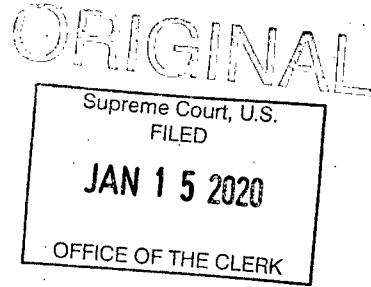


No. 19-7376



IN THE
SUPREME COURT OF THE UNITED STATES

ALICE TRAPPLER
PETITIONER

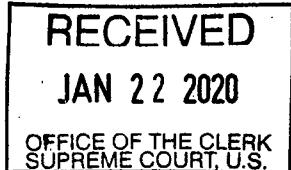
VS.

THE PEOPLE OF THE STATE OF NEW YORK
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Alice Trappler *Pro se*
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QUESTION PRESENTED

1. Upon trial counsel's failure to move to dismiss on legal insufficiency grounds at trial, is the uninformed automatic waiver and silently imposed permanent forfeiture of legal insufficiency claims per *Hines; Lane* a violation of criminal defendant's due process rights?
2. Is it constitutionally reasonable to forever forfeit legal insufficiency grounds, claims, and examination of prosecution's legal sufficiency requirement removing defendant's constitutional protections of burden of proof against the accused as applied by the *Hines; Lane* rule?
3. Can hearsay of a deceased codefendant, unable to be confronted or reliability tested, whom had devised a separate plan with a second codefendant, be used to implicate a third codefendant who had no knowledge of their plan, through coconspirator exception to the hearsay rule?

Is Sixth Amendment right to confront violated?

If there is no shared common plan or shared knowledge between the three, is there a conspiracy on which the hearsay exception can be based?

JURISDICTION

New York Court of Appeals, the highest court of review, denied Leave to Appeal on October 17, 2019.

Decisions:

Court of Appeals decision in *People v. Trappler*, 34 NY 3d 985 (10/17/2019)

People v. Trappler, 173 AD 3d 1334 (June 13, 2019)

Schuyler County Indictment 2012-37

Per U.S. Sup. Ct. Rule 10. 28 U.S.C.A. Section c:

c) a State Court has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this court.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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APPENDICES

- Appendix A Appellate Division Third Department Brief on Appeal; Docket No.: 106227
- Appendix B Appellant's Pro Se Supplemental Brief; Docket No.: 106227
- Appendix C Appellate Division Decision *People v. Trappler*, 173 AD 3d 1334 (June13, 2019)
- Appendix D Leave to Appeal Application to Court of Appeals dated August 13, 2019
- Appendix E Leave to Appeal denial dated 10/17/2019
- Appendix F Leave to Appeal seeking Re-argument Dated November 14, 2019
- Appendix G Schuyler County District Attorney's Opposition to application to reargue dated December 2, 2019
- Appendix H Answer to Opposition highlighting District Attorney's change in theory and proof
- Appendix I Order Denying Reconsideration dated December 19, 2019
- Appendix J Defendant's Motion to Vacate the Verdict pursuant to CPL § 330.30 presenting legal insufficiencies, juror misconduct, and raising false evidence presented at trial

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 C to the petition and is

reported at People v. Trappler, 34 NY3d 985 (10/17/19); or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the New York Appellate Division-Third Dept court appears at Appendix A to the petition and is

reported at People v. Trappler, 173 AD3d 1334 (6/13/19); 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 October 17, 2019. A copy of that decision appears at Appendix E.

A timely petition for rehearing was thereafter denied on the following date: December 19, 2019, and a copy of the order denying rehearing appears at Appendix I.

[] 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).

