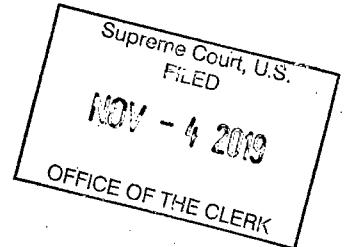


No. 19A150
19-6524

Offices of the
Supreme Court of the United States

IN THE
SUPREME COURT OF THE UNITED STATES

Franklin Elliott Benson — PETITIONER
(Your Name)



vs.
Aimee Smith Warden RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE 11th CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Franklin Elliott Benson
(Your Name)

Dooly State Prison P O Box 750
(Address)

Unadilla Georgia 31091
(City, State, Zip Code)

N/A
(Phone Number)

Questions Presented

- 1) Is the element of "causing the death" an essential element of malice murder in Georgia O.C.G.A. 16-5-1(a), the indictment which accused the Petitioner of causing the death and Patterson v New York 432 U.S. 197 Schad v Arizona 501 U. S. 624?
- 2) Did the burden rest with the State to prove beyond a reasonable doubt that the accused caused the death of the victim?
- 3) Did the state inform the court that causation did not apply in this case (TT 1347 1348)
- 4) Did the state fail to present evidence which proved beyond a reasonable doubt that Petitioner caused the death?
- 5) Did the Court instruct the jury that the presence of the defendant at the scene of the crime is an essential element? (TT 1458)
- 6) Did the State fail to present evidence which proved beyond a reasonable doubt that the Petitioner was present at crime scene?
- 7) Did Petitioner receive fair trial when he was convicted of offense without a jury being required to find proof of essential element of causing the death of the victim?
- 8) Did the Supreme Court of the United States rule: Accordingly

We held in the Thompson case that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is Constitutionally infirm? (Jackson v Virginia 443 U.S. at 314 Thompson v Louisville 262 U.S. 199 80 S Ct 624 (4 L Ed 2d 654) (1960)

q) Did the court rule in Smith v Smith that: "Being an element of the crime the State must prove beyond a reasonable doubt defendants presence at the commission of offense.? 321 F Supp 282 (ND Ga 1970) affirmed 454 F 2d 572 (5th Cir 1971) cert denied 409 U.S. 855 93 S Ct 99.

10) Did the State bear the burden of proving the actus rea for each offense charged?

11) Did the State fail to prove actus rea beyond a reasonable doubt for each offense charged? Presence at the crime scene, causing the death, removing body parts from the scene of death and concealing the death of another human being.

12) Did the United States Supreme Court rule in Berger 295 U.S. 78 82 79 L Ed 1314: "Allegations of an indictment and proof at trial must correspond"?

13) Did the State fail to present proof at trial which corresponded with the allegations in the Newton County indictment?

14) Did the state claim and inform the jury that the offenses occurred in DeKalb County rather than indicted County where trial held? (TT 1421)

15) Did Georgia Statute O.C.G.A. § 17-9-4 permit the accused Petitioner to raise a claim of Void Judgment in any court even when not previously raised?

16) Did trial counsel fail to provide effective assistance at trial by failing to challenge lack of venue after State announced to the jury that venue was not in Newton County Georgia? (TT 1421)

17) Did trial counsel fail to provide effective assistance at trial by failing to object to full courtroom closure? *Owens v United States* 517 Supp 2d 570 577 *United States v Gupta* 699 F3d 682 689

18) Did the State inform the jury that "there was no evidence that suggested that the accused Petitioner dismembered the victim's body or killed her at the Highway 212 location. In all likelihood though Leslyan Williams was killed in DeKalb County"? (TT 1413 lines 4-6)

19) Did the trial court instruct the jury: "The law provides that

criminal actions Shall be tried and indicted in the County in which the crime was committed? (TT 1456) Jones v State 272 Ga 900 902.

