

19-6043

IN THE SUPREME COURT
OF THE UNITED STATES

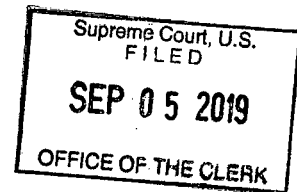
CASE No. _____

ORIGINAL

LARRY CRAIG CASH,
PETITIONER,

v.

STATE OF GEORGIA,
RESPONDENT.

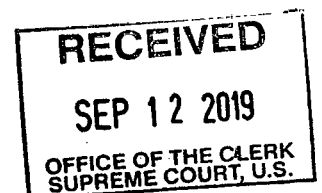


ON PETITION FOR A WRIT OF CERTIORARI
TO VACATE THE DECISION OF THE
GEORGIA SUPREME COURT IN DENYING THE
PETITIONER'S APPLICATION FOR CERTIFICATE
OF PROBABLE CAUSE.

ON PETITION FOR A WRIT OF CERTIORARI

LARRY CASH (HEREINAFTER "PETITIONER") RESPECTFULLY
MOVES THIS HONORABLE COURT TO VACATE THE DENIAL OF
HIS APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE BY
THE SUPREME COURT OF GEORGIA. SAID DENIAL WAS FILED ON
AUGUST 5, 2019, BY THE GEORGIA SUPREME COURT ON
CONSIDERATION OF THE APPLICATION FOR CERTIFICATE OF
PROBABLE CAUSE TO THE DENIAL OF THE HABEUS CORPUS
FILED ON DECEMBER 3, 2018.

1.



Questions Presented

1. ARE THE RIGHTS OF A DEFENDANT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION PROPERLY UTILIZED IN THE STATE OF GEORGIA WHEN THE TRIAL JUDGE HEARS A CASE AT TRIAL AND ON DIRECT APPEAL THOUGH HE IS RELATED TO THE VICTIM?
2. ARE THE RIGHTS OF A DEFENDANT PROPERLY UTILIZED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT CREATES AN AVERMENT IN THE INDICTMENT REMOVING THE ELEMENT OF "INTENT TO MURDER," FROM THE JURY'S CONSIDERATION WHICH WAS PREDICATED UPON AN AGGRAVATED ASSAULT CHARGE, "WITH THE INTENT TO COMMIT MURDER?"
3. DOES THE STATE OF GEORGIA FOLLOW THE UNITED STATES CONSTITUTION IN GOVERNING A DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL STAGES OF A CRIMINAL CASE?

List OF Parties

1. The Honorable Michael Murphy
Judge, Haralson County Superior Court, Georgia

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Opinions Below

1. Jackson v. Virginia, 443 U.S. 307 (1979)
2. Puckett v. United States, 556 U.S. at 129 (II) (a)
3. Ward v. State, 262 Ga. 293, 417 S.E.2d. 130 (1992)
4. Apprendi v. New Jersey, 530 U.S. 466 (2000)
5. New v. State, 327 Ga. App. at 87, 755 (2014)
6. Strickland v. Washington, 466 U.S. 668 (1984)

Jurisdiction

The United States Supreme Court has jurisdiction of this criminal case pursuant to Rule 29 of the Considerations Governing Review on Certiorari. The jurisdiction entitles the Court to review the decisions of the state courts.

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

Constitutional And Statutory Provisions Involved

Jackson v. Virginia, 443 U.S. 307 (1979). Denial of procedural rights, illegal conviction.

Benton v. Maryland, 395 U.S. 784 (1969). Equal Protection Clause Rights, Right to an impartial judge.

Coleman v. Thompson, 501 U.S. at 722, 750 and 111 (1991). Fatal variance, Averment to indictment.

Apprendi v. New Jersey, 530 U.S. 466 (2000). Improper increase in sentencing without supporting evidence

Strickland v. Washington, 466 U.S. 668 (1984). Defendant's right to effective assistance of counsel.

Due Process Clause Under The Fourteenth Amendment Of The United States Constitution.

United States Constitution Fifth Amendment.

United States Constitution Sixth Amendment.

United States Bill of Rights.

Georgia Code of Judicial Conduct, Canon 3 (B) (5).

Official Code of Georgia Annotated § 17-8-57.

