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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 2016CA441	
Petitioner ELLIOTT J. FORGETTE v. Respondent THE PEOPLE OF THE STATE OF COLORADO	
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,417 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

> For each issue raised by the Petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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II. Whether there is, as the division held, "a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve," such that defense counsel can waive the number of jurors without her client's approval.

III. [REFRAMED] Whether a defendant's right to a jury of twelve is waived when defense counsel alerts the judge to a sleeping juror at trial but does not raise an objection.

STATEMENT OF THE CASE

These legal issues do not warrant a lengthy factual discussion. The prosecution charged Mr. Forgette with second-degree burglary of a dwelling (F3). *See* § 18-4-203(1), (2)(a), C.R.S. (2014). (CF pp.8-9.)

He chose not to testify and defended through counsel that he was not the burglar. (TR 10/7/15 PM pp.116-19; TR 10/6/15 PM pp.71-74; TR 10/8/15 pp.14-30.) The prosecution contended his appearance had substantially changed. (TR 10/6/15 PM p.70:7-10.) During the three-day jury trial, four people identified Mr. Forgette, with greater and lesser degrees of confidence. (TR 10/6/15 PM pp.125-27; TR 10/7/15 AM pp.50-53, 135-36; TR 10/7/15 PM p.54:1-11.)

The record establishes that, on the trial's second day, a juror slept during the presentation of evidence. In the morning, defense counsel was cross-examining one of the victims about his description and identification of Mr. Forgette when the court asked counsel to approach the bench to discuss a midmorning break. (TR 10/7/15 AM pp.90-91.) After counsel explained she needed another five or ten minutes, the prosecutor observed that one of the jurors "is now asleep, Judge, and has been for about the last five minutes." (*Id.*) Without hearing from the defense, the court said, "Let's take a break," and released the jury for about fifteen minutes. (*Id.* pp.91-92.)

The juror's sleepiness persisted into the afternoon. When defense counsel concluded her re-cross of the other victim, the court asked counsel to approach to review juror questions. (TR 10/7/15 PM pp.74-77.) This time the defense lawyers spotted the sleeping juror. (*Id.* p.78:1 ("Juror Number Seven is asleep . . . ."); *id.* p.78:3 ("We've lost him again.").) The court found that the juror was unconscious during the presentation of evidence:

> Yes. He does appear to be dozing off. I have been checking periodically, and he had been fine. I also would note that in the first time this was mentioned, he actually asked a question of that juror—I noticed he passed one of the notes. So, I think he is with us sometimes. I've been trying to keep an eye on him, and I certainly have tapped the microphone, which usually works. I noticed as soon as we started to speak after that last break, he was attentive. He does seem to be eyes closed and being on sand at the moment.

(*Id.* p.78:4-12.) Defense counsel expressed concern that the court did not know how long the juror had been asleep. (*Id.* p.78:13-14.) The court said it had not checked on the juror in about fifteen minutes but that a law clerk indicated the juror was watching five minutes earlier, "[s]o, that's as much as we can tell you. We are trying to keep an eye on him." (*Id.* p.78:15-20.) Defense counsel asked, "Can we try to rouse him now?" (*Id.* p.78:21.) Though the court responded, "Well, we might as well do it when we're done with this discussion of jury questions," it announced another break before addressing juror questions with counsel. (*Id.* pp.78-80.) No other incidents of juror sleeping were captured on the record.

By this point, there was no alternate juror to substitute for the sleeping juror because the alternate had been dismissed for parent-teacher conferences. (TR 10/6/15 PM p.4:5-9; TR 10/7/15 AM pp.138, 148-50.)

The jury returned a guilty verdict. (TR 10/8/15 pp.41-42.) The trial court sentenced Mr. Forgette to prison for twelve years. (TR 1/25/16 pp.24-25; CF p.113.)

He appealed and raised the sleeping-juror problem, among other issues, but a division of the court of appeals affirmed without "consider[ing] the merits" of the sleeping-juror issue, deeming it waived. *People v. Forgette*, 2021 COA 21, ¶¶1, 33.

This Court granted Mr. Forgette's cert. petition. *Forgette v. People*, No. 2021SC236 (Colo. Feb. 22, 2022).

SUMMARY OF THE ARGUMENT

This sleeping-juror issue is preserved, not waived, and these facts present structural error. The parties contemporaneously raised the sleeping-juror problem with the trial court, giving it an adequate opportunity to make findings and provide appropriate relief. The appellate record establishes that one of the jurors fell asleep multiple times *because* the issue was timely raised. Despite finding that the juror slept, the trial court took no further investigative or corrective action. This Court should hold these circumstances present structural error, but, if this Court declines to address the merits of the sleeping-juror issue, it should remand for further proceedings because, contrary to the division's conclusion, the issue is not waived.

Defense counsel cannot waive the defendant's personal right to a jury trial, which in Colorado felony cases, means a jury of twelve. Even if the division were right that defense counsel waived this issue, that would not matter because the right to a jury trial is personal to the defendant and cannot be waived by counsel. The division distinguished waiver of the right to a jury from waiver of the right to a jury of twelve, but that reasoning conflicts with Colorado's constitutional requirement that, in felony cases, a jury means twelve people.

Defense counsel does not waive the defendant's right to a jury of twelve by alerting the trial court to a sleeping juror. For the reasons to be given in Issues

I and II, defense counsel did not waive Mr. Forgette's right to be tried by a complete and competent jury when she raised this sleeping-juror problem with the trial court.

ARGUMENT

I. This sleeping-juror issue is preserved because the parties called the trial court's attention to it, the court had an adequate opportunity to address it, and there is a record for appellate review.

A. This Court reviews questions of preservation and waiver de novo.

"Constitutional and statutory rights can be waived or forfeited." *Richardson v. People*, 2020 CO 46, ¶24. "The distinction between waiver and forfeiture is significant because 'a waiver extinguishes error, and therefore appellate review, but a forfeiture does not.'" *Phillips v. People*, 2019 CO 72, ¶18 (quoting *People v. Rediger*, 2018 CO 32, ¶40).

Waiver "is 'the *intentional* relinquishment of a *known* right or privilege.'" *Rediger*, ¶39 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984) (emphasis in *Rediger*)). "In contrast, forfeiture is 'the failure to make the timely assertion of a right.'" *Richardson*, ¶24 (quoting *Rediger*, ¶40).

Proving a waiver is the prosecution's burden. *See People v. Janis*, 2018 CO 89, ¶26. This Court does "not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge[s] every reasonable presumption against waiver." *Rediger*, ¶39 (quotations omitted).

Here, the division ruled defense counsel "waived appellate review of any error related to the sleeping juror." *Forgette*, ¶21 (header).

