necessary).

63. *Id.* at 834-35.

when prejudice is presumed can the defendant successfully appeal based on sleeping jurors.<sup>64</sup>

### III. ANALYSIS

This section will go through an analysis of different cases that dealt with sleeping jurors, showing the inconsistency of trial court discretion. From these cases, it will be clear that there is no set standard regarding how to handle a sleeping juror, when a hearing should be held to inquire into the extent of a sleeping juror's inattentiveness, or when the defendant has demonstrated prejudice as a result.

#### A. *Can the Juror at Least Be Questioned?*

The defendant in the Massachusetts appellate court case of *Commonwealth v. Braun*<sup>65</sup> was convicted of distribution of cocaine and appealed based on the court's failure to determine the extent of a juror's inattentiveness.<sup>66</sup> The defendant's main argument was that he was denied a fair trial as a result.<sup>67</sup> By the end of the first day of trial, the Commonwealth presented three key witnesses.<sup>68</sup> The first was the person who photographed the undercover drug purchase,<sup>69</sup> the second was the lead officer in the undercover drug

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64. See, e.g., *Tierney*, 947 F.2d at 869 (holding that the sleeping juror's inattentiveness was not sufficiently shown to be prejudicial); *United States v. Ortiz*, No. 920592, 2003 WL 303286, at \*3 (Pa. 1993) (finding no prejudice where the judge believed the jurors did not miss a crucial part of trial and holding that there was no error); *Smith v. State*, 432 N.E.2d 1363, 1368 (Ind. 1982) (finding that the defendant did not meet his burden of showing that he suffered prejudice when a juror slept during jury instructions because he worked nights and the judge called a four day recess after being informed); *State v. Webb*, 238 A.2d 147, 150 (Conn. App. Ct. 1996) (finding that the testimony of the juror stating that he was not in fact sleeping was credible, and crediting it was not error where the defendant failed to show what specific portion of the trial was missed); *Mirabel v. State*, 182 So. 2d 289, 290 (Fla. Dist. Ct. App. 1966) (concluding that although a juror appeared to be sleeping during jury instructions, the judge repeated the instructions and the incident was not shown to prejudice the defendant's substantive rights); *People v. Spady*, 64 P. 567, 568 (Cal. Ct. App. 1923) (holding that the defendant did not show prejudice where a juror who was drowsy left his seat while a question was being asked to wake himself up).

65. *Commonwealth v. Braun*, 905 N.E.2d 124 (Mass. App. Ct. 2009).

66. *Id.* at 125.

67. *Id.* The defendant felt that the judge should have taken steps to ascertain that the juror in question was sufficiently attentive during trial before being able to deliberate. *Id.*

68. See *id.* (listing the witnesses presented on the first day of trial). When proving a drug distribution charge, one would think that evidence of the actual exchange is important. This would include testimony by someone who witnessed it or was involved in some way.

69. *Id.* A professional photographer named Abby Brack took the picture. *Id.*

investigation,<sup>70</sup> and the third was the person who measured the drugs for purposes of a school zone complaint.<sup>71</sup> Once the jury was dismissed for the day, defense counsel informed the judge that juror number two had “slept through most, if not all, of the testimony and . . . some of the court’s instructions.”<sup>72</sup>

In response, the judge disclosed the fact that another court member had also alerted him to the presence of a possible sleeping juror.<sup>73</sup> Despite his own observations and the observations of two court members, the judge would not make a finding that the juror was in fact sleeping.<sup>74</sup> In fact, the judge did not even conduct a hearing or question the juror to find out if she was actually sleeping.<sup>75</sup> The appellate court found this to be enough for a reversal in favor of the defendant.<sup>76</sup> The contemporaneous observations from three separate sources alerted the judge to the very real possibility that a juror had slept during key testimony and during the judge’s instructions.<sup>77</sup> Armed with this knowledge, the judge’s failure to take further action was deemed an abuse of discretion, and the judgment was reversed.<sup>78</sup>

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70. *Id.* A state police sergeant, Mark Kiley, was the lead officer in the case. *Id.*

71. *Id.*

72. *Id.* Before trial, the jury venire had been exhausted and the judge, the prosecutor, and defense counsel agreed that only six jurors would be seated. *Id.* Defense counsel noted that had alternates been available, he would have requested that this particular juror be deemed the alternate. *Id.*

73. *Id.* Officer Lackey, who was likely the bailiff at the trial, had brought the juror to the judge’s attention. *Id.*

74. *Id.* at 125-26. The judge stated, “I can’t say for certainty that she was asleep, but she certainly did have that appearance at times. And I can’t say it was throughout the trial, and I can’t say it was throughout my instructions, because I did not notice that.” *Id.* (emphasis omitted).