- 20) Did Appellate counsel fail to provide effective assistance where he failed to present viable claim of error at Motion for New Trial but raised claim at direct appeal with procedural bar for failing to raise claim at Motion for New Trial.
- 21) Did the federal court deviate from its own ruling and the United States Supreme Courts denial of certiorari where state failed to issue proper instructions to jury and state failed to disprove Petitioners defense presented at trial? (TT 1111) Holloway v McElroy 632 F 2d 605 cert denied 451 U. S. 1028 101 S CT 3019
- 22) Did the State Appellate Court, the State habeas court and the Federal habeas court all fail to address the accused Petitioners claim of insufficient evidence of removing body parts from scene of death, insufficient evidence of causing the death, insufficient evidence of concealing a death and insufficient evidence of presence at the crime scene?
- 23) Does the Georgia Corpus Delicti rule require proof that the accused

caused the death of the victim? *Sheffield v. State* 281 Ga 33 (2006), *Chapman v. State* 275 Ga 314 (2002) and *Blackwell v. State* (1999) (And proof that the accused caused the death)

- 24) Did the accused petitioner's State habeas brief identify cause and prejudice for overcoming claims allegedly defaulted by the Court?
- 25) Did the State Amend the indictment by presenting evidence that differed from accusations in indictment? *Ex parte Bain* 121 U.S. 1 10 7 S.Ct 781 786 30 L.Ed 847 (1887) quoted in *Stirone* supra 361 U.S. at 217 80 S.Ct at 273 (Effective holding of the Supreme Court and the 11th circuit) also see *Berger v. United States* 295 U.S. 78 82 55 S.Ct 629 630 79 L.Ed 1314 (1935)

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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OTHER

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 A 1 to A 4
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 B 1 to B 4
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 _____ 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 _____ 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.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 4-2-19.

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: 6-5-19, 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 November 2, 2019 (date) on August 7, 2019 (date) in Application No. 19 A 150.

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 . A copy of that decision appears at Appendix .

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. U. S. Constitution 5th Amendment Appendix F
2. U. S. Constitution 6th Amendment Appendix F
3. U. S. Constitution 14th Amendment Appendix F
4. Official Code Of Georgia Annotated § 9-14-48 (d) Appendix G
5. Official Code Of Georgia Annotated § 1b-5-1(a) Appendix G
6. Official Code Of Georgia Annotated § 17-9-4 Appendix G
7. Miscarriage of justice: defined. Appendix G

Statement of the Case

On October 30, 2007 body parts were discovered in Newton County Georgia on property owned by Petitioner. The body parts were scattered out over the grounds. On November 9, 2007 the Petitioner was questioned at his Dekalb County business. During the interview into the previously unidentified victim the Petitioner informed investigators that he was presently talking to the Dekalb County Police about his missing girlfriend and gave them the name and address of Leslyan Williams. He also gave them the names of the Dekalb investigators involved. The investigators decided that the Petitioner was a suspect ending all other investigative inquiries based upon his relationship with the victim. The now accused Petitioner was arrested 2 days later and charged with Malice Murder; removal of body parts from scene of death and concealing the death of another. Over the next 2 weeks the investigators searched every location and vehicle associated with the accused Petitioner finding no evidence of a crime.

The Newton County Grand Jury indicted the accused Petitioner of Malice Murder: for that on October 30, 2007 Franklin Elliott Benson did then and there commit the offense of murder

to wit: the accused unlawfully, with malice aforethought, caused the death of another human being by homicidal etiology unknown.

That Franklin Elliott Benson on October 30, 2007 did then and there removed the body parts from the scene of death.

That on October 30, 2007 Franklin Elliott Benson did then and there concealed the death of another human being.

During the trial the State failed to produce evidence by way of testimony or exhibits entered into evidence at trial that proved beyond a reasonable doubt or even accused that the accused Petitioner was present in Newton County Georgia on October 30, 2007. The accused Petitioner's defense was that he was not present in Newton County Georgia at or near the crime scene on October 30, 2007 or a date close to October 30, 2007. Because of the accused Petitioner's Alibi defense the Court instructed the jury that the State must prove the petitioners presence at the scene beyond a reasonable doubt. (T 1456) That the defendants presence at the scene is an essential element of each offense and must be proved beyond a reasonable doubt just as any other essential

element.

On direct appeal, the Georgia Supreme Court summarized the evidence presented as follows:

Benson and Williams became romantically involved in 2007, and Benson began spending several nights a week at a home that Williams had purchased in DeKalb County. Williams had family and friends with whom she regularly communicated; was in apparent good health; held a job; was remodeling her home so that she could start a catering business there; and regularly worked in her yard.