Statement Of The Case

During the May Term of 2005, the Haralson County, Georgia, Grand Jury indicted Larry Cash and Jimmy Wayne Wright for the crime of malice murder (2 cts.), felony murder predicated on aggravated assault with intent to murder (2 cts.), and aggravated assault with intent to murder, and with a deadly weapon (2 cts.). In March of 2008, co-defendant, Jimmy Wright

pleaded guilty to two counts of malice murder in the deaths of James Jackson and Tina McAdams, Wright provided the State with a detailed account of what transpired. Wright's testimony, in the negotiated plea for two life sentences without parole to avoid the death penalty, exonerated Cash of any wrong-doing. In his confession, Wright detailed how he used the unsuspecting Cash to make a phone call to have Jackson and McAdams show up to where Wright

was at. Jackson and McAdams arrived shortly later that night with the Petitioner's cousin, Chris Cash. Immediately after arriving Wright shot Jackson and McAdams then turned the gun on both Cashes. Petitioner ran into the nearby woods, but Chris Cash could not escape. Wright, holding the gun on Chris Cash told the Petitioner to come out of the woods or he would kill his cousin. Petitioner complied and was told by Wright that if he or his cousin called the police Wright would kill them and their families.

After getting to their homes, Chris Cash called the police leading to the arrest of Wright, the Petitioner and his cousin.

Initially, the State proceeded to seek the death

penalty against Wright and the Petitioner, but gave Chris Cash five years probation for making the phone call.

The criminal case was heard by Haralson County, Georgia, Superior Court Judge Michael Murphy. Many were well aware that Judge Murphy was related to Tina McAdams by marriage making them second-degree cousins. Trial counsel made not one attempt to recuse Murphy from hearing the case against the Petitioner's wishes.

Events At Trial

From the opening of proceedings, Judge Murphy held that the State could change its theory culpability. Allowing the State to present inconsistent theories into its case against Cash. Though Wright's testimony exonerated, the State made Cash the central piece in the criminal case. Evidence was not brought forth that Cash was a knowing participant or that he was armed. Testimony by Wright plainly demonstrated that Cash was unaware of what was to take place and during the crime his life as well as his cousin's were in danger.

The trial proceeded on the counts of malice murder, felony murder and aggravated assault. The State's presentation of their case did not place a weapon in the hands of the Petitioner, nor did testimony or evidence show Cash as a co-conspirator. The State then tried to change theories without success.

This issue affected the outcome of the trial as it allowed the trial court to omit the required language "intent to murder," as charged in the indictment when charging the jury on the crimes alleged.

The trial court, though requested by the defense, refused

to send the indictment to the jury room to prevent any confusion that may arise.

The jury returned a verdict that acquitted the PETITIONER of malice murder and aggravated assault on McAdams, but guilty of felony murder of both victims and aggravated assault on Jackson. The record shows the trial judge was himself confused about the verdict and sought to poll the jurors but the defense objected.

REASONS FOR GRANTING THE PETITION

1. The rights of a defendant under the Due Process Clause of the Fourteenth Amendment of the United States Constitution were not properly utilized in the Georgia courts when the lower and higher courts held that a trial judge can hear a case though that judge isn't impartial.

It has long been held that a state conviction is unconstitutional even though the statute defining the offense, or any other governing statutes' constitution of the conviction was obtained in violation of the Federal constitutional right, that is, if the conviction resulted from the denial of procedural rights secured by the constitution. See Jackson v. Virginia, 443 U.S. 307 (1979).

The bulk of Federal constitutional procedural rights fall into three categories:

- (1) Those procedural rights secured by the Due Process Clause of the Fourteenth Amendment insofar as it embodies the requirement of fundamental fairness, but does not incorporate any of the Bill of Rights;
- (2) There are the procedural rights secured by the provisions of the Bill of Rights made applicable to the state criminal proceedings under the Due Process Clause of the Fourteenth Amendment by the "selective incorporation" decisions of the 1960's and other cases

and

(3) There are procedural rights secured by the Equal Protection Clause of the Fourteenth Amendment. See Brady v. Maryland, 373 U.S. 83 (1963); Benton v. Maryland, 395 U.S. 784 (1969).

Finally, with respect to procedural rights secured by due process fundamental fairness requirement, a conviction is unconstitutional if it results from a denial of:

the right to an impartial judge.