75. *Id.* at 126. The judge plainly stated that he could not and would not make a finding that the juror was asleep. *Id.*

76. *Id.* at 127. The court declared that, if a judge is alerted to a substantial problem of juror attentiveness, he is required to address it. *Id.* at 126. It acknowledged the long held rule that a judge has considerable discretion in addressing juror misconduct, but asserted that uncertainty regarding whether a juror is asleep is not the equivalent of a finding that the juror is awake. *Id.* The court ultimately concluded that the judge was aware of a compelling reason to conduct *voir dire* and the failure to do so was error. *Id.* at 127.

77. *Id.* at 126. The court recognized the sources as a court officer, defense counsel, and the judge himself. *Id.* This was deemed considerably more information than an affidavit from courtroom bystanders would have provided. *Id.* at 127. The court seems to be emphasizing the credibility of how the judge learned of the juror’s misconduct.

78. *Id.* The court stated that there was a “very real basis for concluding that the juror was sleeping . . . , thereby calling into question that juror’s ability to fulfil [sic] her oath to try the issues according to the evidence.” *Id.* In the court’s view, the judge prevented himself from acquiring the information needed to a properly exercise his discretion. *Id.*

The South Carolina Court of Appeals in *State v. Hurd*<sup>79</sup> came to the same conclusion when the trial judge noticed a juror sleeping during portions of the closing arguments and the jury charge, but did not conduct a hearing or replace the juror.<sup>80</sup> The defendant had been convicted of criminal conspiracy to commit burglary<sup>81</sup> and appealed after the judge denied his request to replace the sleeping juror with an alternate.<sup>82</sup> At the end of the jury charge, defense counsel informed the judge that a juror appeared to be asleep during most of the charge.<sup>83</sup> The judge stated that he noticed the juror “nodding off a couple of times,” but that he was “not going to remove him.”<sup>84</sup> The appellate court concluded that “[j]ust because a juror closed his eyes does not necessarily mean that he was asleep, but a trial judge should at least attempt to make this determination whenever a juror appears to be asleep.”<sup>85</sup>

In both cases, the appellate court focused on the judge, who had noticed the sleeping juror, but failed to make further inquiry to determine whether the jurors were in fact sleeping during trial.<sup>86</sup> One would presume courts could agree that the judge must first determine whether a juror was actually asleep, and if so, what the juror missed, before making a definitive decision that the sleeping juror was harmless. Although it makes perfect sense, and the courts in *Braun*<sup>87</sup> and *Hurd*<sup>88</sup> agree, other courts take a

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79. *State v. Hurd*, 480 S.E.2d 94 (S.C. Ct. App. 1996).

80. *Id.* at 97. The court deemed the trial judge’s refusal to question the juror as to whether he heard all of the charge reversible error. *Id.*

81. *Id.* at 95. The police responded to a burglary in progress at a Burger King and found two men wearing dark clothes walking nearby. *Id.* When the police approached the men, one ran and was never apprehended. *Id.* at 95-96. A search of the other man discovered a hammer, a crowbar, a flashlight, a screwdriver, an axe handle, and a set of keys. *Id.* at 96. The suspect they caught led them to a car, the search of which turned up the defendant’s driver’s license and a speeding ticket. *Id.* At this point, the suspect allegedly told the police that the defendant was the person who ran when the police approached, but this was later recanted at trial. *Id.*

82. *Id.* at 97.

83. *Id.* Defense counsel stated that he was very concerned about the juror after being asked whether he had anything further to say. *Id.*

84. *Id.* Defense counsel requested that the juror either be replaced with the alternate, or be questioned to determine whether he knew what was said during the jury charge. *Id.* The judge reasoned that he believed that the juror was alert during most of the charge. *Id.*

85. *Id.* The court held that the trial judge should have either determined whether the juror was in fact asleep, recharged the entire jury, or replaced the juror with an alternate. *Id.* It reversed the defendant’s conviction and entered an order for a new trial. *Id.*

86. See *Braun*, 905 N.E.2d at 127 (asserting that the facts of which the judge was aware established a compelling reason to conduct a *voir dire* of the inattentive juror); *Hurd*, 480 S.E.2d at 97 (stressing that the court should not speculate, but must determine the juror’s state of mind).