"Whether a claim is waived is a question of law" that this Court "review[s] de novo." *Richardson*, ¶21; *see People v. Tallent*, 2021 CO 68, ¶11; *Bondsteel v. People*, 2019 CO 26, ¶21. Similarly, what duty the trial judge had in a particular situation is a question of law reviewed de novo. *See Richardson*, ¶22; *People v. Melendez*, 102 P.3d 315, 320 (Colo. 2004).

As discussed below, the issue is preserved. (TR 10/7/15 AM pp.90-91; TR 10/7/15 PM pp.77-79.)

As discussed further below, even if this Court concludes the issue is unpreserved, it should remand for the court of appeals to review for plain error.

B. The trial court had a meaningful chance to redress the sleeping-juror error because the parties contemporaneously raised it, and there is a record for appellate review because the trial court made a finding that the juror slept during trial.

According to the division, informing the trial court of the sleeping juror "without a request for a remedy or a specific objection" did not preserve the issue. *Forgette*, ¶14 (citing *People v. Greer*, 262 P.3d 920 (Colo. App. 2011), and *People v. Ujaama*, 2012 COA 36).

But in *Greer*, the defendant's acquittal motion did not alert the trial court to a potential double-jeopardy error. 262 P.3d at 924. This sleeping-juror issue, by

contrast, was not raised for the first time on appeal. *Cf. People v. Wester-Gravelle*, 2020 CO 64, ¶¶2, 22-27, 42 (concluding defendant's request for prosecutorial election or modified-unanimity instruction was unpreserved, but not waived, because defense never raised those issues with trial court); *People v. Miller*, 113 P.3d 743, 747, 751 (Colo. 2005) (concluding arguments about voluntary-intoxication instruction merely unpreserved where defense "did not object to the instructions or tender alternative instructions").

Ujaama said an issue is unpreserved where "no objection or request was made in the trial court," where the appellant objected "but on grounds different from those raised on appeal," or where the party's actions "would not have alerted the trial court to the issue of which the defendant now seeks review." *Ujaama*, ¶37.

But here, the parties objected to the sleeping juror by pointing him out. As the State told the division, "No attorney would believe that it was proper for a juror to sleep during a portion of the trial." COA AB p.12. In other words, alerting the trial court that a juror is sleeping is an objection to that conduct. *See Vigil v. People*, 300 P.2d 545, 547 (Colo. 1956) (requiring parties to state grounds for objection with specificity, "unless the reasons for an objection are obvious"); *People v. McFee*, 2016 COA 97, ¶31 ("An objection is sufficiently specific when it draws the court's

attention to the asserted error."). The trial court was alerted to the sleeping-juror issue, which Mr. Forgette continues to raise on appeal.

Precedent from this Court does "not require that parties use 'talismanic language' to preserve particular arguments for appeal." *Melendez*, 102 P.3d at 322. "[T]he trial court must be presented with an adequate opportunity to make findings of fact and conclusions of law" before this Court will review an issue. *Id.* "To preserve a claim, a party must make an objection 'specific enough to draw the trial court's attention to the asserted error.'" *Tallent*, ¶12 (quoting *Martinez v. People*, 2015 CO 16, ¶14).

In *Tallent*, the court of appeals reversed the defendant's convictions, and at the status conference before retrial, the prosecution wanted to admit otherwise suppressed evidence by raising "issues of attenuation, inevitable discovery, and the like." *Id.* ¶¶5, 13. Defense counsel argued that the law of the case governed the matter. *Id.* ¶13. "Defense counsel did *not* argue that it was improper to consider those exceptions on remand because the People *had not* asserted them previously." *Id.*; *see id.* ¶22. Because the defendant made the latter argument on appeal, and it "was never presented to the trial court, it was forfeited," and this Court reviewed for plain error. *Id.* ¶13. Mr. Forgette has not changed positions on appeal but has consistently argued a juror fell asleep during his trial.

In *Martinez*, a murder case on which *Tallent* relied, the trial court defined "after deliberation" for the jury using language this Court had held to be constitutionally deficient. 2015 CO 16, ¶¶1, 7. "[D]efense counsel objected to the language on the grounds that it was cumulative and unnecessary," but she did not provide the court a meaningful chance to avoid the error because she "erroneously conceded that the [disputed] language correctly stated the law." *Id.* ¶¶1, 7, 15. On appeal, the defendant challenged the instruction as legally incorrect, and this Court reviewed for plain error "because defense counsel's trial objection failed to identify the ground that rendered the instruction erroneous." *Id.* ¶2, 10, 12. *Martinez* explained that "[a]n adequate objection allows the trial court a meaningful chance to prevent or correct the error and creates a record for appellate review." *Martinez*, ¶14; *see Brown v. Am. Standard Ins. Co. of Wisconsin*, 2019 COA 11, ¶21 ("If a party raises an argument to such a degree that the court has the opportunity to rule on it, that argument is preserved for appeal.").

Contemporaneously pointing out a sleeping-juror problem creates a record and gives the trial court an adequate opportunity to provide an appropriate response. *Cf. People v. Syrie*, 101 P.3d 219, 220-23 (Colo. 2004) (declining to consider prosecution's search-incident-to-arrest argument in interlocutory appeal after

prosecution conceded the argument in suppression hearing, so trial court did not have "an adequate opportunity to make factual findings").

Raising a sleeping-juror problem is inconsistent with waiver because generally "an instance of a sleeping or inattentive juror inherently evades documentation in the record." *State v. Marquina*, 478 P.3d 37, 44 (Utah 2020). There is a record here *because* the parties fulfilled their "duty to call [the sleeping] to the attention of the court at the time." *People v. Hanes*, 596 P.2d 395, 397 (Colo. App. 1978), *aff'd, Hanes v. People*, 598 P.2d 131, 133 (Colo. 1979) (upholding trial court's finding that juror had headache and was listening with eyes closed); *see also Tanner v. United States*, 483 U.S. 107, 127 (1987) (rejecting post-verdict inquiry into alleged juror misconduct partly because the court, counsel, and court personnel can observe the jury during trial); *id.* at 141 (Marshall, J., concurring in part and dissenting in part) (noting majority's approach required reports of inappropriate juror behavior to reach the court "before a verdict is rendered").

This is not like sleeping-juror cases where parties waited to alert the trial court. *See Kershaw v. Tilbury*, 8 P.2d 109, 114 (Cal. 1932) ("If one of the jurors fell asleep during the trial and it was noticed by appellant, it then became his duty to so notify his attorney who should call the court's attention thereto, and his failure to do so must be deemed a waiver of the objection."); *Yates v. State*, 7 So. 880, 884 (Fla.

