

18-8093

No. _____

Supreme Court, U.S.
FILED

FEB 12 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

John Ferreira — PETITIONER
(Your Name)

vs.

The State of Georgia — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Supreme Court of Georgia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John Ferreira
(Your Name)

#1233006 Autry State Prison
(Address)

P.O. Box 648 Pelham, GA 31779
(City, State, Zip Code)

N/A
(Phone Number)

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

I. Did The State of Georgia err, and later the Supreme Court of Georgia by upholding, when they concluded that "the State of Georgia was not required to make any special allegation of intent" in *Ferreira v. The State of Georgia* (Unpublished)? Is there questionable intent - where there lies no requisite element of intent (I.E. no element of a crime)? A necessary legislative defined element, exceptional to the Statute O.C.G.A. § 16-5-21. (See appendix).

II. Is the Constitutionality of O.C.G.A. § 16-5-21 Aggravated Assault in question? It has (2) two essential elements. Yet, the Assault portion which is one of the elements essential to this crime is omitted from the indictment in violation of due process of the (5th) Fifth Amendment and (14th) Fourteenth Amendment of The United States Constitution.

III. Has substantive due process rights been violated Assault, by Attempting to Commit a Violent injury is the substantive point of this issue involved in this instant case. Since, the assault as defined under the Attempt theory is not properly charged; the 5th Amendment articulated...

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Cobb County Superior court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was NOV. 15 2018
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) AMENDMENT 5 OF THE CONSTITUTION (Due Process of Law)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except from cases arising in the land or naval forces, or in the Militia, when actual service in time of war or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of Life, Liberty, or Property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) AMENDMENT 14 OF THE CONSTITUTION

No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States, nor shall any state deprive any person of Life, Liberty,

With out due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

(3)

O.C.G.A. § 16-1-7(a)

(Multiple prosecutions for same conduct)

(a) When the same conduct of an accused may establish the commission of more than one crime the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if:

(1) One crime is included in the other; or

(2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

(4)

O.C.G.A. § 17-9-4

(Validity of judgement rendered by court having no jurisdiction of person or subject matter)

The judgement of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity and may be so held in any court when

it becomes material, to the interest of the parties to consider it.

- (5) O.C.G.A. 16-5-21
(Aggravated Assault)

See Appendix E pg 1

- (6) O.C.G.A. 16-5-20
(Simple Assault)

See Appendix E pg 3

- (7) O.C.G.A. 16-5-1
(Murder, Felony Murder)

See Appendix G

- (8) O.C.G.A. 9-11-60
(Relief from Judgments)

(b) Law of the Case rule

The Law of the Case rule is abolished but generally judgments and orders shall not be set aside or modified without just cause and, in setting aside or otherwise modifying judgments and orders the court shall consider whether

or not innocent parties would be in there by; provided, however that any ruling by the Supreme Court or Court of Appeals shall be binding in all subsequent proceedings in the case in the lower Court and in the Supreme Court or the Court of Appeals as the case may be.

STATEMENT OF THE CASE

On or about the date of June 15, 2006 a Grand Jury returned an indictment against the above-named Petitioner, John Ferreira. Ferreira was indicted for Murder, Felony Murder predicated on Aggravated Assault, Aggravate Assault, and Possession of a Controlled Substance. On November 13, 2006 he entered a negotiated plea to one Count of Voluntary Manslaughter and was sentenced to 20 yrs. He filed a Pro-Se motion for an out-of-time appeal on June 14, 2016. Which was denied by the Superior Court of Cobb County on July 27, 2016. Ferreira then filed an appeal with the Court of Appeals of Georgia. This appeal was heard and ultimately denied by the Court of Appeals on April 24, 2018. Ferreira then filed a Petition for Certiorari with the Supreme Court of Georgia which was docketed on May 22, 2018, then denied by the Supreme Court of Georgia on November 15, 2018.

In this instant case Ferreira argued to the trial court (and more fully on appeal) the count on his indictment (Count 3) was deficient. (see appendix F page 4.) Count 3

on the indictment alleged; that Ferreira "did unlawfully make an assault upon a person by pointing and firing at him". This is a vague ambiguous manner that does not require specific intent when a death ensues. Nonetheless, a Grand Jury returned an indictment against the petitioner. For extraordinary reasons (such as an error in the law itself) and this being an external impediment amounting to an unjustifiable reliance upon the State's District Attorney's Office at Cobb County Georgia. This office, who ultimately failed to elect and produce the substantive element of the crime. Therefore, the petitioner is honorably raising the question(s) before this honorable Supreme Court of The United States. The Petitioner has exhausted all of his legal state remedies up and until the Supreme Court of Georgia.