87. *Braun*, 905 N.E.2d 124.

completely opposite approach to the problem.

1. *Whose Responsibility Is it to Ensure That Jurors Are Awake?*

In *Commonwealth v. Strunk*,<sup>89</sup> the trial judge himself acknowledged that he saw a juror with his eyes closed,<sup>90</sup> but because counsel did not specifically request a remedy, the Pennsylvania Superior Court found the issue to be waived.<sup>91</sup> Defense counsel noting for the record that the tipstaff had to wake the juror during the judge's charge was insufficient.<sup>92</sup> The superior court did not mention the fact that the judge saw the juror, yet failed to acknowledge it until after defense counsel chose to reflect it in the record. It also overlooked the judge's failure to at least find out if the juror was actually asleep.

Similarly, in *State v. Smith*,<sup>93</sup> despite the trial judge's recognition that a juror appeared to be sleeping, the South Carolina Court of Appeals found that because the defendant did not show whether the juror was actually asleep nor request a direct examination of the juror, the issue was waived on appeal.<sup>94</sup> In all four cases, the judge himself observed a juror who appeared to be sleeping in addition to being alerted to the problem by sworn members of the court. Both the appellate courts in *Braun* and *Hurd* agreed that the trial court must not speculate, but must make a finding as to the attentiveness of a juror who appears to be asleep during a criminal trial;<sup>95</sup> yet this is exactly what the trial

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88. *Hurd*, 480 S.E.2d 94.

89. 953 A.2d 577 (Pa. Super. Ct. 2008).

90. *Id.* The judge admitted that determining whether a juror is sleeping is a hard thing to do. *Id.*

91. *Id.* at 581. The judge believed defense counsel was satisfied with the sleeping juror because he did not request that an alternate be put on. *Id.* at 580.

92. *Id.* Counsel felt as though he had an obligation to point out the incident so that it would be reflected in the record. *Id.* From this, we can infer that the judge made no acknowledgment of the fact that his own staff had to wake up the juror during the judge's charge.

93. 525 S.E.2d 263 (S.C. Ct. App. 1999). The defendant, a prison inmate, was convicted of assault and battery with the intent to kill based on a prison brawl where several people were injured when the defendant allegedly hit them with a bat. *Id.* at 264.

94. *Id.* at 268. The court used the fact that the judge observed the juror write something down on a note pad to support its conclusion that the judge believed the juror was in fact alert. *Id.* This seems contrary to the judge's own assertion that the juror "may be a person that is just simply closing her eyes and listening. *I don't know. I don't know whether she is or isn't . . .*" *Id.* at 265 (emphasis added).

95. See *Braun*, 905 N.E.2d at 126 (asserting that the inquiry should not have ended once the judge was uncertain whether the juror was sleeping and was unwilling to make such a finding); *Hurd*, 480 S.E.2d at 97 (holding that the trial court must conduct an inquiry to determine the juror's state of mind,

court in *Strunk* and *Smith* did not do. Despite the fact that in all four cases, the judges observed the sleeping jurors themselves and stated that they were still uncertain whether the juror was actually asleep,<sup>96</sup> the appellate courts came to different conclusions as to when a hearing is necessary. So when should a judge inquire into the attentiveness of a juror who appears to be sleeping? *Braun* and *Hurd* would say when the judge is reliably informed of the potential problem, in order to protect the defendant's right to a fair trial. *Strunk* and *Smith* would say even if the judge noticed it himself, only if the defendant requests it. Clearly, the question remains unanswered.

### B. When Is a Sleeping Juror Prejudicial?

Assuming there is no dispute as to whether a juror was in fact sleeping during trial, determining whether the defendant is entitled to some sort of remedy as a result should be an easier issue to resolve. Unfortunately, courts differ as to whether the problem is one that needs to be resolved at all after applying a prejudice analysis to the issue.