1890) (similar); *People v. Nachowicz*, 172 N.E. 812, 819 (Ill. 1930) (similar); *Blevins v. State*, 603 P.2d 1168, 1170 (Okla. Crim. App. 1979) (explaining new-trial motion did not preserve sleeping-juror claim because counsel must "timely apprise the trial court of juror misconduct to afford the opportunity to provide remedial action"); *State v. Saunders*, 807 N.W.2d 679, 680 (Wis. Ct. App. 2011) (requiring parties and counsel who notice sleeping jurors to "bring the issue to the trial court's attention during trial as soon as practicable . . . so that the problem can immediately be resolved" and concluding defendant forfeited sleeping-juror claim by raising it after trial, which made it "impossible for the trial court to determine the extent of the problem, if any"); *see also Yoon v. Consol. Freightways, Inc.*, 726 S.W.2d 721, 722-23 (Mo. 1987) (stating that a claim "based upon jurors dozing during trial must be made known to the court at the time of trial" and concluding party timely raised issue during recess).

An issue is unpreserved "if the defendant failed to alert the trial court to the asserted error." *Martinez*, ¶12; *see* Crim. P. 52(b) (providing for plain-error review of issues "not brought to the attention of the court"); *see also Martinez v. People*, 2017 CO 36, ¶23 (explaining plain error applies when "no contemporaneous objection preserved the error").

Here, the trial court had a contemporaneous opportunity to respond to the sleeping-juror error because the parties alerted the court as the juror slept. *See Rael v. People*, 2017 CO 67, ¶17 ("The objection need only draw the trial court's attention to the asserted error, thus allowing the court 'a meaningful chance to prevent or correct the error' and creating a record for appellate review." (quoting *Martinez*, 2015 CO 16, ¶14)); *id.* ¶¶17-19 (concluding issue was preserved where trial court resolved jury's access to video evidence on the record).

This Court's decision in *Deleon v. People*, 2019 CO 85, also shows this issue is preserved. In *Deleon*, the division reviewed a jury-instructional claim for plain error, *id.* ¶10, but this Court concluded the issue was preserved where "[u]ndoubtedly, the trial court understood" that the defendant wanted a no-adverse-inference instruction, *id.* ¶24. He did not testify, and defense counsel tendered a jury instruction about his right to remain silent. *Id.* ¶1. The trial court rejected the tendered instruction but agreed to instruct the jury using the relevant pattern instruction. *Id.* Ultimately, the trial court never instructed the jury on the right to remain silent. *Id.* The division faulted the defendant for not objecting to the trial court's omission of the instruction, *id.* ¶10, but this Court concluded his original request preserved the claim, despite the lack of objection, *id.* ¶14. Similarly here, the trial court understood the defense did not want jurors sleeping through trial.

This sleeping-juror issue is preserved because the parties specifically called the court's attention to it, which allowed the court a meaningful chance to redress the error and created a record for review. (TR 10/7/15 AM pp.90-91; TR 10/7/15 PM pp.77-79.)

C. In deeming this issue waived, the division misapplied this Court's case law.

To deem this issue waived, the division wrongly extended this Court's decision in *Stackhouse v. People*, 2015 CO 48. *See Forgette*, ¶¶29-32.

In *Stackhouse*, this Court adhered to a specialized preservation rule that defense counsel waives the defendant's right to a public trial "by not objecting to the trial court's known closure." *Stackhouse*, ¶5; *see Phillips*, ¶26 (explaining *Stackhouse* "followed precedent that has stood the test of time for almost half a century, *see Anderson v. People*, 490 P.2d 47, 48 (Colo. 1971)"). *Stackhouse* concluded intervening U.S. Supreme Court decisions did not require abandonment of *Anderson*, *see Stackhouse*, ¶¶1, 5, 11-16, but *Stackhouse* rests on a questionable understanding of *United States v. Olano*, 507 U.S. 725 (1993). *See Stackhouse*, ¶¶18, 24-30 (Márquez, J., dissenting) (explaining why "the majority [was] wrong" to find the issue waived "especially after *Olano*").

Stackhouse still governs the public-trial right, *see People v. Hernandez*, 2021 CO 45, ¶35 (applying *Stackhouse*), but this Court has not extended the rule to other

rights. Extending *Stackhouse* to this context is unwarranted because a key piece of *Anderson*'s underlying reasoning—that the public-trial violation had no influence on the jury's verdict, *see* 490 P.2d at 49—does not apply to sleeping-juror problems.

Further, the defense in *Stackhouse* did not object to the closure "at any point during the trial," *Stackhouse*, ¶2 (majority opinion); here, defense counsel contemporaneously raised the sleeping-juror problem. And defense counsel in *Stackhouse* stood in *Anderson*'s shadow because Colorado had "long treated defense counsel not objecting to a known closure as an affirmative waiver of the public trial right." *Id.* ¶16; *id.* (presuming counsel knew applicable rule of procedure). Here, no pre-existing, specialized preservation rule required more of defense counsel.

Since *Stackhouse*, this Court has moved away from specialized preservation rules. *See Bondsteel*, ¶2 (overruling *People v. Barker*, 501 P.2d 1041 (Colo. 1972), and *People v. Aalbu*, 696 P.2d 796 (Colo. 1985), to the extent they "required a defendant to renew at trial a pretrial objection to joinder or motion to sever"); *see id.* ¶28 (explaining this "historical requirement" was "obsolete" and "existing precedent for preservation suffices" so there was "no basis" for "a unique rule in the context of joinder and severance").

Under this Court's cases, there was no waiver here because the record does not show "the *intentional* relinquishment of a *known* right or privilege." *Rediger*,

¶39 (quotations omitted). The *Rediger* division concluded the defendant waived his challenge to a constructive amendment when defense counsel "stated that he was 'satisfied' with the proposed jury instructions." *Id.* ¶3; *see also Phillips*, ¶¶19-21 (discussing *Rediger*).

This Court reversed: "mere acquiescence to a jury instruction does not constitute a waiver without some record evidence that the defendant intentionally relinquished a known right." *Rediger*, ¶3. "Because the record did not contain any evidence that Rediger's counsel intended to relinquish his client's right to be tried in conformity with the charges set forth in the charging document, [this Court] concluded that no waiver occurred." *Phillips*, ¶20 (alterations and quotations omitted).

In *Rediger*'s companion case, *People v. Smith*, 2018 CO 33, "defense counsel stated that the proposed jury instructions were generally acceptable," but on appeal the defendant raised a simple-variance claim because the jury instructions did not specify the victim. *Smith*, ¶¶1, 10. This Court decided there was no waiver "because the record [did] not indicate that [the defendant] intentionally relinquished a known right." *Smith*, ¶1; *see also Rail v. People*, 2019 CO 99, ¶¶29, 36-37 (holding, consistent with *Rediger* and *Smith*, that defendant "did not waive his claim by failing to raise the [verdict] inconsistency with the trial court or declining the court's offer

to poll the jury further" because the record did not show counsel intentionally relinquished the issue despite being "aware that the jury had been given the unanimity interrogatory" and being able to request "the trial court to read the jury's responses to it").

