

Superior Court of New Jersey  
Appellate Division  
Docket No. A-002662-21-T4

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| <b>Jeremy Arrington,</b><br><br><b>Defendant - Appellant,</b><br><br><b>vs.</b><br><br><b>State of New Jersey,</b><br><br><b>Plaintiff - Respondent.</b> | <b><u>Criminal Action</u></b><br><br><b>On Appeal from</b><br><br><b>March 04, 2022 Judgment</b><br><b>of Superior Court of</b><br><b>New Jersey, Law Division,</b><br><b>Essex County Judge</b><br><b>and a Jury</b> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Pro Se Supplemental Brief  
for Appellant  
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### **Procedural History**

Appellant relies upon the procedural history listed in appellate counsel's brief.

### **Statement of Facts**

Appellant relies upon the statement of facts listed in appellate counsel's brief.

### **Legal Argument**

**I. Trial Court Deprived Appellant Of His 6th & 14th U.S. Constitutional Amendment, and Article I, Paragraph 10 Of The New Jersey Constitutional Guarantee Of The Right To A Trial By An Impartial Jury (March 03, 2022; 1T3-19 to 21-12).**

**A. Facts:**

On February 08, 2022, the Superior Court of New Jersey, Essex County, the trial of Jeremy Arrington on Essex Count Indictment No. 17-05-01346 began.

On March 03, 2022 it became evident to the court that juror # 12 may have known a member of the victims' family, and after judicial review of a voicemail the juror was excused, and the remaining jurors were instructed not to speculate as to why said juror was excused (1T3-15 to 21-12; 3-19 to 12-1).

On March 04, 2022 the jury returned guilty verdicts on all charges, sentencing Arrington on April 08, 2022.

## **B. Controlling Principles:**

Any error or omission capable of producing an unjust result are recognized as reversible errors. New Jersey Court Rule 2:10-2; State v. Trinidad, 241 N.J. 425, 445, 451-52 (2020); State v. Macon, 57 N.J. 325, 336 (1971).

Criminal defendants have constitutional rights to trials by impartial juries. To have the jurors decide cases solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters. Sheppard v. Maxwell, 384 U.S. 333, 351 (1966); State v. R.D., 169 N.J. 551, 557 (2001) (LaVecchia, J.); State v. Williams, 93 N.J. 39, 60 (1983).

## **C. Abuse of Discretion**

The abuse of discretion standard of review applies to reviewing the handling of possible tainted jury determinations, R.D., 169 N.J. at 559, and whether it was necessary to voir dire individually other jurors to ensure the jury's impartiality, R.D., 169 N.J. at 560-61.

An abuse of discretion occurs when a trial court makes "findings inconsistent with or unsupported by competent evidence," utilizes "irrelevant or inappropriate factors," or "fail[s] to consider controlling legal principles." Steele v. Steele, 467 N.J.

Super. 414, 444 (App. Div. 2021) (Enright, J.A.D.) (quoting Elrom v. Elrom, 439 N.J. Super. 424, 434 (App. Div. 2015)). This is also demonstrated if the court fails to consider "all relevant factors." Steele, *supra*, 467 N.J. Super. at 444 (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)).

#### **D. Legal Argument**

Criminal defendants have constitutional rights to trials by impartial juries. 6<sup>th</sup> and 14<sup>th</sup> U.S. Const. Amdnts; N.J. Const. Art. I, Para. 10. This privilege includes the right to have the jury decide the case based solely on the evidence presented at trial, free from the taint of outside influences and extraneous matters. Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) (Of particular significance here is that aspect of impartiality mandating "that the jury's verdict be based on evidence received in open court, not from outside sources[ ]"); State v. R.D., 169 N.J. 551, 557 (2001) (LaVecchia, J.); State v. Williams, 93 N.J. 39, 60 (1983); Panko v. Flintkote Co., 7 N.J. 55, 61 (1951) (Ackerson, J.)(The jury verdict must be "free from the taint of extraneous considerations and influences," and a new trial will be granted when jury misconduct or the intrusion of irregular influences into jury deliberations "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge[ ]").