Benson, who operated an automobile repair business near Williams's home, was having financial difficulties with that business in 2007 and had borrowed over \$ 10,000 from Williams. On the morning of Saturday, October 27, 2007, both Benson's sister, Cassandra, and Williams's sister called Williams to wish her happy birthday. Williams told them that Benson was taking her to a casino in Mississippi for the weekend, and she told her sister, with whom she frequently spoke, that she would call her on Monday. Benson and Williams, however did not go to Mississippi.

Around noon on October 28, 2007, Benson and Williams had a domestic dispute over the money that Benson had borrowed from Williams. The police responded to Williams's home, but, because no violence had occurred, the police left after questioning Benson and Williams. About 6:00pm. on October 28, Benson called his bank to check on his account, which was overdrawn. At 7:32pm. that day, Williams's credit card was swiped on the credit card machine at Benson's business. Whoever swiped the card attempted to transfer \$ 7500 from Williams's account,

but the bank declined the transfer because the bank declined the transfer because the amount exceeded the transfer limit on the card.

On Monday morning October 29, Williams was scheduled to meet with Cassandra to go to a job fair. Williams however, did not meet with Cassandra and did not answer her cell phone. Williams also did not call her sister, as she had promised to do. Benson did not start work at his regular hour that Monday and could not be reached on his cell phone.

In the early morning hours of Tuesday, October 30, human body parts were found scattered around a secluded, wooded area near a house owned by Benson in Newton County. A coroner examined the remains and determined that the cause of death was homicide by an unknown cause. It was not until November 9, 2007, that law enforcement officials identified the body parts as belonging to Williams. Meanwhile, Benson never reported Williams missing before moving out of her house on November 3, and told conflicting stories about her disappearance and his activities around that time.

Benson also told law enforcement officers that Williams was selling drugs from her house, and he asked another sister, Jennifer, to tell officers the same thing. Jennifer, however, would not do so, because it was not true, and Williams's friends and family said that she had never sold drugs. Moreover, Benson asked Jennifer to tell law enforcement officers that he never lived with Williams.

A white, powdered substance that police found in Williams's house turned out to be sheetrock powder. In addition, about 8:00 a.m. on October 29,

2007, a video camera at a hotel in Chattanooga Tennessee, recorded Benson towing Williams's car into the hotel parking lot and leaving it. Williams car keys were later found at Benson's business.

Benson, 754 S.E.2d at 25-26

Accused petitioner contended on direct appeal that the evidence was insufficient to support his convictions, that the trial court erred in closing the courtroom during voir dire, and his trial counsel provided constitutionally ineffective assistance.

The Georgia Supreme Court's summary of the States evidence at trial fail to present any evidence which proved beyond a reasonable doubt that the accused Petitioner was present in Newton County Georgia at or near the crime scene on October 30, 2007

The summary of the trial evidence fails to prove beyond a reasonable doubt or even allege that accused Petitioner committed an unlawful homicide

The summary of the trial evidence fails to prove beyond a reasonable doubt or even allege that accused Petitioner possessed malice aforethought (specific intent to kill) at the time the victim was killed.

The summary of the trial evidence fails to prove beyond a

reasonable doubt or even accuse that the accused Petitioner caused the death of the victim.

The above are the essential elements of malice murder plus the addition of presence at the scene of the crime according to the jury instructions by the court. (TT1456)

Within the summary of evidence there is no mention of the crime of murder, the crime of removing body parts or concealing a death.

The accused Petitioner was found guilty of all three counts and sentenced to life in prison plus eleven years.

Petitioner filed a timely motion for new trial arguing sufficiency of the evidence among other claims.

Petitioner filed a timely motion for appeal arguing sufficiency of the evidence among other claims.

Petitioner filed a timely State habeas arguing sufficiency of the evidence among other claims.

Petitioner filed a timely Federal habeas arguing sufficiency of the evidence among other claims.

Petitioner filed a timely Federal appeal also arguing sufficiency of the

evidence among other claims.

Petitioner is now before the United States Supreme Court with a timely filed motion for certiorari arguing insufficient evidence.

Reasons for Granting The Petition

Petitioner is being held in violation of the United States Constitution and laws of the United States. During the petitioner's State trial there were several instances of blatant violations of the rights afforded the petitioner by the United States Constitution. These violations resulted in the infirm conviction presently before this court. Although some of the claims of error were procedurally defaulted during post conviction proceedings it doesn't negate the fact that they did occur and they aided in achieving an unconstitutional conviction.