The State of Georgia has its own safeguards that are meant to protect a defendant of undo prejudice and bias from the trial court. These safeguards were enacted by the Georgia Legislature to prevent the endangerment of one's due process rights by a trial court that has a bias that prevents a fair trial;

The Georgia Code of Judicial Conduct, Canon 3 (B) (5) provides that, Judges shall perform judicial duties without bias or prejudice. Judges shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

The Official Code of Georgia § 17-8-57 provides, it is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge

violate this Code section, the violation shall be held by the Supreme Court or Court of Appeals to be error and the decision in the case reversed, and a new trial granted in the court below with such directions as the Supreme Court or Court of Appeals may lawfully give.

This statute protects a defendant from prejudice from the bar, or a fundamental miscarriage of justice. The record of this case shows that these protections were ignored by the state habeus corpus court and the Supreme Court of Georgia as the Petitioner showed documented proof and deposed testimony from a direct family member on the stand during the state habeus evidentiary hearing that the trial judge was in relation to the deceased victim. This fact was known to the trial judge; Michael Murphy, prior to trial, during trial, and on direct appeal as Judge Murphy heard and denied the Petitioner's motion for new trial.

This constitutional error and procedural violation is shown plainly in the record when during the jury instructions the trial judge created an overment of the indictment in regards to the language of aggravated assault. The trial judge removed the element of "intent to murder" from the jury's consideration. The fatal variance was the result of an incomplete charge that allowed the jury to find guilt without regarding the essential elements of the charge as required by law, instead relying on a loose and open interpretation. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed. 2d. 640 (1991).

The Petitioner's right of due process was endangered.

when the trial judge defined a crime as an act which may be committed in a manner other than the manner alleged in the indictment. SEE PUCKETT V. UNITED STATES, 556 U.S. 129 (II) (a), 129 S.Ct. 1423, 173 L.Ed. 2d. 266 (2009).

This issue is not novel to the courts in Georgia as this constitutional violation and plain-error has been heard and corrected. These holdings clearly hold that the trial judge should have recused himself when he knew he was related to the victim. SEE WARD V. STATE, 262 Ga. 293, 417 S.E.2d. 130 (1992); GEORGIA CARRY. ORG., INC. V. JAMES, 298 Ga. 420, 782 S.E.2d. 284 (2016).

In the area of the life sentences imposed by the trial court, the increased sentence is contrary to this Court's holding in APPENDI V. NEW JERSEY, 530 U.S. 466 (2000). The United States Supreme Court ruled that the state court procedure of a judge assessing increased penalties was an unacceptable departure from the jury tradition required by the Sixth and Fourteenth Amendments that require a jury to find on the basis of proof beyond a reasonable doubt the factual determination for the increased penalties. SEE RING V. ARIZONA, 536 U.S. 584 (2002).

A defendants due process rights are endangered when a conflict exists that possibly clouds a trial judges' decision making. When that trial judge avers on indictment and interjects language that is unconstitutionally broad in regards to the aggravating circumstances in the jury instructions is plain-error. The question must be asked, would the jury had come to the same verdict had the aggravating factors not been vague and amended by the trial court. SEE JONES V. UNITED STATES, 527 U.S. 373, 402 (1999).

Appellate review is required when the courts in Georgia do not address this issue in a meaningful manner, instead, the State cites a case under common law from 1904 in denying the petitioner his right to a trial judge free of prejudice and bias. See Baldwin v. State, 120 Ga. 188 (1904).

2. The Rights of the defendant were not properly utilized under the safeguards of the Fifth and Fourteenth Amendments when the trial court created an averment in the indictment that removed the element of "Intent To Murder," from the jury's consideration which was predicated upon an aggravated assault charge, "with the Intent to Commit Murder."

The courts in Georgia have held that the aggravated assault statute, (O.C.G.A. §16-5-21), authorizes convictions on alternate methods of assault in the disjunctive. The State need only show that aggravated assault had been committed in any of the separate ways listed in the indictment, even if the indictment uses the conjunctive rather than the disjunctive form, then citing the petitioner's own case, Cash v. State, 297 Ga. 859 (2015).

This argument has been raised in the Federal circuit courts regarding aggravated assault and the improper charging of the essential elements thereof. In those cases the Federal appellate courts weighed differently on those state cases than Georgia. The appellate courts generally held that, a state court's narrowing construction

will be upheld "so long a rational factfinder could have found evidence of the elements identified by the construction." See Wiley v. Puckett, 969 F.2d. 86, 91-92 (5th Cir. 1992); United States v. Chanthadara, 230 F.3d. 1237, 1262 (10th Cir. 2000); Hoffman v. Arave, 236 F.3d. 523, 541 (9th Cir. 2001).