#### 1. Different Standards for Different Courts

In *People v. Evans*,<sup>97</sup> the Colorado Court of Appeals held that the defendant was prejudiced when a juror slept during closing argument, and that the trial court should have granted him a new trial as a result.<sup>98</sup> The bailiff initially brought the sleeping juror to the court's attention, and the judge then provided the juror with a glass of water.<sup>99</sup> Defense counsel was unaware of the situation until after the jury returned a guilty verdict and the judge brought contempt proceedings against the juror for unsatisfactory service.<sup>100</sup> Ultimately, the trial court denied the defendant's

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not speculate).

96. *Braun*, 905 N.E.2d at 125-26 ("I can't say for certainty that she was asleep, but she certainly did that have appearance at times."); *Hurd*, 480 S.E.2d at 97 ("I noticed him nodding off a couple of times, but he was alert during most of the charge."); *Strunk*, 953 A.2d at 580 ("I did see him close his eyes at times. [T]his is a hard thing to know because some people close their eyes when they're listening for long periods of time."); *Smith*, 525 S.E.2d at 265 ("[S]he may be a person simply closing her eyes and listening. I don't know. I don't know whether she is or isn't . . .").

97. *People v. Evans*, 710 P.2d 1167 (Colo. App. 1985). The defendant in this case was convicted of conspiracy to distribute marijuana with intent to dispense. *Id.* at 1167.

98. *Id.* at 1168.

99. *Id.* It is unclear from the facts of this case whether the juror drank the water and remained awake or continued to sleep despite the water being provided, but we can infer that the glass of water did not remedy the problem from the fact that the issue was brought back up after trial commenced.

100. *Id.* Thereafter, defense counsel made a motion for a judgment of acquittal, or alternatively for a new trial. *Id.*

motion for a new trial based on the sleeping juror, finding that the facts of the case did not warrant a new trial.<sup>101</sup>

Although there was no mention of a prejudice analysis by the trial court, the judge appeared to make a finding that the defendant was not prejudiced by the juror's conduct because the facts of his case warranted a conviction. The appellate court found this hard to believe because "closing argument is one of the most consequential parts of the trial"<sup>102</sup> and "it is imperative that the defendant [have] the opportunity to marshal the evidence before submission of the case."<sup>103</sup> The appellate court reasoned that because the trial court found the juror's conduct serious enough to warrant a contempt proceeding, that same conduct must also be serious enough to constitute prejudice.<sup>104</sup>

Compare *Evans* with *State v. Yamada*,<sup>105</sup> where the Hawaii Supreme Court reversed the circuit court's grant of a new trial after a juror admitted to sleeping through about twenty percent of defense counsel's closing argument.<sup>106</sup> Defense counsel questioned the juror as to whether he had been drifting throughout the closing argument and the juror responded, "I may have been drifting. I'm not sure."<sup>107</sup> The juror was also asked to recall what defense counsel talked about during the closing, but he said he did not know.<sup>108</sup> Surprisingly, the supreme court reversed the circuit

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101. *Id.* In denying the defendant's motion for a new trial, the court acknowledged a defendant's right to a trial before a complete jury, but stated that the facts of this case did not require a new trial, and did not suggest that the defendant's rights were violated. *Id.*

102. *Id.* Both the trial court and appellate court agreed on the importance of closing argument to the overall trial process. *Id.*

103. *Id.* In rejecting the trial court's assertion that the defendant's rights were not violated as a result of the sleeping juror, the court emphasized that the purpose of closing argument is to sharpen and clarify the issues for resolution by the trier of fact. *Id.*

104. *Id.*

105. *Yamada*, 122 P.3d 254.

106. *Id.* at 257. Defense counsel's closing argument was approximately one hour long; therefore, the juror was asleep for about twelve minutes. *Id.*

107. *Id.* The questioning took place after defense counsel alleged that two or three jurors were sleeping during his closing argument, including the jury foreperson. *Id.* at 255-56. The prosecution added that the juror next to the foreperson appeared drowsy during closing as well. *Id.* at 256. After the jury returned a guilty verdict and in response to the allegations, the judge questioned all three jurors in which two denied that they had been sleeping. *Id.* The third juror admitted to sleeping and was the subject of the questioning referred to in the text. *Id.*

108. *Id.* at 257. The juror first said he did not think he was drifting throughout the whole closing, but then followed that statement with maybe. *Id.* After being asked more specific questions regarding the amount of time he was asleep, the juror stated that he was asleep for maybe twenty percent of defense's closing argument. *Id.* Defense counsel followed by asking whether he was asleep during the beginning or end and the juror stated that it was "probably more towards the middle." *Id.*



court's order for a new trial, reasoning that based on the circumstances of the case, the juror's misconduct was harmless beyond a reasonable doubt.<sup>109</sup> The supreme court focused on the fact that the circuit court did not expressly enter a finding of prejudice before granting a new trial.<sup>110</sup>