Similarly here, there is no evidence defense counsel intentionally relinquished Mr. Forgette's right to be tried by a complete and competent jury. *Cf. State v. Payne*, 777 A.2d 731, 736 (Conn. App. Ct. 2001) (concluding defense waived sleeping-juror issue where "counsel was apprised by the court that a juror may have been sleeping" but counsel "argued that the juror had not been asleep" and "requested that the court not dismiss the juror"), *rev'd and remanded on other grounds*, *State v. Payne*, 797 A.2d 1088 (Conn. 2002); *Fisher v. United States*, 749 A.2d 710, 715 (D.C. 2000) (treating sleeping-juror issue as waived where defense declined court's invitation to repeat relevant questioning and allowed court to seat juror as a regular, not an alternate); *Faust v. State*, 642 N.E.2d 1371, 1373 (Ind. 1994) (holding defendant waived claim that sleeping juror should have been brought into courtroom before being excused because he agreed bailiff should excuse juror).

This Court's more recent waiver decisions—*Cardman v. People*, 2019 CO 73, and *Phillips v. People*, 2019 CO 72—also show the division erred by treating this issue as waived. In those cases, the defendants tried unsuccessfully to suppress

evidence. *Cardman*, ¶¶2, 6-7; *Phillips*, ¶1. In their respective appeals, the divisions treated as waived their new arguments for suppression. *Cardman*, ¶¶2, 6-7; *Phillips*, ¶1. But this Court held the new claims were forfeited, not waived. *Cardman*, ¶¶3, 11; *Phillips*, ¶2. Although there are some strategic situations where defense counsel will refrain from seeking suppression of evidence, appellate courts cannot find waiver "[a]bsent evidence of an intentional relinquishment." *Phillips*, ¶22 & n.4.

There was no waiver in *Cardman* because the record did not show "defense counsel intended to relinquish Cardman's right to challenge the admissibility of the confession, including on [the newly raised] grounds." *Cardman*, ¶11. In *Phillips*, there was "no evidence that defense counsel intended to relinquish Phillips's right to challenge the admissibility of [the evidence], including pursuant to the grounds advanced for the first time on appeal." *Phillips*, ¶22; *see also id.* ¶31 (contrasting, as an example of waiver, *Hansen v. State Farm Mutual Automobile Insurance Co.*, 957 P.2d 1380 (Colo. 1998), where the trial court alerted a party its proposed instruction was legally incorrect but the party declined court's revision invitation).

Phillips explained that, unlike in *Stackhouse*, where the nature of the charges (sexual assault on a minor) provided sound strategic reasons for allowing a courtroom closure, there was no reason not to raise additional suppression arguments. *Phillips*, ¶¶27-28; *see Stackhouse*, ¶15. Here, the division said there

were "conceivable strategic reasons for defense counsel not to have requested relief," like, counsel "may have determined that the sleeping juror was favorable to the defense or that his effective absence from hearing eyewitness cross-examination was beneficial." *Forgette*, ¶31.

The record shows no such strategic determination by counsel. And instead of speculating about her motives, the division should have "indulge[d] every reasonable presumption *against* waiver." *Rediger*, ¶39 (emphasis added) (quotations omitted). Raising the sleeping-juror issue was inconsistent with a determination that the juror's effective absence was beneficial. The point of defense counsel's cross-examination was to elicit testimony for the jury's consideration, and there is no strategy in presenting evidence to a sleeping factfinder. The record refutes the division's speculation that defense counsel wanted the juror asleep. Parties do not waive issues by complaining about them. Defense counsel exercised reasonable diligence, and the trial court's finding that the juror was asleep obligated it to investigate and take appropriate corrective action, as discussed more below.

The division cited *Richardson v. People*, 2020 CO 46. *See Forgette*, ¶31. In *Richardson*, the defendant complained on appeal that the trial judge's wife was one of the jurors. *Richardson*, ¶1. The parties knew of the relationship at trial, but defense counsel did not question the juror, challenge her for cause, or remove her

with a peremptory challenge. *Id.* ¶¶6-10, 26. And defense counsel confirmed on the record that he made a *decision* not to challenge the juror because he was afraid of angering the judge. *Id.* ¶11. So, the record showed defense counsel "intentionally relinquished his right to challenge" the juror. *Id.* ¶26; *id.* (stressing that the trial judge had "even seemed to invite defense counsel to exercise a peremptory challenge as to" the judge's wife, but defense counsel excused someone else). Whereas the defense in *Richardson* had the power to remove the juror, and the court specifically invited the defense to exercise that power, here the trial court had the responsibility to undertake the sleeping-juror investigation and the power to appropriately remedy the resulting prejudice.

The division treated this claim as unreviewable so as not to provide "an appellate parachute to non-objecting defense counsel," *Forgette*, ¶32 (quoting *Stackhouse*, ¶16), but "[t]he assumption that any competent attorney would withhold a meritorious argument at trial in the hope of having something to argue on appeal if the trial goes badly belies reality," *Bondsteel*, ¶28. *See also Henderson v. United States*, 568 U.S. 266, 276 (2013) (suspecting that, "like the unicorn," the lawyer who deliberately forgoes objection to argue plain error later "finds his home in the imagination, not the courtroom").

As with suppression claims, there is "no real danger of sandbagging" with sleeping-juror claims because, if the defense fails to raise the problem, the fact of the sleeping juror will likely escape documentation in the record, and thus appellate review. *Phillips*, ¶29 (explaining gamesmanship concern inapplicable because defendant runs "significant risk that the factual record will be insufficiently developed"); *see Marquina*, 478 P.3d at 44 (observing sleeping-juror problems tend to evade the record); *see also People v. Abu-Nantambu-El*, 2019 CO 106, ¶38 (noting fast-paced circumstances of juror challenges leaves little time for gamesmanship). The division erred by concluding defense counsel waived this sleeping-juror issue. The record does not show the intentional relinquishment of a known right.

D. Because the record establishes that a juror slept during the presentation of evidence and the trial court took no further investigative or corrective action, this Court should reverse.