The test is "not whether the irregular matter actually influenced the result but whether it had the capacity of doing so." Ibid.

These defendants are entitled to juror taint hearings when evidence of juror exposure to extraneous information could potentially effect their impartiality. During these hearings, courts are obligated to interrogate the juror, in the presence of counsel, to determine if there is a taint. R.D., 169 N.J. at 557-58; State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div. 1997).

Where there is the possibility of actual juror taint or exposure to extraneous influences, the judge must voir dire that juror and, in appropriate circumstances, the remaining jurors. State v. Bisaccia, 319 N.J. Super. 1, 13 (App. Div. 1999).

A new trial is not necessary in every instance where it appears an individual juror has been exposed to outside influence. R.D., 169 N.J. at 559.

The proper judicial response into outside influences and extraneous matters should involve "interrogat[ing] the juror, in the presence of counsel, to determine if there is a taint; if so, the inquiry must expand to determine whether any other jurors have been tainted thereby, R.D., 169 N.J. at 557 (citing Pressler, Current N.J. Court Rules, comment 2 on R. 1:16-1 (2000)). The trial court must then determine whether the trial may proceed after excusing the tainted juror or jurors, or whether a mistrial is necessary. Ibid.

Simply taking a juror's version of the facts concerning whether outside information was spread to other jurors is at odds with Justice LaVecchia reasoning in R.D., *supra*, 169 N.J. at 561

("[...] the court should not simply accept the juror's word that no extraneous information was imparted to the others, the court's own thorough inquiry of the juror should answer the question whether additional voir dire is necessary to assure that impermissible tainting of the other jurors did not occur[ ... .]").

In early 2022 appellant Jeremy Arrington's trial on Essex County Indictment No. 17-05-01346 began. In the late evening of March 02, Juror # 12 attempted to contact the trial judge with relevant to the case.

During the March 03, 2022 morning session of the trial, the following occurred in appellants absence:

*THE COURT : Okay. Counsel, the reason I 'm calling you as early as I am today is because last evening, approximately a quarter to 12 last night I received on my voicemail here at work, a message from one of our jurors.*

*It was juror number, I think, 12, who advised -- advised us, advised me that I think she just got to work and she just realized that one of her co -- -- coworkers lost her daughter to gun violence in Newark pre -- -- previously and her last name is McBurroughs.*

*So she's pretty confident that it's our -- -- you know, one of our decedents, Syasia McBurroughs, and she just wanted to know whether or not that would disqualify her.*

*Obviously, it will. But I wanted to bring that to your attention, because first and foremost, I*

*-- -- cert -- -- I don't want her -- her to come in today and -- and possibly speak to anybody, actually, but we might be able to save her a trip down and we could*

*maybe just -- if we -- if we're all in agreement, we could maybe excuse her. (1T3-19 to 4-14).*

The discussion progressed, by the court's initiation of an inquiry:

*What do -- -- Mr. Edwab, what's your position?*

*MR. EDWAB: I think she should be excused. I*

*-- -- I don't -- -- I don't want to chance this. Maybe she does know something, maybe she doesn't. Why even -- -- that's why we have this many jurors. I say it involves a question. Release her so that there's no issues in the future, if there's anything that comes up with the verdict.*

*THE COURT: All right. Mr. Bini?*

*MR. BINI: Judge, I guess, do we need to question as to whether or not she might have either alluded to in general some situation or certainly at worst more specifically to the situation, or she just said she realized it.*

*THE COURT: I'll tell you what? Why don't I do this? My Law Clerk saved the message. Let me have her share or play the message for all of you. I -- -- I should have done that in the beginning . So you can all listen to her voicemail at this time. Dana will cue it up.*  
*ANSWERING MACHINE: Honorable Roland.*