On the other hand, the appellate court in *Evans* did not make an express finding either. In *Evans*, the appellate court equated prejudice with the outrageous conduct of the juror.<sup>111</sup> There was no analysis as to the likelihood that the defendant's case would have come out differently had the juror been awake,<sup>112</sup> only a conclusion that conduct outrageous enough for a contempt proceeding was outrageous enough to prejudice the defendant.<sup>113</sup> The appellate court essentially rejected the idea that the juror's behavior did not prejudice the defendant.<sup>114</sup> After all, the defendant has no way of knowing if the sleeping juror actually participated in deliberations.

The trial court in *Yamada* stated that the motion for a new trial was granted *in the interest of justice* based on the fact that a juror was asleep for approximately twelve minutes during defense counsel's closing argument;<sup>115</sup> essentially equating this serious misconduct to prejudice. Why would the defendant's closing argument in *Evans* be any more "consequential" to the overall trial

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109. *Id.* at 262. (finding that the prosecution proved that the misconduct was harmless). The prosecutor argued that the defendant was not prejudiced by the juror's misconduct because he did not sleep through any of the evidence introduced at trial or any of the jury instructions. *Id.* at 260. It referenced the fact that arguments of counsel are not evidence. *Id.* The court also deemphasized the importance of defense counsel's closing argument by claiming that the defense's theory of the case was presented when its two witnesses testified. *Id.* The prosecutor also attempted to lessen its importance by noting that defense counsel included an explanation of the reasonable doubt standard in his closing argument that had also been explained in the jury instructions to which there was nothing to suggest the juror did not hear. *Id.*

110. *Id.* at 259. The court announced that the trial court was under a duty to determine whether the misconduct was one which could substantially prejudice the defendant's right to a fair trial. *Id.* The court noted that the critical issue becomes whether there is a reasonable possibility that the error might have played a part in the conviction. *Id.*

111. *Evans*, 710 P.2d at 1168 (noting that a juror's inattention during closing argument demonstrates contempt for the court and contempt for the rights of the defendant). The court reasoned that, because the trial court had determined that the juror's misconduct was sufficient to warrant a contempt proceeding (and actually imposed a penalty against that juror), the conduct must also have constituted prejudice to the defendant. *Id.*

112. This is one of the most common definitions of prejudice. See *Jones*, 861 N.E.2d at 279 (quoting the definition of prejudice).

113. *Evans*, 710 P.2d at 1168. The court concluded that the defendant had demonstrated that he was prejudiced by the juror's misconduct. *Id.*

114. *Id.*

115. *Yamada*, 122 P.3d at 258.

proceeding than the defendant's closing argument in *Yamada*? Ironically, the *Yamada* court tried to reconcile the holding in *Evans* by claiming that the appellate court equated the contempt finding with a finding of prejudice.<sup>116</sup>

To the contrary, the appellate court in *Evans* equated the conduct serious enough to warrant contempt proceedings—sleeping during defense counsel's closing argument—to conduct serious enough to prejudice the defendant.<sup>117</sup> The trial judge believed that the defendant was rightfully convicted despite the sleeping juror,<sup>118</sup> which appears to be a finding that the defendant was not prejudiced by the sleeping juror. The appellate court ignored this and was instead focused on the juror's unsatisfactory service<sup>119</sup> as a result of him sleeping. How could it have not prejudiced the defendant to have a juror who was found not to have done his job decide the defendant's fate? From the outcome of the case we can infer that the appellate court believed this reasoning to be illogical.

#### IV. PROPOSAL

As illustrated in Part III, inconsistency regarding the way sleeping jurors are handled in criminal cases commonly manifest in two different ways. The first deals with discrepancies concerning when a hearing should be held to determine the extent of a sleeping juror's inattentiveness. The second deals with discrepancies on appeal surrounding what actually constitutes prejudice in a sleeping juror case. This proposal introduces a comprehensive pre-appeal solution as well as a post-appeal solution to both problems.