The trial court's role in investigating sleeping-juror issues is sensitive and essential. *See Faust*, 642 N.E.2d at 1373 (noting neither prosecution nor defense wanted "to embarrass the juror by bringing her into the courtroom and confronting her with the fact she had slept"); *see also Tanner*, 483 U.S. at 114 (majority opinion) (noting trial judge's remarks to counsel that, if they saw sleeping jurors, they should "ask for a bench conference and . . . I'll figure out what to do about it, and I won't mention who suggested it"). Trial judges should not take a hands-off approach when

a criminal defendant's trial becomes unfair. *Cf. State v. Majid*, 914 N.E.2d 1113, 1114 (Ohio Ct. App. 2009) (granting new trial where parties alerted court to sleeping juror but judge said, "I saw it. So what. Let him sleep. You guys picked the jury. I didn't.").

If a trial court "notices, or is informed, that a juror is asleep during trial, the court has a responsibility to inquire and to take further action if necessary to rectify the situation." *Golsun v. United States*, 592 A.2d 1054, 1057 (D.C. 1991). "When a trial court receives a reliable report of a sleeping or otherwise inattentive juror, the court should proceed in a manner that is proportional to the report." *Marquina*, 478 P.3d at 44; *see People v. Williams*, 315 P.3d 1, 65 (Cal. 2013) ("Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty to make whatever inquiry is reasonably necessary to determine whether the juror should be discharged." (quotations omitted)); *Samad v. United States*, 812 A.2d 226, 230 (D.C. 2002) (holding that trial court abused its discretion by failing to inquire further after being informed that a juror was asleep but concluding no prejudice resulted).

"[A]t a minimum," the court should "glean any facts relevant to determining whether a juror has missed a portion of the trial" and then "make an informed decision about whether the juror remains qualified to decide the case." *Marquina*,

478 P.3d at 44; *see State v. Mohammed*, 141 A.3d 243, 245 (N.J. 2016) ("If the judge did not observe the juror's attentiveness, the judge must conduct individual voir dire of the juror; if that voir dire leads to any conclusion other than that the juror was attentive and alert, the judge must take appropriate corrective action."); *see also United States v. Barrett*, 703 F.2d 1076, 1083 (9th Cir. 1983) (holding "that in failing to conduct a hearing or make any investigation into the 'sleeping'-juror question, the trial judge abused his considerable discretion in this area").

A trial court's investigation may establish the juror was not asleep. *See People v. Daley*, 2021 COA 85, ¶¶44-51 (trial court found jurors were not asleep and juror who looked tired was having problems with her contact lenses); *see also, e.g.*, *People v. Silagy*, 461 N.E.2d 415, 426 (Ill. 1984) ("[T]he trial court found that the evidence was insufficient to prove that [juror] was asleep at any time."); *Taylor v. Commonwealth*, No. 2005-SC-000119-MR, 2006 WL 1045460, at *7 (Ky. Apr. 20, 2006) (unpublished) (trial court questioned alleged sleeping jurors and found one juror "had a skin condition, which caused her eyes to hurt so she closed them often" and other juror "was not asleep and had heard all the evidence"); *Coddington v. State*, 142 P.3d 437, 445-46 (Okla. Crim. App. 2006) (trial court's investigation revealed juror was feeling ill but she did not believe she missed any testimony); *State v. Rushford*, No. 2001-049, 2002 WL 34423635, at *1-3 (Vt. Mar. 2002)

(unpublished) (trial court rejected allegation that jurors slept after hearing from defendant's father and court officer).

"[I]f the trial court concludes . . . that the juror was alert, the inquiry ends." *Mohammed*, 141 A.3d at 245; *see, e.g.*, *People v. King*, 121 P.3d 234, 241-42 (Colo. App. 2005) (concluding the decision not to replace juror was not an abuse of discretion where trial court determined evidence did not show juror was actually asleep); *People v. Hayes*, 923 P.2d 221, 229 (Colo. App. 1995) (rejecting new-trial argument where "the record d[id] not reflect that the juror actually fell asleep"); *see also United States v. McKeighan*, 685 F.3d 956, 974 (10th Cir. 2012) ("[T]he trial transcript does not establish that jurors were actually asleep."); *Bialach v. State*, 773 A.2d 383, 386 (Del. 2001) ("There is no record evidence at all to support Bialach's allegation that any juror was asleep. Accordingly, we find no violation of Bialach's Sixth Amendment rights.").

If the trial court finds the juror slept, it should investigate the extent of the misconduct and take appropriate remedial action. *See Mohammed*, 141 A.3d at 245 (requiring "appropriate corrective action" if judge reaches "any conclusion other than that the juror was attentive and alert"); *see also Commonwealth v. McGhee*, 25 N.E.3d 251, 256 (Mass. 2015) ("If a judge reaches a preliminary conclusion that information about a juror's inattention is reliable, the judge must take further steps

to determine the appropriate intervention."); *id.* at 257 (discussing inquiry into "what portions of the evidence the juror may have missed"); *State v. Novy*, 827 N.W.2d 610, 621 (Wis. 2013) (requiring trial court to assess prejudice if juror slept).

Depending on how much the juror missed, the trial court might take a variety of actions. *See Commonwealth. v. Dancy*, 912 N.E.2d 525, 532 (Mass. App. Ct. 2009) (explaining that a stretch break may suffice if juror is caught just "beginning to 'nod off,'" but that persistent sleeping requires the judge "to conduct a sensitive voir dire to determine the extent to which the juror remains capable of fulfilling his or her obligation to render a verdict based on all of the evidence"); *Golsun*, 592 A.2d at 1057 (noting court might permit juror's continued participation, replace juror with alternate, or declare a mistrial); *e.g.*, *People v. Tunis*, 2013 COA 161, ¶¶30-34 (no abuse of discretion where trial court replaced sleeping juror with an alternate); *Gibson v. State*, 717 S.E.2d 447, 451 (Ga. 2011) (finding "no error in the trial court's removal of a juror after concluding the juror slept through the presentation of portions of the evidence"); *see also Williams*, 315 P.3d at 64-65 (noting trial court secured on-the-record waiver from defendant as to lack of prejudice from sleeping incident); *Mathis v. State*, 750 S.E.2d 308, 311 (Ga. 2013) (noting trial court "instituted a 'buddy system' between jurors" so they helped each other stay awake); *Rushford*, at *2 (discussing read-back of certain testimony).

The trial court's response should be proportionate to the sleeping-juror problem. *Cf. People v. Kent*, 2020 CO 85, ¶32 ("When a discovery violation occurs, the trial court must impose the least restrictive sanction that preserves the truth-finding process, restores a level playing field, and deters future misconduct by the prosecution." (emphasis omitted)). A sleeping incident may not be so prejudicial as to require a mistrial, where, for instance, the trial court can replace the juror with an alternate. *See* §§ 13-71-140; 16-10-105, C.R.S.; Crim. P. 24(e).