*THE COURT: I like that as a name. You're muted, Dana, by the way.*

*LAW CLERK: Am I? I was standing here, sorry.*

*ANSWERING MACHINE: Play message again.*

*Stopping . One, received yesterday at 11:44 p.m.*

*JUROR: Yes, hi. My juror ID number is 00138172. And this message is for Judge Wigler. I'm calling -- -- I'm calling from work. When I got here today, I found out that one of our social workers here*

*has lost her daughter to gun violence in Newark. I also found out that her last name is McBurroughs and very likely is the mother of one of the decedents in the case. And so I thought it necessary to call and disclose this information. My telephone number is (973) 255-9301. Please let know tomorrow if this will require disqualifying me a juror. Thank you. Bye -- bye. (1T4-24 to 6-12).*

As the discussion furthered, the tenor of this inquiry subsided:

*THE COURT : Okay. I don't necessarily take from her message that she necessarily violated my -- - my Order not to discuss the case with the others or anyone else. It could have -- --I mean, I don't know. I don't know how it came up. I have no idea how it came up, but I don't know that it necessarily violate -- -- violated my Order. But, regardless, I just think that - -- I mean, I have no reason to think that she discussed this with any other juror. We just got the message late -- -- late last night and I'm pretty confident. And we could actually confirm when I have someone from my staff if I call -- -- call her to excuse her and tell her not to come in today, just confirm that she -- -- she didn't speak to any -- -- any of the other jurors about this. But I don't see a need to necessarily, you know, cross-examine her on -- on -- on how that conversation may have started.*

*MR. EDWAB: I don't think we need to inquire any further, but I also appreciate that since she called you last night, when she just realized this, makes me think that she didn't realize it before and that this just popped up after she -- that she went to work last night, said to me, I think it's pretty clear she realized something and from that point she called the Court.*

*THE COURT: Yeah. I think she was actually being diligent. And as --*

MR. EDWAB: Right.

THE COURT: -- soon as she learned of it, she immediately called us at -- at a quarter to 12 at night.

MR. EDWAB: Right.

THE COURT: So I think she was actually probably being very diligent in complying with the Court's instruction. So, is there any objection to having one of my staff call her and tell her she's - you know, thank her, but she's excused. She need not come in today and to confirm that she did not have this conversation with any of the other sitting jurors.

MR. EDWAB: I have no objection.

MR. BINI: Judge, could we just add one thing? And that's -- that she's not to speak with any of the jurors if -- I don't think she would have that inclination, but do we need to add that?

THE COURT: I -- I could certainly, yeah, I -- sure. We could certainly advise her also not to discuss this with any of the other jurors. I don't even think she would have their phone numbers, really.

MR. BINI: Right. She probably doesn't know them anyway.

THE COURT: No, I have no problem, Judge. Mr. Edwab is always speaking about an abundance of caution. I thought that that might be one.

THE COURT: No, she doesn't know them. And I -- we have, I have their phone numbers, but I -- we don't disseminate this list of all the jurors numbers to the other jurors.

MR. BINI: No, I have no problem, Judge. Mr. Edwab is always speaking about an abundance of caution. I thought that that might be one.

THE COURT: Yeah. We'll -- we'll tell her, You know -- I'll have -- we'll -- we'll notify her not to discuss this, obviously with any of the other jurors, in the unlikely situation that she would somehow bump into one of them or something like that.

*MR. BINI: Fine.*

*THE COURT: All right? All right. So this way she doesn't come in today. And I know your client is not here, Mr. Bini, but you could certainly act on his behalf and we could, you know -- you could let him know later. We can put it in the record just before we start also for his benefit. Okay?*

*MR. BINI: Fine, Judge.*

*THE COURT: Talk to you later.*

*(1T8-5 to 12-1)*

Trial courts have an independent duty to act swiftly and decisively to overcome the potential bias of a jury from outside sources, Williams, supra, 93 N.J. at 62-63. They must use appropriate discretion to determine whether the individual juror, or jurors, "are capable of fulfilling their duty to judge the facts in an impartial and unbiased manner, based strictly on the evidence presented in court." State v. Bey 112 N.J. 45, 87 (1988).