During the Petitioners State habeas the petitioner submitted a brief which outlined and identified cause and prejudice for those procedurally defaulted claims. (State Habeas Index pgs 21-166). The State habeas court failed to afford the petitioner a full, fair and adequate hearing where if issues in Petitioner's brief had been examined the petitioner's claims would have been more fully developed. Instead the Court notified the petitioner that Petitioners brief was on the front seat of his truck. The Court identified the Petitioners brief as that "one hundred forty five page brief." The Petitioner's brief identified areas within the trial record that required further factual development.

The Federal Court's assessment as well as the State Habeas Court's assessment have been based on deference to the State appellate court and the trial court's rulings. Petitioner argues that this is where the constitutional violations started and they continue to be used to support the unconstitutional deprivation of Petitioner's liberty. Petitioner asserts that with a *de novo* hearing that's full, fair and adequate the Court will easily see the merit in the issues Petitioner is presenting. The finding of fact and law do support the Petitioner's request for reversal of convictions and sentences.

This Court has not been faced with an argument this compelling where the accused Petitioner was not present at the scene of the crime and was convicted of offenses that one must be present in order to commit.

The Newton County Grand Jury indicted the Petitioner for the violation of three offenses. Each offense consists of acts and intent. The conditions of each offense involve an accused being present at the crime scene and performing some act which is the cause and fact of the offense.

This miscarriage of justice has lasted for 12 years with the Constitutionally infirm conviction causing an innocent citizen to have gone through the stigma of being a convicted individual.

A de novo examination of the facts in evidence will reveal a record completely void of a presentation of evidence beyond a reasonable doubt of every essential element of each offense.

The indictment lists the essential elements which if proved beyond a reasonable doubt would support a proper constitutional conviction. The trial court issued instructions to the jury that the accused's defense is that he was not there at the crime scene, therefore you must find that the state had proved beyond a reasonable doubt the essential element of presence at the scene of the crime. (TT 1458) The charge on alibi did not shift the burden of persuasion to the defendant to the appellant to show that he was not at the scene of crime; rather charge placed the burden of proving appellant's presence at scene on the State Pittillo v State 250 Ga 510

Being an element of the crime, the State must prove beyond a reasonable doubt defendant's presence at the commission of the offense. It is impermissible to require the defendant to prove his presence by any definite quantum of proof. Assuming that the State presents evidence of defendant's presence the burden going forward may shift to defendant but it must not carry with it the requirement that the defendant establish his by any quantum of proof (ie burden of proof or persuasion). Evidence of alibi should come into the case like any other evidence for jury's consideration as to whether guilt has been established beyond a reasonable doubt Smith v Smith 321 F.Supp 282 (ND Ga 1970) affirmed 454 F.2d 572 (5th cir 1971) cert denied 409 U.S. 855 93 S.Ct 99

The State failed to present a scintilla of evidence which proved beyond a reasonable doubt or even alleged that the accused petitioner was present at the crime scene. However testimony by a state witness, unchallenged and not rebutted, proved beyond a reasonable doubt that petitioner was in Atlanta not Newton County at the time of the crime. (TT 111)

In addition to instructing the jury about the essential element of Petitioner's presence at the scene, the court also instructed on the essential element of venue in Newton County Georgia. (TT1456) However the State announced to the jury "We certainly don't have any evidence to suggest that he dismembered her body or killed her at this Highway 212 location. In all likelihood though Leslyan Williams was killed in DeKalb County." (TT1413) The court also instructed that "Venue is a jurisdictional fact that must be proved by the State beyond a reasonable doubt as to each crime charged. Venue must be proved by direct or circumstantial evidence or both." (TT1456). Georgia Statute O.C.G.A § 17-9-4 reads: The judgment of a court having no jurisdiction of 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.