The trial court cannot tailor its relief, however, when it does not investigate the extent of the problem. The facts of *People v. Melendez,* 102 P.3d 315, 322 (Colo. 2004), offer a useful comparison. The trial court there, on the prosecutor's mere assertion that a witness had breached the court's sequestration order, precluded the defense from calling the witness. *Id.* at 318-19. In contrast to this case, where the trial court found misconduct and stopped, the trial court in *Melendez* jumped to an extreme sanction without "an adequate inquiry . . . into whether the sequestration violation actually occurred." *Id.* at 319; *see id.* at 320 ("The trial court has a duty of diligent inquiry into allegations of a sequestration violation."). A trial court may respond to a sequestration-order violation in a variety of ways, but "[b]efore it considers sanctions," it "must first determine that a violation has actually occurred" and assess prejudice. *Id.* at 319. Here, having found that a juror slept during the

presentation of evidence, the trial court needed to investigate and supply an appropriate remedy.

This Court should hold that where, as here, the trial court finds that a juror slept during the presentation of evidence but takes no investigative or corrective action, structural error occurs. This is a narrow but important rule to ensure fair criminal trials.[1]

Mr. Forgette argued the division should adopt this structural-error rule, *see* COA OB pp.8, 16-21, which is narrower than Massachusetts's approach. In *Commonwealth v. McGhee*, 25 N.E.3d 251 (Mass. 2015), a juror reported on the second day of trial that another juror slept the previous day. *Id.* at 255. The lawyers had not noticed the incident, and the trial court chose to simply watch the juror. *Id.* at 255-56. The Supreme Judicial Court ordered a new trial because "[t]he *serious possibility* that a juror was asleep for a significant portion of the trial is a structural error that so infringes on a defendant's right to the basic components of a fair trial that it can never be considered harmless." *Id.* at 257 (emphasis added) (alterations

[1] This case does not require this Court to address the civil context. *See Jackson v. A-C Prod. Liab. Tr.*, 622 F. Supp. 2d 641, 648 (N.D. Ohio 2009) (noting that failing to remove a juror whose sleeping is noted on the record in a civil case does not implicate a criminal defendant's constitutional rights); *see also Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 883 n.15 (Ky. 2016) (noting that verdict did not depend on vote of allegedly sleeping juror where eleven of twelve jurors agreed and only nine jurors were required to make a verdict).

and quotations omitted). In the face of a reliable report of sleeping, "the judge conducted no further inquiry to determine whether and, if so, when the identified juror was sleeping." *Id.*; *see Commonwealth v. Villalobos*, 84 N.E.3d 841, 843-44 (Mass. 2017) (granting new trial in case "much like *McGhee*," where trial court failed to take action on prosecutor's sleeping-juror report); *see id.* (rejecting State's argument that "sleeping jurors missed minimal and relatively inconsequential portions of the testimony" because trial court did not inquire); *see also In re Caldellis*, 385 P.3d 135, 145 n.6 (Wash. 2016) ("[H]aving a judge or juror sleep during a trial could be structural error.").

Here, the trial court had more than a reliable report that a juror slept—the court itself found that the juror slept during the presentation of evidence, but it took no further investigative or remedial action. This was structural error.

"The jury is a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017). "A fair and impartial jury is a key element of a defendant's constitutional right to a fair trial under both the United States and Colorado Constitutions." *Abu-Nantambu-El*, ¶14; *see* U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. "[A] defendant has a right to a tribunal both impartial and mentally competent to afford a hearing." *Tanner*, 483 U.S. at 126 (quotations omitted); *see Smith v. Phillips*, 455 U.S. 209, 217 (1982)

(discussing due process right to "a jury capable and willing to decide the case solely on the evidence before it"); *McKeighan*, 685 F.3d at 973 (noting defendant's Fifth Amendment right to due process and Sixth Amendment right to impartial jury at risk where jurors fall asleep and cannot fairly consider case).

"Certain constitutional rights are so basic to a fair trial that their violation can never be harmless." *Abu-Nantambu-El,* ¶27; *see Arizona v. Fulminante*, 499 U.S. 279, 294 (1991) (White, J., dissenting) (discussing *Vasquez v. Hillery*, 474 U.S. 254 (1986), where conviction set aside despite overwhelming evidence of guilt because members of the defendant's race were excluded from the grand jury, an error that "struck at fundamental values of our society and undermined the structural integrity of the criminal tribunal itself" (quotations omitted)). Colorado should not be a place where people can lose their liberty at the hands of sleeping factfinders. To convict on the evidence, jurors must hear the evidence.

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). *Weaver* explained there are "at least three broad rationales" for recognizing errors as structural. *Id.* at 1908; *id.* (noting "[t]hese categories are not rigid" and "more than one" may apply). The *Weaver* rationales apply here.

First, requiring jurors to be awake "protects some other interest" than the defendant's core interest in avoiding erroneous conviction. *Id.* "Defendants, as well as the public, have a right to decisions made by alert and attentive jurors." *McGhee*, 25 N.E.3d at 256 (quotations omitted); *see* § 16-10-101, C.R.S. ("The people also have the right to refuse to consent to a waiver of a trial or sentencing determination by jury in all cases in which the accused has the right to request a trial or sentencing determination by jury."). Jury decisions cannot enjoy public legitimacy if courts allow jurors to sleep through trials. Even when the court and parties fail to notice sleeping jurors, they disturb spectators. *E.g.*, *Williams*, 315 P.3d at 64 (explaining spectator informed court of sleeping juror and said, "I'm not the only spectator who has noticed. I just really don't think that it is fair to the defense or the prosecutor's case. I really don't think that is fair." (alterations omitted)).

Second, an error may be structural "if the effects of the error are simply too hard to measure." *Weaver*, 137 S. Ct. at 256. Where, as here, the trial court finds that a juror slept but takes no further action, a reviewing court is left with "serious doubt that the defendant received the fair trial to which he is constitutionally entitled." *McGhee*, 25 N.E.3d at 257 (quotations omitted). A structural-error rule for this circumstance encourages trial courts to investigate sleeping-juror problems and timely remedy the resulting prejudice. Juror interdependence and the secrecy of

deliberations can make the damage of sleeping-juror problems hard to measure after the fact. *See* CRE 606(b); *see also Tanner*, 483 U.S. at 113-16, 127; *Harper v. People*, 817 P.2d 77, 81-82 (Colo. 1991) (discussing "problem of proof" created by no-impeachment rule's intersection with requirement to show prejudice).