In this instance, trial court sidestepped the question of whether the courts instruction not to talk to anybody about the case was disregarded, ignored Justice LaVecchia logic in R.D., accepted juror 12's voicemail as fact, never questioning her as to how the the fact of one of the victims social worker mother working at her job arose, if she shared this or any other outside information with any of the remaining jurors, never considering the possibility of actual juror taint or exposure to extraneous influences requiring the remaining jurors to be questioned. cf. State v. Scherzer supra, 301 N.J. Super. at 486-91.

Speculating, actual questioning of juror # 12 or the remaining jurors at this point is useless to protect against outside

influences or a pre-verdict discovery of information possibly influencing a trial counsel juror exclusion request/motion for any or all of the remaining jurors.

The trial courts presumption during analysis that the jurors are unfamiliar with each other, only in contact when court was in session before ruling is not law or fact based, and lacks full consideration of the procedural due process principles highlighted in State v. R.D., supra, 169 N.J. at 558 (The court is obliged to interrogate the juror, in the presence of counsel, to determine if there is a taint; if so, the inquiry must expand to determine whether any other jurors have been tainted thereby. The trial court must then determine whether the trial may proceed after excusing the tainted juror or jurors, or whether a mistrial is necessary), State v. Scherzer, supra, 301 N.J. Super. at 486, Panko v. Flintkote Co., 7 N.J. at 61, and State v. Bisaccia, supra, 319 N.J. Super. at 13; Jeffrey S. Mandel, New Jersey Appellate Practice (GANN, 2021) § 35:3-5 (Jury Matters) (c) (Removal or excusal of juror during trial).

Waiver is the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Although rights may be waived, courts "indulge every reasonable presumption against waiver of fundamental constitutional rights." Ibid. (internal quotation omitted). Arrington was never given a chance to waiver of any of these rights or processes.

Additionally, the courts determination of facts involved a voicemail and officers of the court, not those to whom facts were

attributed, Juror #12 and the remaining jurors. This process was far less than a full and fair hearing later entitling habeas corpus relief, see Townsend v. Sain, 372 U.S. 293, 313 (1963) (Warren, Ch. J.) (Federal courts must grant evidentiary hearings to habeas applicants when state factual determination are not fairly supported by the record as a whole, and/or the state court fact-finding procedure was not adequate to afford a full and fair hearing), and the resulting ruling was an abuse of the courts discretion.

These errors/omissions are clearly capable of producing unjust result and recognized as reversible errors. New Jersey Court Rule 2:10-2; State v. Trinidad, 241 N.J. 425, 445, 451-52 (2020); State v. Macon, 57 N.J. 325, 336 (1971).

Appellant humbly requests that, in light of these errors/omissions the court grant an Order reversing the judgment of conviction in this case, and further Order a retrial on the aforelisted charges within 180 days.

**II. Trial Court Deprived Appellant Of His 6th & 14th U.S. Constitutional Amendment, and Article I, Paragraph 10 Of The New Jersey Constitutional Guarantee Of The Right To Be Present Throughout All Portions of His Trial (Not Raised Below) (March 03, 2022; 1T3-19 to 21-12).**

**A. Facts**

During the early 2022 Superior Court of New Jersey, Essex County trial of Essex Count Indictment No. 17-05-01346, a March

03, 2022 juror exclusion hearing was held, without appellant Jeremy Arrington's knowledge, consent or waiver.

During this hearing a voicemail of juror # 12 was relayed, the juror was excused and the remaining jurors were instructed not to speculate as to why said juror was excused (1T3-15 to 21-12; 3-19 to 12-1). After the hearing Arrington was informed of the rulings.

On March 04, 2022 the jury returned guilty verdicts on all charges, sentencing Arrington on April 08, 2022.