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116. *Id.* at 261. Discussing *Evans*, the court stated that "the juror's conduct was so egregious . . . [that it] resulted in a finding of contempt, which the appellate court equated with a finding of prejudice." *Id.*

117. *Evans*, 710 P.2d at 1168.

118. *See id.* (concluding that the defendant's rights were not violated after acknowledging that there was a sleeping juror, and that a defendant has a right to a trial before a complete jury).

119. *Id.* During the trial court's contempt proceeding against the juror, the judge stated, "[t]he court finds your service as a juror was unsatisfactory . . ." *Id.* Essentially, this judge believed that sleeping during closing argument made the juror's service unsatisfactory, which supported a finding of contempt. *Id.* The appellate court was then left with a record indicating that a juror's service was unsatisfactory, but that the juror's unsatisfactory service did not prejudice the defendant. *Id.* It appears that the appellate court was unable to reconcile a finding of unsatisfactory jury service with a finding of no prejudice to the defendant. To resolve this inconsistency, the appellate court concluded that the defendant was entitled to a new trial. *Id.*

### A. Pre-Appeal Sleeping Juror Guideline

Inconsistencies regarding when a hearing should be held to determine the extent of a sleeping juror's inattentiveness can be addressed using a combination of new pre-trial procedures and the creation of a duty to investigate.

#### 1. Sleeping Juror Pre-Trial Instructions

Similar to cautionary jury instructions,<sup>120</sup> the trial judge should provide the jury with a three part pre-trial instruction on their duty to remain awake and attentive. The first part should stress the importance of being fully aware of everything that goes on in the courtroom at all times. The next portion should specifically state that sleeping in the jury box is expressly prohibited. The final component of the instruction should focus on affirmative actions jurors can take to remedy the problem during trial. This includes options to ask for a recess if anyone feels sleepy,<sup>121</sup> to inform the judge if a juror feels as though he or she cannot stay awake,<sup>122</sup> and to make an effort to keep fellow jurors attentive if they witness someone dozing off.<sup>123</sup>

#### 2. The Court's Duty to Act

With new pre-trial jury instructions implemented that create a duty for jurors to remain awake and attentive, naturally, courts should have a similar duty. Consistent with what some courts have already held, trial courts should have an affirmative duty to conduct a hearing after being reliably informed that a juror is sleeping.<sup>124</sup> The purpose of this hearing is to determine the extent of a sleeping juror's inattentiveness, including what portions of trial were missed. This hearing also serves as added protection from reversal on appeal.<sup>125</sup>

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120. One example is an instruction on note taking, ILL. PATTERN JURY INSTR. CRIM. 1.05 (4th ed., West 2008). The committee note provides a recommendation that it may be helpful to give this instruction before opening statements and at the conclusion of the case. *Id.*

121. *See Wiggins*, 507 A.2d at 523 (advising the jury to kindly request a recess if necessary). The judge gave this instruction after being informed that a juror appeared asleep. *Id.* Proposing this instruction is not inviting the juror to interrupt the trial, but instead to pass a note to the bailiff indicating the reason for the request.

122. *See id.* (informing the jury to let the judge know if the sleeping situation is getting beyond their control).

123. *See id.* (instructing jurors to help keep fellow jurors awake by giving them a little poke).

124. *Braun*, 905 N.E.2d at 127; *Hurd*, 480 S.E.2d at 97.

125. In *McCormick v. St. Louis Univ., Inc.*, the plaintiff participated in a six day trial and the release of the alternate juror and then, only after an adverse verdict was returned, raised a sleeping juror issue in a motion for a new trial. 14 S.W.3d 601, 606 (Mo. Ct. App. 1999). Because the motion was the first time

If the court finds that a juror was asleep during a substantial portion of trial, that particular juror should be replaced with an alternate.<sup>126</sup> If, on the other hand, the court finds that the juror was not asleep during a substantial portion of trial, then the trial can proceed with the hearing on the issue in the record. Of course, creating this new duty curbs the amount of trial court discretion in handling sleeping jurors, but it does not eliminate it. The judge still has discretion regarding the findings made from the hearing.

### B. *Post-Appeal: Structural Error Standard of Review*

When a case is appealed based on a sleeping juror, courts tend to use a plain error standard of review that encompasses a prejudice analysis.<sup>127</sup> The defendant is supposed to show that had the juror been awake, the outcome of his case would have been different. But applying this standard most often results in the sleeping juror being considered harmless error.<sup>128</sup> Using a structural error standard of review instead would essentially eliminate this problem.