The Georgia Supreme Court summarized the evidence in the Petitioner's case by indicating seven (7) paragraphs of the strongest of the prosecution's evidence. These seven paragraphs are quoted in the Statement of The Case. (1) These seven paragraphs fail to present

sufficient evidence which proved beyond a reasonable doubt that Petitioner was "present at the scene of the crime" in Newton County on October 30, 2007. ② These seven paragraphs fail to present sufficient evidence which proved beyond a reasonable doubt that Petitioner "then and there" performed an unlawful homicide. ③ These seven paragraphs fail to present sufficient evidence which proved beyond a reasonable doubt that Petitioner did "then and there" possessed malice aforethought (specific intent to kill). ④ These seven paragraphs fail to present sufficient evidence which proved beyond a reasonable doubt that Petitioner did "then and there" caused the death of the victim. ⑤ These seven paragraphs fail to present sufficient evidence that Petitioner did "then and there" removed body parts from the scene of the death. ⑥ These seven paragraphs fail to present sufficient evidence which proved beyond a reasonable doubt that Petitioner did "then and there" concealed the death of another human being.

The State failed to present evidence which tended to identify acts or conduct by the accused Petitioner which would be a violation of Statutes charged in indictment.

On pages 1347-48 of petitioner's trial transcript the State admitted that the essential element of causing the death did not apply in this case. "I'm looking at this cause the death charge, Judge. I mean, if -- it doesn't seem to apply in this case... I mean, again there's not even any evidence that he struck her." The Georgia Statute for the crime of murder requires that the accused "unlawfully" "with malice aforethought" "cause the death of the victim". O.C.G.A. 16-5-1(a). The 1968 Criminal Code of Georgia page 1249-1261 States especially that causation is an essential element of the crime of murder in the State of Georgia and no time limit is in place. The Georgia Supreme Court in Parks v State 254 Ga 403 held: The act of the killing must also be proved in murder case. That is in addition to proving malice the State must prove that defendant caused the death of another. In Wilson v State the Georgia Supreme Court identified causing the death 190 Ga 824, 829 (10 S.E. 2d 861) (1940) The court held: The requirement for determining the proximate cause of death. Where one inflicts an unlawful injury such injury is to be accounted as the efficient proximate cause of death, whenever it shall be made to appear either that (1) the

injury itself constituted the sole proximate cause of the death or that (2) the injury directly and materially contributed to the happening of a subsequent occurring immediate cause of the death or that (3) the injury materially accelerated the death, although proximately occasioned by a pre-existing cause." Ward v State 238 Ga 367 369 233 S.E. 2d 175 (1977) accord James v State 250 Ga 655 656 300 S.E. 2d 492 (1983)

The seven paragraphs which the Georgia Supreme Court summarized as the evidence which was sufficient to prove the guilt of Petitioner failed to prove or mention that Petitioner caused the death. The Federal Habeas Court failed to afford the Petitioner an actual examination of the record evidence. Thereby failing to provide a full fair and adequate hearing on the merits. Deference is not warranted where the evidence fails to identify evidence beyond a reasonable doubt of all the essential elements of every charge.

The two most important elements to the States case: Petitioner's presence at the scene and his unlawful acts or conduct which caused the violations of the statutes charged both fail to appear

and fail to be mentioned in the evidence presented at trial. With no proof beyond a reasonable doubt that petitioner was present at the crime scene (required essential element TT1458) and no presentation of evidence of unlawfully causing the death the State's evidence fails to corroborate any of the essential elements of offenses charged.

The Federal court failed to afford petitioner full, fair and adequate hearing in order to develop the findings for a reliable assessment of the facts before the State court.

If the habeas applicant did not receive a full and fair evidentiary hearing in a State Court either at the time of the trial or in a collateral proceeding, then Federal Court must hold an evidentiary hearing in an attempt to resolve disputed factual issues. *Id* at 318 83 S.Ct 745 *Townsend v Sain* 372 U.S. 293 318

Applying the no evidence criterion of *Thompson v Louisville* 362 U.S. 199 206 805 S.Ct 624 the court will find the record void of any mention of: Petitioner's presence at the scene, causing the death, removing body parts from scene of death or concealing the death in Newton County Georgia on October 30, 2007-presented in evidence at trial.

Applying the Jackson Standard the court will find the record void of proof beyond a reasonable doubt of every element of every offense charged.

During the guilt/innocent phase of Petitioner's trial the State failed to establish jurisdiction over person and subject matter. The fact of the jurisdiction is an essential element of the trial process. The State removed jurisdiction from County where trial held - "We certainly don't have any evidence to suggest that he dismembered her body or killed her at the Highway 212 location. In all likelihood though Leslyan Williams was killed in DeKalb County." Therefore the conviction and sentence is void. Georgia's Statute O.C.G.A. § 17-9-4 reads: The judgment of a court having no jurisdiction of 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. The State and Federal habeas courts failed to afford Petitioner a full and fair hearing on Petitioner's lack of jurisdiction and void judgment claims.