## **B. Controlling Principles**

(1). Errors/omissions capable of producing unjust result are recognized as reversible errors, New Jersey Court Rule 2:10-2; Trinidad, supra, 241 N.J. at 445, 451-52; Macon, supra, 57 N.J. at 336.

(2). Criminal defendants have rights to be present throughout all critical stages of their trials, Kentucky v. Stincer, 482 U.S. 730, 745 (1987); N.J. Court R. 3:16 (Presence of the Defendant) (b).

## **C. Abuse of Discretion**

An abuse of discretion occurs when a trial court makes "findings inconsistent with or unsupported by competent evidence," utilizes "irrelevant or inappropriate factors," or "fail[s]

to consider controlling legal principles." Steele, supra, 467 N.J. Super. at 444. This is also demonstrated if the court fails to consider all relevant factors. Steele, supra, 467 N.J. Super. at 444.

#### **D. Legal Argument**

Criminal defendants in New Jersey have constitutional and statutory rights to be present throughout all critical stages of their trials. 6<sup>th</sup> and 14<sup>th</sup> U.S. Const. Amdnts; N.J. Const. Art. I, Para. 10; see Kentucky v. Stincer, 482 U.S. 730, 745 (1987) ("[...] a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure[]"); see also N.J. Court R. 3:16 (Presence of the Defendant) (b) (At trial or post-conviction proceedings) ("The defendant shall be present at every stage of the trial [...]").

Arrington was available and should have been permitted to be present during the juror exclusion hearing to ensure he was afforded the procedural process and rights he was due as shown through R.D., 169 N.J. at 557-58, Scherzer, 301 N.J. Super. at 486, Bisaccia, 319 N.J. Super. at 13, and Williams, 93 N.J. at 60.

Trial court determined facts based solely upon a voicemail and officers of the court, not those to whom facts were attributed. At a minimum, the opportunity for Arrington to

object, N.J. Court R. 1:7-2, and request that all the jurors be questioned should have been afforded.

This situation required actual notice, see Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (Stewart, J.) n. 3 (An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections), and a meaningful opportunity to be heard, Armstrong v. Manzo, supra, 380 U.S. at 552 n. 6-7 (A fundamental requirement of due process is the opportunity to be heard, required by due process must be granted at a meaningful time and in a meaningful manner), on the possibility of his attendance during the juror exclusion hearing.

Absent these safeguards or a waiver of such, Johnson v. Zerbst, supra, 304 U.S. at 464, the hearing was less than a full and fair hearing, and warrants relief, Townsend v. Sain, supra, 372 U.S. at 313.

In order for Arrington to request trial counsel object he would first need to be informed of such, then given a chance to either object or waive his rights through counsel prior to the courts fact findings and exclusion rulings.

Trial attorneys are required to consult with defendants throughout cases, see, e.g., Strickland v. Washington, 466 U.S. 668, 688 (1984) (Counsel has the duty to consult with the defendant on important issues and to keep the defendant

informed of important developments in the course of the prosecution); RPC 1.4 (Communication) (a) ("A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer[]"), (b) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information[]"), and (c) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation[]").

The scope of a trial attorney's representation is normally determined by the prevailing professional norms, the attorney and client. Strickland, 466 U.S. at 688 (The proper measure of attorney performance is reasonableness under prevailing professional norms).

There are times when States deny or impede the assistance of trial counsel and prejudice is presumed. See, e.g., U.S. v. Cronin, 466 U.S. 648, 662 (1984) (Stevens, J.) ("... only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial. Where circumstances dictate that the likelihood that any lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *id.*, 466 U.S. at 659-60); Strickland, 466 U.S. at 686 (The Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. In the

case of constructive denial of the assistance of counsel, prejudice is presumed. So are various kinds of state interference with counsel's assistance. *id.*, 466 U.S. at 692).

Without analysis trial court held this hearing in Arrington's absence, forcing trial counsel to defend Arrington's rights and make decisions effecting him without communication, deciding for both Arrington and trial counsel whether/when consultation between them during the hearing was within the expected scope of representation. Cf. Cronic, 466 U.S. at 659-60, 662; Strickland, *supra*, 466 U.S. at 686.