#### 1. *What Is a Structural Error?*

Structural errors affect the framework within which a trial proceeds and defies a harmless error analysis.<sup>129</sup> This type of error infringes on a defendant's right to the basic components of a fair

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a sleeping juror was mentioned, the court called this "a classic example of 'sandbagging' and a waste of precious administration of justice time and effort." *Id.* Had the proposed instructions been read, the court would have more likely been made aware of the sleeping juror and would have had to conduct a hearing, foreclosing the possibility of this type of "sandbagging" tactic.

126. In addition to the regular panel, courts may direct that one or two jurors be impaneled to serve as alternate jurors. 735 ILL. COMP. STAT. 5/2-1106(b) (West 2009). Alternates shall replace jurors who become unable to perform their duties prior to deliberations. *Id.*

127. *United States v. Kimberlin*, 805 F.2d 210, 244; *Jones*, 861 N.E.2d at 278-79; *Gonzalez*, 900 N.E.2d at 1172.

128. *See Yamada*, 122 P.3d at 262 (concluding that a sleeping juror was harmless beyond a reasonable doubt because there was no proof that actual prejudice resulted); *Golsun v. United States*, 592 A.2d 1054, 1058-59 (D.C. 1991) (holding that the trial court erred in arbitrarily deciding which sleeping jurors would be replaced, but that this was harmless because no prejudice was apparent).

129. *People v. Bingham*, 847 N.E.2d 903, 909-10 (Ill. App. Ct. 2006). This case involved a denial of the defendant's request for a continuance to substitute private counsel. *Id.* at 906. The court found that the trial court violated the defendant's right to choice of counsel by denying his motion without conducting an adequate inquiry into the request. *Id.* Once it was determined that the trial court erred, the next issue was whether this error was subject to a harmless error or prejudice analysis. *Id.* at 907. The court concluded that the error was a constitutional error affecting a substantial right and defies harmless error analysis. *Id.* at 910.

trial and can, therefore, never be considered harmless.<sup>130</sup> Once a court determines that an error was structural, automatic reversal is required.<sup>131</sup> An inquiry into the question of prejudice would require “unguided speculation” and “would not be susceptible to intelligent, even handed application,” therefore, prejudice is presumed.<sup>132</sup> A well recognized example of a structural error is the denial of the right to effective assistance of counsel,<sup>133</sup> implicated when an attorney sleeps during trial.<sup>134</sup>

## 2. *Sleeping Counsel, Structural Error*

In *Burdine v. Johnson*,<sup>135</sup> a federal district court case, the sole issue on appeal involved the legal significance of defense counsel sleeping during trial.<sup>136</sup> Ultimately, the court concluded that this type of error was a structural one where confidence in the fairness and reliability of the proceeding was so undermined that prejudice was presumed.<sup>137</sup> The court adopted a *per se* rule that when a

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130. *Rose v. Clark*, 478 U.S. 570, 592 (1986). The court “recognized that some constitutional errors require reversal without regard to the evidence in the particular case.” *Id.* at 577.

131. *Bingham*, 847 N.E.2d at 909. The court called these errors so intrinsically harmful that they require automatic reversal without regard to their effect on the outcome of the case. *Id.* at 909-10.

132. *Burdine v. Johnson*, 66 F. Supp. 2d 854, 863 (S.D. Tex. 1999).

133. *See id.* at 861-62 (recognizing the right to counsel guaranteed by the Sixth Amendment as the right to effective assistance of counsel). Other examples of structural errors include discrimination on the basis of race in the selection of grand jurors, violation of the defendant’s right to self-representation at trial, and violation of the right to a public trial. *Bingham*, 847 N.E.2d at 910.

134. Courts distinguish between ineffective assistance of counsel claims based on specific acts and omissions, and claims based on sleeping. *Javor*, 724 F.2d at 834. Prejudice is inherent in the latter case because a sleeping counsel is equivalent to no counsel at all. *Id.* This same logic should be applied to sleeping juror cases to distinguish them from other forms of juror misconduct due to inattentiveness.