Third, allowing a sleeping juror to convict a criminal defendant "always results in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Denying the defendant "an impartial adjudicator, be it judge or jury," is structural error. *Abu-Nantambu-El*, ¶27 (quotations omitted). A sleeping juror is a partial and capricious adjudicator because he shows contempt for the defendant's weighty liberty interest. *See People v. Evans*, 710 P.2d 1167, 1168 (Colo. App. 1985) (agreeing with trial court that juror's sleeping during closing argument was contemptuous of the court and the rights of the defendant). A sleeping juror cannot rationally assess the evidence presented to him. *See* **William Shakespeare, *Macbeth* act 5, sc. 1, *l.* 10-12 ("A great perturbation in nature, to receive at once the benefit of sleep and do the effects of watching.").** "A juror who has not heard all the evidence . . . is grossly unqualified to render a verdict." *People v. Valerio*, 529 N.Y.S.2d 350, 351 (N.Y. App. Div. 1988); *see Samad*, 812 A.2d at 230 ("[A] fair trial presupposes careful attention by the jurors to all of the testimony . . . ." (quotations omitted)). As the sleeping juror in this case said during voir dire, the juror's job is "[t]o assess the

facts and make a rational decision." (TR 10/6/15 AM p.105:6-7.) Sleeping jurors cannot do that.

This error always results in fundamental unfairness for the additional reason that the framers of Colorado's constitution determined that a fair felony trial includes twelve jurors, but a sleeping juror sets up a trial by eleven.

This Court has explained, "The Sixth Amendment of our federal constitution does not require a jury of twelve in criminal cases in state courts," *People v. Rodriguez*, 112 P.3d 693, 698 (Colo. 2005) (citing *Williams v. Florida*, 399 U.S. 78, 102-03 (1970)), but the federal constitution, properly understood, likely does require twelve jurors. *Williams* acknowledged the original understanding "may well" have been that a jury consisted of twelve people, 399 U.S. at 98, and the Court now emphasizes original meaning, *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1395-97, 1401-02 (2020); *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (plurality); *see also Lange v. California*, 141 S. Ct. 2011, 2022 (2021).

Regardless, article II, section 23 of the Colorado Constitution "specifically identif[ies] 'twelve' in reference to the number of jurors in criminal cases." *Rodriguez*, 112 P.3d at 698; *id.* at 709 ("[S]ection 23 prohibits the General Assembly from providing fewer than twelve jurors in felony cases."). This Court should thus ground the structural-error rule in the Colorado Constitution. *See* Colo. Const. art.

II, § 23; *People v. McKnight*, 2019 CO 36, ¶¶38-41; Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 178-82 (2018) (encouraging state courts to resolve state-law claims and then consider federal claims only if necessary).

In Colorado, "The right of a person who is accused of an offense . . . to have a trial by jury is inviolate and a matter of substantive due process of law as distinguished from one of 'practice and procedure.'" § 16-10-101, C.R.S. "Every person accused of a felony has the right to be tried by a jury of twelve." Crim. P. 23(a)(1); *see* § 18-1-406(1), C.R.S.; *People v. Taylor*, 2021 COA 133, ¶¶1, 14 (holding that trial court cannot accept eleven-juror verdict in felony case over defendant's objection and declaring unconstitutional subsection 18-1-406(7), C.R.S.); *Taylor*, ¶25 (rejecting trial court's reasoning "that the constitutional right to have twelve jurors 'at the start' of a trial does not encompass a right to have twelve jurors 'at the end'").

"The defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver*, 137 S. Ct. at 1907 (alterations and quotations omitted). The jury is at the heart of the trial framework, and a sleeping juror effectively absents himself

from trial, creating a problem that "pervades and infects the entire framework of the trial." *Abu-Nantambu-El*, ¶30 (quotations omitted).

Because the record establishes that one juror was asleep during the presentation of evidence and because the trial court, despite finding the juror was unconscious, took no further investigative or corrective action, this Court should reverse for structural error.

E. Alternatively, this Court should remand for further proceedings.

If this Court declines to address the merits, it should remand for further proceedings. Before the court of appeals, Mr. Forgette argued for structural error and argued in the alternative that the division should apply constitutional-harmless-error review because the issue was preserved. COA OB pp.8-23; COA RB pp.1-13.

He further argued that, even if the issue was unpreserved, he was entitled to relief under plain-error review. *See* COA OB pp.8, 22-25; COA RB pp.6-7, 12-13. An issue is reviewable for plain error "if the defendant failed to alert the trial court to the asserted error." *Martinez*, 2015 CO 16, ¶12. Plain-error review does not apply to structural errors, *Stackhouse*, ¶10 n.3; *Sanchez v. People*, 2014 CO 29, ¶19, but if this Court concludes this issue is forfeited and subject to plain error, *see, e.g.*, *Majid*, 914 N.E.2d at 1114-17 (reviewing for plain error and awarding new trial where defendant reported sleeping juror to trial judge but did not ask for mistrial or for

juror to be excused), it should reverse and remand for the division to conduct plain-error review.

Mr. Forgette is likely to prevail even if the issue is unpreserved. "Plain error is obvious and substantial." *Hagos v. People*, 2012 CO 63, ¶14. The juror's sleeping was sufficiently apparent that multiple people in the courtroom brought it to the court's attention. *Cf. People v. Delgado*, 2019 CO 82, ¶34 (discussing inconsistent-verdicts error that "was obvious on its face"). And this error is obvious under *People v. Evans*, 710 P.2d 1167 (Colo. App. 1985). *Evans* ordered a new trial where the trial court found that one of the jurors slept during the defense closing argument. *Id.* at 1167-68; *see Daley*, ¶¶51, 58-63 (citing *Evans* for proposition that sleeping jurors may "materially affects the defendant's rights" but distinguishing case as "nothing like" *Evans* because the trial court found that no jurors slept).

The sleeping-juror error here is more prejudicial than in *Evans* because this juror slept during the presentation of evidence. "[C]losing arguments are not evidence." COLJI Crim. B:03 (2021). Their purpose is to remind jurors of the evidence and argue what the verdict should be. *Id.* Although some jurisdictions will hold harmless sleeping-juror incidents that arise during closing argument, *see State v. Yamada*, 122 P.3d 254, 262 (Haw. 2005) (concluding State proved juror's twelve minutes of sleeping during closing argument was harmless beyond a

reasonable doubt), *Evans* shows Colorado requires jurors to remain awake not just for the presentation of evidence but for closing argument as well, *see* 710 P.2d at 1168.

In this case, the context of the sleeping incidents shows the juror slept as defense counsel cross-examined the victim-witnesses, including over the disputed identity issue. *See* COA AB p.15 (recognizing "the juror was asleep . . . during the end of cross-examination of two witnesses"); *cf. State v. Myers*, 770 N.W.2d 713, 718 (N.D. 2009) ("[I]f the juror did fall asleep, it was . . . not during the defendant's cross examination of a witness . . . ."); *Yamada*, 122 P.3d at 258 (recounting State's argument that defendant was not prejudiced because juror "did not sleep through any testimony"). Because the juror here did not hear the evidence, he could not make a rational decision affecting Mr. Forgette's liberty. This obvious sleeping incident was seriously prejudicial. Thus, even if the issue is unpreserved, this Court should remand for the division to conduct plain-error review. Because this issue is preserved, however, the answer to the first question presented is "yes."