In addition to the United States Constitution Amend Six the Georgia Supreme Court held in Tolbert v. Tolle 291 Ga 357 (2014): However,

Georgia's customary procedural default rule, which holds that claims not raised at trial and enumerated on appeal are waived does not apply to a claim that a criminal conviction or sentence was void on jurisdictional or other grounds. Such claims may be decided on habeas even where the issue was not raised in the trial and is not enumerated as error on appeal *O.C.G.A. 9-14-48(d)*.

The violation of this Constitutional right is not procedurally defaulted by any Georgia procedural default rule or law has confirmed that the petitioner is being held in custody in violation of the United States Constitution and laws of the United States.

Ex parte Boilman v Cranch 75 U.S. 95 2 LEd 554 (1807) If the imprisonment cannot be shown to conform with the fundamental requirements of law the individual is entitled to his immediate release. See *Fay v Noia* 373 U.S. 391 401 402 83 Sct 822 829 8 LEd 2d 274 (1963) More often than not claims of unconstitutional detention turn upon the resolution of contested facts.

Petitioner's conviction and denials of post conviction relief resulted in a decision that was based on an unreasonable determination.

facts in light of the evidence presented at trial.

The trial court failed to instruct the jury that it must find that the accused petitioner caused the death of the victim. This omission of this essential element in jury instructions allowed the state to achieve an unconstitutional conviction without a jury finding guilt beyond a reasonable doubt. (Prejudice shown) Presnell v. Kemp January 11, 1988 835 F.2d 1567 The court held: Georgia does not have a contemporaneous objection rule and accordingly a petitioner does not have to object an instruction at trial or preserve it for review in a state habeas corpus hearing. Harris v. United States 536 U.S. 545 558 153 L.Ed.2d 524 also see Holloway v. McElroy 632 F.2d 605 617 cert denied 451 U.S. 1028 101 S.Ct. 3019 69 L.Ed.2d 398 (1981), (cause for overcoming default) Georgia Statute O.C.G.A. § 17-8-58(b) which provides: Failure to object in accordance with subsection(a) of this code section shall preclude appellate review of such portion of jury charge, unless such portion of the jury charge constitutes plain error which affects substantial rights of the parties. Such error may be considered

on appeal even if it was not brought to the trial court's attention as provided in subsection (a) of this Code Section.

In Peterson v Haskins 316 F.3d 596 The judgment denying the habeas petition was reversed. A conditional writ was granted ordering petitioner's release from prison unless a new trial against him was commenced by the State. Petitioner contended that his due process rights were violated because the State Court omitted proximate cause from its instructions. The Supreme Court precedent hold that they complied with the constitutional mandate giving a defendant the right to have a jury determine beyond a reasonable doubt every element of crime.

What constitutes proximate cause is "undeniably a jury question".
Robinson v State 298 Ga 455 458 (782 S.E.2d 657)(2016)

The jury must be authorized to conclude that defendant's actions were the proximate cause of the victim's death for evidence to be sufficient to convict defendant of Malice Murder
Stribling v State 304 Ga 250 253

Petitioner's trial record shows the State informing the court that "causing the death instruction didn't apply in this case" (TT 1347, 48)

"I mean, we don't even have any evidence he struck her."

The Supreme Court specifically expressed the view that a conviction based on a record lacking evidence as to a crucial element of the offense charged violates due process *Vachon v New Hampshire* 414 U.S. 678 38 L Ed 2d 666 94 S Ct 664.

The essential elements of presence at the scene and causing the death were never presented in evidence, therefore the State failed to prove their existence beyond a reasonable doubt. No trier of fact can find a fact never present in evidence. No instruction was given to the jury to look for the element that was never presented to be able to be found. The evidence presented fails to be constitutionally sufficient to support a conviction for crimes charged.

The conviction in this case is a quintessential miscarriage of justice and must be reversed.

Reasonable doubt exists when the evidence fails to establish that the accused was present at the crime scene. Required element. Reasonable doubt exists where the evidence fails to establish that the accused caused the death of the victim. Required element of Malice murder.

Therefore the evidence is not sufficient to prove guilt beyond a reasonable doubt. Due process requires that conviction must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 10-21-19