Although no express judicial order prohibited conversations between Arrington and trial counsel, the manner in which the hearing took place prevented communication between Arrington and trial counsel throughout the hearing without analysis, another reversible error, see, e.g., Perry v. Leeke, 488 U.S. 272, 281-84 (1989) (Except for when testifying, or breaks in between, criminal defendants have absolute rights to consult with counsel during criminal trials).

Arrington had no way of learning of or challenging trial courts fact determinations or legal rulings in his absence when unable to discuss matters with counsel.

These rights were Arrington's, not counsel's. This case doesn't involve the forfeiture of any rights. Thus, a reasonable presumption against such should be indulged. Johnson v. Zerbst, 304 U.S. at 464.

The record shows that the factors, legal precedents and principles appellant relies upon were never considered and

therefore were an abuse of trial courts discretion. Steele, supra, 467 N.J. Super. at 444.

These errors/omissions are not harmless. They are clearly capable of producing unjust result and recognized as reversible errors. New Jersey Court Rule 2:10-2; Trinidad, 241 N.J. at 445, 451-52; Macon, 57 N.J. at 336.

Appellant humbly requests that, in light of the several things Arrington could have done and gained by attending the hearing, Stincer, 482 U.S. at 747, the court grant an Order reversing the judgment of conviction in this case, and further Order a retrial on the aforelisted charges within 180 days.

**III. The Appellant was Deprived of His 6th & 14th U.S. Constitutional Amendment, and Article I, Paragraph 10 Of The New Jersey Constitutional Guarantee Of The Right To Counsel (March 03, 2022; 1T3-19 to 21-12) (Not Raised Below).**

**A. Facts**

During appellant Arrington's trial, spanning from February through early March of 2022, the Superior Court of New Jersey, Essex County, held a March 03, 2022 hearing in his absence to exclude a juror based on the voicemail said juror left for the court explaining that they and a victim's mother works at the same job. The court then determined facts, excluded the juror and did not question the remaining jurors.

Trial courts' hearing never included the appellant, forcing trial counsel to represent his interests and make decisions

concerning his rights in his absence without Arrington's knowledge or consent.

Trial counsel never objected to the manner in which the hearing was called, appellant's unknown absence, the loss of his rights without a waiver or that the scope of representing Arrington was altering by the courts actions.

The remaining jurors were then instructed not to speculate as to why said juror was excused (1T3-15 to 21-12; 3-19 to 12-1).

On March 04, 2022 the jury returned guilty verdicts on all charges, sentencing Arrington on April 08, 2022.

## **B. Controlling Principles**

**(1).** Any error or omission capable of producing an unjust result are recognized as reversible errors, New Jersey Court Rule 2:10-2; Trinidad, supra, 241 N.J. at 445, 451-52; Macon, supra, 57 N.J. at 336.

**(2).** At times, when States deny or impede the assistance of trial counsel prejudice is presumed. See Cronic, supra, 466 U.S. at 662 (Stevens, J.) ("... only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial[]").

**(3).** The right to counsel is the right to the effective assistance of counsel, Strickland v. Washington, supra, 466 U.S. at 686 n. 5.

Trial counsel can deprive a defendant of the right to effective assistance by failing to render adequate legal assistance. *id.*, 466 U.S. at 686. These type of claims have two components, each of which the must be shown in order to set aside a conviction: (a) that counsel's performance was deficient, which requires a showing that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (b) that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable, Strickland, 466 U.S. at 687 n. 10.

### **C. Abuse of Discretion**

An abuse of discretion occurs when a trial court fails to consider controlling legal principles or all relevant factors. Steele, *supra*, 467 N.J. Super. at 444.

### **D. Legal Arguments**

#### **(1). Constructive Denial of Trial Counsel**

Criminal defendant have rights to the effective assistance of trial counsel throughout their trials. 6th & 14th U.S. Const. Amend; N.J. Const. (1947) Art. I, Para 10.