Interestingly, the Georgia courts have also held in the same manner, holding that,

In criminal prosecutions, the court's instructions must be tailored to fit the charge in the indictment and the evidence adduced at trial. In particular, that is true when the offense charged may be committed in one of several ways, but the indictment charges one specific method. Indeed, averments in an indictment as to the specific manner in which a crime was committed are not mere surplusage, and such averments must be proved as laid, or the failure to prove the same will amount to a fatal variance and a violation of the defendant's right to due process of law. See New v. State, 327 Ga. App. 87; 755 S.E.2d. 568 (2014).

Yet, the State has shown a propensity to rule against a defendant on the same argument prior to this case and since. See Crowder v. State, 265 Ga. 719 (1995); Bruce v. Smith, 274 Ga. 432 (2001).

The State does not find a possibility of prejudice that infected the entire trial in this case when the trial judge was within (3) three degrees of relation to the victim and the trial judge created an averment to the indictment that broadened the language of the statute. The State does not hold that an actual and substantial disadvantage took place that denied the petitioner his due process rights contrary to United States v. Frady, 456 U.S. 152 (1982).

3. The State of Georgia does not follow the United States Constitution in governing a defendant's Sixth Amendment right to effective assistance of counsel at any stage of a criminal case.

Prior to filing a state habeas corpus, the Petitioner went through the appeal process in the form of a motion for new trial. Though having reservations, the petitioner agreed to continue being represented by his trial attorney. Petitioner was not informed that he was losing his right to a claim of ineffective assistance of trial counsel.

Trial counsel's failure to motion the trial judge to recuse himself knowing that a conflict existed was extremely prejudicial, a factor which could support a finding of harmful error. See Strickland v. Washington, 466 U.S. 668, 694 (104 S.Ct. 2052, 80 L.Ed. 2d. 674) (1984). Counsel, though knowing that the trial judge was related to the victim, failed to object to the judge hearing the case. When the case was heard over three years later on a motion for new trial, again, the same trial judge heard the case without objection being raised against the fact that the defendant's due process rights were being violated.

As raised above, the essential elements of aggravated assault were charged upon the jury without the statutory definition of "assault," the charges were substantially different in the language of, "intent to murder," thus making the charge fatally insufficient because it did not instruct on substantive points or issues involved in the case.

Here, the felony murder counts and the two aggravated

assault counts were based on the petitioner being present at the time of the crime being committed. The State initially sought the death penalty for the petitioner merely being present, though unarmed and his own life being threatened.

There is a reasonable probability of a different outcome had counsel mounted a meaningful argument to the evidence not supporting the crimes charged. The State failed to introduce sufficient evidence to enable a rational jury to find Cash guilty beyond a reasonable doubt of the crimes charged. See Jackson v. Virginia, 443 U.S. 307, 318-319 (99 S.Ct. 2781, 61 L.Ed. 2d. 560) (1979); Burks v. United States, 437 U.S. 1, 10-11, 16-18 (98 S.Ct. 2141, 57 L.Ed. 2d 1) (1978).

Trial counsel's decision not to raise these issues was not a reasonable tactic or trial strategy. The vague component of the MENS REA for a conviction under O.C.G.A. § 16-5-21 was not difficult to discern or the product of esoteric or unpredictable judicial decisions. Instead, it is found in the plain language of the statute. See Strickland v. Washington, *Supra*. Trial counsel only needed to request an instruction on the law of felony murder and aggravated assault.

Trial counsel's failure to raise these issues at trial and on direct appeal can possibly be construed as a breakdown of the adversarial process. See United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d. 657 (1984).

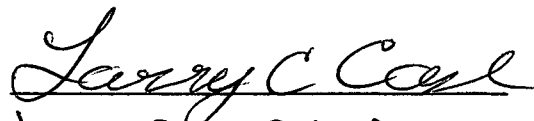
Though the above issues were raised in a manner that procedure dictates, the courts in Georgia have held that no harm or prejudice occurred. These rulings are contrary to settled law and the safeguards of the United States Constitution.

THEREFORE, the PETITIONER respectfully moves this Honorable Court to vacate his convictions and sentence as contrary to law.

CONCLUSION

THE PETITIONER prays this Court to grant his Petition For Writ OF CERTIORARI based on the facts shown on the record and grant relief in this criminal case.

Respectfully submitted this 4th day of September, 2019.


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