REASONS FOR GRANTING THE PETITION

The petitioner is honorably raising these questions before this honorable Supreme Court of the United States since the Supreme Court of Georgia has denied his claims pertaining to the following:

- I. Questionable intent - Where there lies no real element of intent. (I.E. no element of a crime) A necessary legislative defined element, excepted to the Statute O.C.G.A. § 16-5-21. (appendix see count 3 of indictment. (appendix F))
- II. The Constitutionality of the Statute of Aggravated assault, which has (2) two essential elements. Yet, the Assault portion, which is one of the elements essential to this crime, is omitted from the indictment
- III. Assault, by Attempting to Commit a Violent injury, is the substantive point of this issue involved in this instant case. Since the assault as defined under the Attempt Theory is not properly charged, the 5th Amendment guarantee has been violated and substantive due process is questionable.

Opinion and Judgement of The Courts

In regards to enumeration of error (I), set forth here-in below, the trial court failed to reach the substantive point or issue in this instant case, and was precluded from doing so, as the State erroneously failed to produce this element of "Going Forward" at the Grand Jury stage of the process. This substantive - defect, Ab-initio voids the entire proceeding, and the matter of law is substantively and substantially harmful to the effect of invalidating the petitioner's plea.

In regards to enumeration of error (II) set forth here-in below, the Constitutionality of the Statute of Aggravated Assault is a question of first impression as to the Assault being the substantive element of due process rights which affords fundamental foundational guarantees under the 5th Amendment of the Federal Constitution. Since there are only two essential elements to review, there should be no room for pre-judicial speculation as to which of the two essential elements is the element which guarantees that

Substantive due process has been adjudicate the assault portion(element); that probable ca upon "True" Bill Indictment was returned that explained this "Legal Word of Art in a practice manner of Conduct that a Common-man would know its meaning.

In regards to enumeration of error(I set forth here - in below, the only way an manner that assault could be fairly charged and cross-examined, had the petitioner opted to go-to trial, was the subsectioned manner of an Attempt to Commit a Violent Injury - O.C.G.A. § 16-5-20 (a)(1) see appendix E. O.C.G.A. § 16-5-20 (a)(2) Theory of Reasonable Apprehension looks to the victim's mental culpability or state of mind. This would violate the Confrontation Clause to confront and cross-examine the victim. Since death ensued from the alleged assault, the victim was unquestionably unavailable for interview as he died before indictment, trial, nor could he be interviewed or cross-examined. Therefore perforce one must place the Attempt Theory of O.C.G.A. § 16-5-20 (a)(1). It is absurd and Unconstitutional that the judicial system of

the State of Georgia finds it acceptable to one could be found guilty of Aggravated Assault based solely on the general intent of O.C.G.A. 16-5-20(a)(2) as the underlying felony of O.C.G.A. § 16-5-1 (Felony Murder), then sentenced to Life in prison for "Committing an act that placed another in reasonable apprehension of immediately receiving a violent injury". Especially since it is physically impossible to murder another by placing them in reasonable apprehension of receiving a violent injury. Wherefore beyond this "non-essential theory" of O.C.G.A. § 16-5-20(a)(2), Only O.C.G.A. § 16-5-20(a)(1) Attempt to Commit a Violent Injury Conduct is the essential way and manner that this Criminal act could be reasonably charged. Absent of any speculation when viewed in the light of a necessary exception to O.C.G.A. § 16-5-21 language used which does not explain how the act of assault is defined, as it does in O.C.G.A. 16-5-20(a)(1) Simple Assault.

A 6th Amendment function of a more definite notice was not what the petitioner was asserting. It's the 5th Amendment guarantee that reflects "from the Grand

Jury Stage" that two due processes (Procedural facts and Substantive facts), that each process, as a matter of right of guarantee (protection and prohibition) applies to the Statutes; Set so that the Substantive element of Conduct Constituting a Criminal act of liability shall be properly charged a Statutes Created abridge from this Command are Substantively Unconstitutional.