They also have constitutional rights to have impartial juries decide cases free from the taint of outside influences and extraneous matters, Sheppard v. Maxwell, *supra*, 384 U.S. at

351, and to be present throughout all critical stages of their trials, Kentucky v. Stincer, supra, 482 U.S. at 745, 747; N.J. Court R. 3:16 (b).

Defendants also retain procedural due process rights to notice and a meaningful opportunity to be heard at meaningful times appropriate to the claims and concerns, Armstrong v. Manzo, supra, 380 U.S. at 550 n. 3, 552 n. 6-7, to either object and preserve rights, N.J. Court R. 1:7-2, or waive them, Johnson v. Zerbst, supra, 304 U.S. at 464.

The scope of defense counsel's representation includes consulting with their clients "on important issues and to keep the defendant informed of important developments in the course of the prosecution[,]" Strickland, 466 U.S. at 688; RPC 1.4 (Communication) (a), and (b). They are required to reasonably explain matters to these clients to the extent necessary to permit clients to make informed decisions regarding the representation. RPC 1.4 (c).

As earlier detailed, in this case Arrington had an absolute rights to consult with trial counsel throughout the hearing, Perry v. Leeke, supra, 488 U.S. at 281-84.

In failing to include Arrington trial court, without any court order prohibiting communication between Arrington and trial counsel or analysis, created a communication barrier between Arrington and trial counsel. Altering the expected scope of trial counsels' representation of Arrington.

Throughout the hearing he remained unaware it was taking place. Consultation with trial counsel was needed to advise of

the surrounding circumstances, the available options and the steps required to protect and preserve his right, and the legal authorities controlling his rights to;

- a full and fair juror exclusion hearing;
- procedural due process;
- to be present;
- full and fair hearings, and;
- the effective assistance of counsel.

This was a constructive denial of trial counsel, and prejudice should be presumed, see Cronic, 466 U.S. at 662 (Stevens, J.) ("... when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial[]"); and see Neder v. United States, 527 U.S. 1, 7 (1999); Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (A structural error compromises a proceeding, requiring reversal); Jeffrey S. Mandel, New Jersey Appellate Practice, §34:3-3 (b) (Standards, Deference and Types of Error; Structural Error) (GANN 2021).

Arrington had no way of requesting consultation with trial counsel, and trial counsel had no way of conversing with him during the hearing. Trial courts' choice interfered with trial counsels' ability to decide whether to include and communicate with Arrington in juror exclusion matters, Strickland, 466 U.S. at 686 (The Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independant decisions about how to conduct the defense).

The likelihood that any lawyer could provide effective assistance in this instance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Cronic, 466 U.S. at 659-60, 662, requiring a reversal of appellants judgment of convictions, New Jersey Court Rule 2:10-2; Trinidad, supra, 241 N.J. at 445, 451-52; Macon, supra, 57 N.J. at 336.

The trial courts' reasoning does not include consideration of the relevant factors or controlling legal principles, and was an abuse of its discretion, Steele, supra, 467 N.J. Super. at 444.

Appellant humbly requests that the court grant an Order reversing the judgment of conviction in this case, and further Order a retrial on the aforelisted charges within 180 days.

**(2). Denial of the Effective Assistance of Trial Counsel**

Criminal defendants have rights to the effective assistance of trial counsel throughout their trials, Strickland, 466 U.S. at 686 n. 5.

To establish the denial of an effective assistance claim litigants must prove deficient performance, and that the deficient performance prejudiced the defense, Strickland, 466 U.S. at 687 n. 10.

**(a) Deficient Performance**

The proper measure of attorney performance is reasonableness under prevailing professional norms, Strickland, 466 U.S. at 688.

Appellants making ineffective claims must identify acts or omissions that are alleged not to have been the result of reasonable professional judgment. Courts must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. Strickland, 466 U.S. at 690-91.