135. *Burdine*, 66 F. Supp. 2d 854. In this capital murder case, the defense counsel was found to have repeatedly dozed and actually slept during trial. *Id.* at 859. The state district court conducted an evidentiary hearing after the defendant filed his second writ of habeas corpus on the issue. *Id.* at 857. One of the witnesses called was the jury foreperson who testified that he observed defense counsel asleep more than twice. *Id.* Another juror testified that this behavior went on for about ten minutes and occurred five to ten times during trial. *Id.* The defense counsel himself testified that he did not sleep during any portion of trial, but that he tends to close his eyes when thinking. *Id.* at 859. The court found this testimony to be impeached by defense counsel’s former co-counsel who testified that the defense counsel had slept during a previous capital murder trial. *Id.*

136. *Id.* at 861. The district court found that the defense counsel had slept throughout numerous portions of trial and the court of appeals adopted these findings of fact. *Id.* at 860-61. Subsequently, the court accepted these findings and determined that no issue of fact needed to be addressed. *Id.* at 861.

137. *Id.* at 861, 866.

defense attorney sleeps during substantial portions of trial, the defendant is prejudiced as a matter of law.<sup>138</sup> To determine what constitutes a substantial portion of trial, the court applied a three part test: (1) did counsel sleep for repeated and/or prolonged lapses; (2) was counsel actually unconscious; and (3) were the defendant's interests at stake while counsel was asleep.<sup>139</sup>

### 3. *Sleeping Juror, Structural Error*

Applying the *Burdine* standard to sleeping juror cases as applied in sleeping counsel cases mandates a similar result. An effective counsel plays a central role in the basic trial process,<sup>140</sup> but the Sixth Amendment also establishes the jury as an equally central entity.<sup>141</sup> With the jury being so important to the basic trial process, misconduct in this form cannot be justifiably ignored.<sup>142</sup> Just as a defense counsel must remain awake to perform his or her duties,<sup>143</sup> jurors have duties to perform and must do the same. To expect something less would impair the framework within which a trial proceeds.

When the Sixth Amendment mandated that all criminal trials be by jury,<sup>144</sup> a jury trial that does not require jurors to be awake was not contemplated. Our criminal justice system relies on jurors to not only weigh evidence, but also to assess witness credibility. Jurors who are asleep cannot perform these duties and allowing them to sleep undermines confidence in the fairness and reliability of trial proceedings. As such, a juror who sleeps through a substantial portion of trial should be considered a structural error where prejudice is presumed.

In sleeping juror cases, an inquiry into prejudice would involve the same type of unguided speculation that courts determined was not appropriate for sleeping counsel cases.<sup>145</sup>

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138. *Id.* at 864.

139. *Id.* The last element would not apply in sleeping juror cases because jurors have a duty to be attentive and awake during all the evidence.

140. *Rose*, 478 U.S. at 592.

141. *Id.*

142. *See id.* at 592-93 (describing the importance of the jury system). The Court recognized as the jury's central obligation the duty to determine whether the state has proved each element of the offense charged beyond a reasonable doubt. *Id.* at 593. Because the Framers chose to protect defendants by establishing certain trial procedures to be followed in criminal cases, this duty cannot be interfered with or delegated to another entity. *Id.*

143. *See Tippins v. Walker*, 77 F.3d 682, 686 (2d Cir. 1996) (pointing out that the attorney must be present and attentive in order to make adequate cross-examination).

144. U.S. CONST. amend. VI.

145. *See Javor*, 724 F.2d at 835 (rejecting an application of prejudice to the sleeping counsel issue because it would require unguided speculation); *Burdine*, 66 F. Supp. 2d at 863 (accepting the *Javor* court's rejection of applying a prejudice analysis to sleeping counsel cases).

Therefore, a test similar to the one employed in those cases should be used to determine what constitutes a substantial portion of trial for purposes of sleeping jurors.<sup>146</sup> The defendant would need to show that a juror slept on multiple occasions or for prolonged periods of time and was unconscious. Once this is proven, automatic reversal would be required in the interest of justice.

#### V. CONCLUSION

Sleeping jurors impair the fairness of our criminal justice system, and they should not be tolerated any more than sleeping counsel. Creating a duty for jurors and courts to make sure jurors are awake, and allowing jurors to inform court members of their slumber gives courts more opportunity to correct the problem during trial, resulting in fewer appeals. When a case does get appealed, analyzing the issue as a structural error maintains the importance our Constitution places on jury trials. It also sends a message that this behavior will not be tolerated in our system.

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146. This proposed test would exclude the third element of the test employed in *Burdine*.