Enumeration of Errors With Citation Authorities

(I)

The trial court is in error for failing reach the Substantive point or issue involved in this instant case. Although it is clear, plain, and unequivocal that it is the incumbent duty of the Court to reach the Substantive point or issue in "every case" Case [cite] Driver V. State, 194 GA 561 1942. The Appeals Court of Georgia is obligated to uphold the decisions of the Supreme Court of Georgia as binding and Controlling authorities on issues decided under O.C.G.A. § 9-11-60(h). Therefore any contrary decision opined upon by the Court of Appeals of Georgia lie questionable upon certior

ari. The Supreme Court of Georgia refuses to provide remedy by denying Certiorari.

"Substantive due process rights differ from their procedural counterparts in an important fashion, the manner in which a violation of the right occurs. A violation of a substantive due process right, for instance, is complete when it occurs. Hence, the availability vel non of an adequate post-deprivation state remedy is irrelevant. Because the right is fundamental no amount of process can justify its infringement. By contrast, a procedural due process violation is not complete unless and until the state fails to provide due process. In other words a state may cure a procedural deprivation by providing a later procedural remedy. Only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation arise" [Cite] McKinney v. Pate, 20 F.3d 1550; (1994) US App. which the Supreme court of Georgia has done. This is where the question of the requisite element of intent needs to be viewed. How the honorable Supreme Court of The United States should address and redress the element of assault under the specific intent subsection of O.C.G.A. 16-5-20(a) attempt conduct.

A review of the language of the indictment in this instant case reveals that it was insufficient to charge an assault based on O.C.G.A. § 16-5-20 (a)(1) in regards to the aggravated assault underlying Felony Murder Charge. Assaulting a victim "with a firearm, a deadly weapon, by pointing at said person" is insufficient. See Howard v. State, 230 GA App 43 (1998). Firing a weapon at another could be accidental or construed as criminal negligence, see Donagan v. State, 269 GA 590 (1998).

Live victim = general intent

Deceased victim = Specific intent

"Where a death ensues from the use of a deadly weapon; a specific intent to kill will be presumed. But where death does not ensue such an intent to kill will not be presumed. Hawkes v. State, 51 GA App 317, (1931)"

O.C.G.A. § 16-5-20 (a)(2) the intent to do the act that happens to place another in apprehension of injury, can be applied in prosecutions for assault with out much difficulty. O.C.G.A. § 16-5-20 (a)(2) "prohibits even negligently causing apprehension of imminent violent injury" which renders the statute an "outlier". United States v. Torres Jaime, 821 F3d 577, (2016) US App

Under OCGA § 16-5-20 (a)(2) all that is required for simple assault is the general intent to do the act. "I appears that the act itself need not be otherwise unlawful, inherently wrongful, or unreasonably dangerous. Under the precedents of this Court [The Supreme Court of Georgia], most farmers and teachers, peace officers and preachers, lawyers, and members of this Court, as well as many members of the General Assembly, would be felon-saved from prosecution only by the grace of a prosecuting attorney." Patterson v. State 229 GA 491 (2016).

Even so, it is impossible to determine the reasonable apprehension theory of OCGA § 16-5-20 (a)(2) on a single victim, single aggravated assault count, on an indictment for a deceased victim, because there is no manner to determine "IF" apprehension occurred from the accused acts. General Intent is insufficient, as well as unconstitutional, when death ensues from an OCGA § 16-5-21 (a)(2) Aggravated Assault.

Authorities and recent conclusive substantive criminal law changes showing how OCGA § 16-1-7(a) applies in this instant case, where the Court of Cobb County Georgia merged

the assault with Count (1) one of the indictments (see Appendix D p1) in this case as the same conduct. However, the petitioner contended that had a professional appellate attorney raised the issue of a substantive defect appropriately on appeal, the Court of Appeals of Georgia would not have overlooked this meritorious issue. They would have remanded this case back to Cobb County as requested. Sole for the limited purpose of allowing an appointed counsel on the first time appellate process to professionally raise issues that only a trained attorney would have known to properly raise. The petitioner is attempting to clarify as a pro-se layman, that Truth v. State, 295GA874 (2014), that only a professional counsel on appeal at a first time direct - appeal is capable of raising meritorious issues. There is no way to know what a professional attorney would have raised on appeal "[I]t is beyond question that an indigent has the right to appointed counsel to assist him on direct appeal." Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)

"Accordingly, the only way to remedy the harm created from the defendant having been deprived of the right to an attorney to present his

or her first appeal is to grant the defendant an attorney for the purpose of presenting a brand new Appeal, " Roberts, Supra