II. Defense counsel cannot waive the defendant's personal right to a trial by jury, which, in a felony case like this one, means a jury of twelve.

A. This Court's review is de novo.

This Court reviews questions of waiver and preservation de novo. *See Richardson*, ¶21. Before the court of appeals, the State argued that defense counsel

waived the sleeping-juror issue by failing to request a remedy. COA AB pp.8-14; *see* COA RB p.5 (responding that jury right is a personal, fundamental right that can be waived only by the defendant himself). The division determined "[t]here is a distinction between the waiver of the right to a jury trial and the waiver of the right to a jury of twelve," such that counsel can waive the number of jurors. *Forgette*, ¶¶19-20.

B. Whether to waive a jury trial is a decision for the defendant, and in a Colorado felony trial, a jury means twelve, conscious factfinders.

Whether a defendant must participate personally in a waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. *See Olano*, 507 U.S. at 733; *Phillips*, ¶16. This Court should reverse the division because defense counsel cannot waive the defendant's personal right to a jury, which, in a felony trial like this one, means a jury of twelve. *See* Colo. Const. art. II, § 23.

"[T]he jury trial right is one of the few rights that can only be waived by a defendant personally," thus "whether his counsel's actions constituted waiver is immaterial." *People v. Oliver*, 2018 COA 146, ¶10 (citing *People v. Bergerud*, 223 P.3d 686, 693-94 (Colo. 2010)); *see Phillips*, ¶16 n.3; *Rice v. People*, 565 P.2d 940, 941-42 (Colo. 1977) (remanding for new trial where defense counsel waived jury trial but record did not show personal waiver by defendants).

The State has pointed to no evidence that Mr. Forgette personally waived his jury-trial right. "But the waiver of the right to a jury of twelve," the division concluded, "may be made by defendant or defense counsel." *Forgette*, ¶19.

This Court should reject this distinction because it undermines the core holding of *Rodriguez* that, in Colorado, a jury in a felony trial requires twelve people. *Rodriguez*, 112 P.3d at 698; *see* Colo. Const. art. II, § 23; *cf. Majid*, 914 N.E.2d at 1117 (discussing defendant's due process right "to have 12 attentive jurors decide his fate").

Colorado's statutes and rules show that a felony trial with fewer than twelve jurors is possible, but it requires the defendant's agreement. § 18-1-406(4), C.R.S. ("[T]he defendant . . . may . . . elect . . . to be tried by a number of jurors less than the number to which he would otherwise be entitled."); Crim. P. 23(a)(1), (7) (allowing defendant to agree to fewer jurors); Crim. P. 23(a)(5) (procedure for waiving jury trial altogether); *see also Taylor*, ¶1.

Requiring a personal waiver is appropriate for "a right considered one of the most important in our democracy." *Rice*, 565 P.2d at 941; *see* § 16-10-101, C.R.S. The guarantee of trial by jury "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *see Ramos*, 140 S. Ct. at 1395-97; *Haymond*, 139 S. Ct. at 2384

n.9. If the division were correct, defense counsel could erode this fundamental right to a nullity and threaten the unanimous-verdict protection, which loses its potency as the number of jurors diminishes. Because the right to twelve jurors is the right to a jury in felony cases, this Court should reject the division's distinction.

In cutting Mr. Forgette out of the waiver process, the division cited two cases, *People v. Chavez*, 791 P.2d 1210 (Colo. App. 1990), and *People v. Baird*, 66 P.3d 183 (Colo. App. 2002). *Forgette*, ¶19. But *Chavez* and *Baird* were decided before *Rodriguez* held the Colorado Constitution requires twelve jurors in felony cases, and each case is factually distinguishable.

The *Chavez* defendant wanted a six-person jury. 791 P.2d at 1211. *Chavez* rejected an argument about the extent of the record the trial court had to create, *id.*, but whether the defendant must personally waive a right and what procedures are required to make that personal waiver effective are different questions, *see Janis*, ¶¶15-34 (concluding a formal advisement was not required for defendant to knowingly, intelligently, and voluntarily waiver her personal right to be present at trial); *see id.* ¶¶8-11 (discussing protocol counsel and court worked out for defendant to leave if she became uncomfortable and noting she returned to testify).

Baird concluded the defendant personally waived his right to a jury of twelve after one juror became ill. 66 P.3d at 187-90 (concluding defendant waived right in

open court after advisement and over counsel's advice). These decisions do not support the division's assertion that defense counsel can whittle down the defendant's constitutional right to a jury of twelve without the defendant's approval.

Colorado courts may not infer a waiver of the defendant's jury right "from a defendant's failure to object to his counsel's statement," *Rice*, 565 P.2d at 941; *see id.* (explaining that reliance on defendant's silence increases danger of misinterpretation). Thus, even if this were a case where Mr. Forgette might be said to have adopted, by failing to speak up, his counsel's position on the sleeping juror, that would not prove a waiver. Here however, there is no evidence Mr. Forgette was present at the bench conferences so he would not have known what the lawyers and court said about the sleeping juror.

This Court should reverse the division's decision allowing defense counsel to waive the defendant's personal right to a jury of twelve in felony cases. Mr. Forgette did not waive his right to a jury trial in this felony case. The answer to the second question presented is "no."

III. Defense counsel does not waive the defendant's right to a jury of twelve by alerting the judge that a juror is asleep.

This Court's review is de novo. *See Richardson*, ¶21.

The reframed third question presupposes that defense counsel "does not raise an objection" by alerting the trial court to a sleeping juror. But as discussed, alerting the trial court that a juror is sleeping is an objection to that conduct.

Even assuming a failure to object, defense counsel would not have waived the sleeping-juror issue because "the mere failure to raise an issue neither amounts to the type of unequivocal act indicative of a waiver nor constitutes the type of conduct that clearly manifests any intent to relinquish the claim." *Phillips*, ¶21 (alterations and quotations omitted). Indeed, raising this issue on the record is inconsistent with waiver.

Further, as Issue II shows, defense counsel's actions cannot waive the defendant's personal right to a trial by jury, which means a jury of twelve in Colorado felony cases. Thus, for the reasons already given, the answer to the third question is "no."

CONCLUSION

This Court should hold that this sleeping-juror issue is preserved and reverse for structural error. Alternatively, if this Court does not address the merits, it should reverse and remand for further proceedings.

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CERTIFICATE OF SERVICE

I certify that, on May 17, 2022, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on William G. Kozeliski of the Attorney General's Office.