As established earlier, Arrington had rights to a full, fair and complete juror exclusion process under the controlling legal authorities cited, where accurate fact based determinations were made, he had a chance to attend, Stincer, supra, 482 U.S. at 745, 747; N.J. Court R. 3:16 (b), where he received procedural due process - actual notice, and a meaningful opportunity to be heard at meaningful time to either object and preserve rights, N.J. Court R. 1:7-2, or waive them, Johnson v. Zerbst, supra, 304 U.S. at 464.

One of trial counsel's duties is to consult with defendants on important issues and to keep informed of important developments in the case, *id.*, 466 U.S. at 688; RPC 1.4 (c).

When coupled with the Court's approach to denying defendants ability to consult counsel during trials, Perry v. Leeke, supra, 488 U.S. at 281-84, there is no question that trial counsels' failure(s) to object to the courts' summary adoption of

the voicemail as an absolute fact that there was no need of further inquiry, in lieu of questioning juror # 12 as to: (1) how did the matter of victim's mother working at juror # 12's job arise; (2) whether juror # 12 became acquainted with or have any out of court contact with any other jurors during the trial, and; (3) whether juror # 12 had an opportunity to or share this information with any of the remaining jurors was deficient performance. These involved structural errors, Neder, supra, 527 U.S. at 7; Fulminante, supra, 499 U.S. at 310; Mandel, New Jersey Appellate Practice, at §34:3-3 (b), warranting relief if raised.

These failure left Arrington's rights to a trial by an impartial jury, to have jurors decide his case on the evidence presented, free from outside influences and extraneous matters, Sheppard v. Maxwell, supra, 384 U.S. at 351; R.D., 169 N.J. at 557; Williams, 93 N.J. at 60, unprotected.

The trial courts' reasoning does not include consideration of the relevant factors or controlling legal principles, and was an abuse of its discretion, Steele, supra, 467 N.J. Super. at 444.

### **(b). Prejudice**

Trial counsels' failures to object, N.J. Court R. 1:7-2, raise and preserve the valid claims denied Arrington rights and litigation opportunities before and throughout the juror exclusion hearing.

Trial counsel allowed the trial court to interfere with his independence in choosing whether to include and communicate with Arrington on juror exclusion matters before and during the hearing, Strickland, 466 U.S. at 686 (The Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Counsel, however, can also deprive a defendant of the right to effective assistance by failing to render adequate legal assistance), a constructive denial of trial counsel claim warranting relief, Perry v. Leeke, supra, 488 U.S. at 281-84; Cronic, 466 U.S. at 659-60, 662.

These omissions permitted trial court to deprive Arrington's rights to a full and fair juror exclusion hearing where he could attend, be afforded procedural due process, and consult with counsel to learn of the voicemail and request that juror # 12 and the remaining jurors be interrogated without analysis or waiver. Neither Arrington nor trial counsel can now pose any pre-verdict questions juror # 12 or the remaining jurors.

There is no conceivable logic any trial attorney could have in bypassing these rights. Under the facts of this case, these failures were prejudicial, Strickland, 466 U.S. at 687 n. 10, effecting Arrington's rights, the fairness of the hearing and potentially the impartial of the jury verdict. This is far less than the effective assistance constitutionally guaranteed, and outside the wide range of professional competent assistance. Strickland, 466 U.S. at 690-91.

Trial counsel's errors effected Arrington's rights, prevented a fair hearing and require a reversal of appellants judgment of convictions, New Jersey Court Rule 2:10-2; Trinidad, supra, 241 N.J. at 445, 451-52; Macon, supra, 57 N.J. at 336.

Appellant humbly requests that the court grant an Order reversing the judgment of conviction in this case, and further Order a retrial on the aforelisted charges within 180 days.

### **Conclusion**

For the foregoing reasons, an Order reversing the judgment of conviction in this case should be granted, and a retrial of the case scheduled within 180 days.

Respectfully Submitted,

10/19/23

Dated

x Jeremy Arrington

Jeremy Arrington