II

Although, Habeas Corpus is a meaningful avenue for asserting the Constitutionality of the petitioner's claims, ameliorative relief in the form of an out-of-time appeal is appropriate as a substantive defect in the indictment is a cognizable claim that could have been asserted in a "timely" motion at the end of the Criminal Case, by effective counsel as to reserve the issue on appeal. Furthermore, the Constitutionality of the statute must be raised at the earliest practicable time or procedural bar and default prevents the accused from asserting such issues later. Therefore, only upon the authority of Nazario V. State, 243 GA 480, (2013) and Estes V. Chapman, 582 F3d 1237 (2004) can this Court of last resort look past the trial court, The Court of Appeals of Georgia, and The Supreme Court of Georgia and enforce the State of Georgia to apply its own laws of OCGA § 16-1-7(a); 17-9-4 as a substantively void merger of law violation

and adhere to the due process clauses of the 5th and 14th Amendments of the Federal Constitution. There by rectifying the error attempting to be hid as a safe assylum with in the nucleus of Stare decisis at The Court of Appeals of Georgia's opinion, and upheld by The Supreme Court of Georgia. The Court of Appeals of Georgia ruled erroneously and misapplied the law in an arbitrary manner Using the "general intent" of reasonable apprehension when it does not apply to this instant case when "specific intent" is clearly required.

III.

The rule of Specificity and lenity is applicable to this instant case, as the only way and manner any questionable, intentional act of could have reasonably and legally occurred, is as if the petitioner was first and foremost actually charged and accused in the indictment with an act defined as an [A]ttempt. The OCGA § 16-5-20 (a)(1) portion of OCGA § 16-5-21 is the Substantive Conduct portion. Absent, this act of an attempt, which requires a substantial step towards another to commit battery.

Stand as a legal valid conviction upon a charge not actually made out by a grand jury. See Hopper v. Hampton, 244 GA 361 (1979) Smith v. Hardrick, 266 GA 54 (1995).

"Notice and its nature is a 6th Amendment function is not what the petitioner is asserting. However it is the 5th Amendment which we are concerned with." Outler v. US, 659 F2d 1306, (1981)

"A True Bill Grand Jury Indictment must set forth each and every essential and substantive element in order for the resulting conviction to stand. This well settled rule serves as a dual function beyond the 6th Amendment nature and cause as a notice of information concerning the offenses. Unless every essential substantive element of an offense appears in the indictment, it is impossible to assure the defendant that the grand jury properly determined the probable cause of the offense." see Horne v. US, 344 F2d 7: 5th Cir. (1965). "To allow... a subsequent guess as to what was in the minds of the Grand Jury at the time they returned the indictment would deprive the defendant of the basic protection which the guarantee of the intervention of a Grand Jury was designed to secure." Russell v. US, 369 US at 770, 82 S.Ct 1050 (1962)

An indictment is void to the extent that it fails to allege all the essential elements of the crime or crimes charged. The void issue is more clarified in Henderson v. Hames, 697 S.E.2d 798 (2010). In this instant case the indictment lacks the required specific intent required for aggravated assault in which a death ensues.

The Court of Appeals of Georgia failed to rule on factual matters at hand that were specified in the petitioner's "imperfect" or "layman's" brief; As noted on page 6 lines 8 through 13 of the Court of Appeals ruling (see Appendix A). The petitioner is a lay person, not a trained professional concerned with matters of law. Therefore, he cannot be held to a higher standard than the Grand Jury, District Attorney, Judges, as well as the entire judicial structure of the State of Georgia. To hold this lay person to such high expectation is unjust. The petitioner is only simply requesting the State of Georgia Judicial System abide by its own laws and to the Constitution of The United States and not continuously skirt or avoid the specific intent issue.

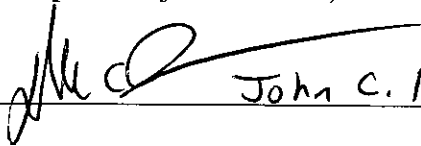
Wherefore, the petitioner prays that

Honorable Supreme Court of The United States grants certiorari relief by addressing the following above raised questions pertaining to jurisdictional defect(s) on the subject matter of the omitted necessary element of [A]ttempting to Commit a violent injury as the core element and same conduct that merges as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



John C. Ferreira

Date: 2/10/19