PETITION

New York Court of Appeals repeatedly held that “sufficiency of evidence,” basis for proof beyond a reasonable doubt, is not preserved for review if defendant, at the close of case, did not move to dismiss on that ground. (see *People v. Hines*, 97 NY 2d 56 (2001); *People v. Lane*, 7 NY 3d 888 (2006)) New York State law requires preservation of legal sufficiency by motion, Criminal Procedure Law section 290.10. Without this motion by trial counsel, forfeiture of constitutional rights results and forever prohibits review of legal insufficiency. Unknowing waiver by counsel’s inaction effectively negates requisite proof standard the People must meet. The Fifth Amendment applied through the Due Process Clause of the Fourteenth Amendment guarantees this right; proof beyond a reasonable doubt. Failure of trial counsel, and ensuing waiver by uninformed defendant, facilitate the disappearance of the People’s burden.

In re Winship, 397 U.S. 358 (1970) provides the essential of due process and fair treatment as relating to constitutional entitlement to proof beyond a reasonable doubt when charged with a violation of criminal law. “Reasonable doubt standard of criminal law has constitutional stature, and due process clause protects accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute crime with which he is charged.”

The result of the current New York standing and applied practice demonstrated by the Trappler case is loss of the fundamental constitutional right; the most protective of the accused, proof beyond a reasonable doubt. Under the current holding, every later challenge of the State’s proof of guilt standard is prohibited. This loss of rights manifests unknowingly, involuntarily, and without participation of the criminal defendant in this decision. The “waiver” qualifies as neither defined standard by United States Supreme Court. *Johnson v. Zerbst*, 58 U.S. 458 (1938)

“A waiver is ordinarily an intentional relinquishment or abandonment of a known (emphasis) right or privilege.” Due Process violation that causes prejudice and fundamental unfairness is shown by the Trappler case. *Zerbst* also holds “It has been pointed out that ‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and we ‘do not presume acquiescence on the loss of fundamental rights.’” This New York State law is contrary to clearly established United States Supreme Court law and standing constitutional principles.

In comparison, *Boykin v. Alabama*, 395 U.S. 238 (1969) sets forth clear basis and language where rights cannot be waived [by plea], an admission to all elements of formal charges, unless the defendant possesses an understanding of the law in relation to the facts. If this not so, the waiver of these constitutional rights is not valid. Yet, in the forum of an adversarial trial process, *Hines; Lane* and progeny silently applied impact unknowing, uninformed, defendants bringing about involuntarily waiver of legal sufficiency. This practice is contrary to the well established constitutional waiver process and rigid mandatory assurances. On this basis, the State’s automatic forfeiture of legal sufficiency is unconstitutional and contrary to well established United States Supreme Court law.

Despite trial counsel’s deficient performance resulting in fundamental rights forfeiture, Appellate Division review deemed Trappler had effective assistance of counsel. Right to counsel here is open to challenge as no reasonable professional judgment can support the failure to preserve Trappler’s right at that point in the trial process, and exposure to indefinite prejudice precluding viable future insufficiency of proof claims. All charges in Trappler hinged on conspiracy; accessorial liability. The Appellate Division’s decision identifies lacking proof of elements, most noteworthy the negated mental culpability prong required where charges are solely through accessorial liability. *Clark v. Arizona*, 548 U.S. 735 (2006) As applied to *mens*

rea, (and every other element), the force of the showing needed to overcome it, which is proof beyond a reasonable doubt that a defendant's state of mind was in fact what the charge states. (see *In re Winship*, 397 U.S. 358 361-363) The *Hines; Lane* preserve-or-forfeit standard render later evidence and filings by the People that prove insufficiency in fact existed, unreviewable. Counsel's failure prevented the Appellate Division authority of curative action and forever instituted ban of this most fundamental constitutional right protecting the client; Trappler. Under current New York standard, by trial counsel's failure to employ the procedural device of CPL § 290.10; Trial order of dismissal, addressing elements lacking from People's proof, appeal of right, and all available redress for legal insufficiency vanish forever.

This deficient performance combined with *Hines; Lane* practice is in contradiction with *Johnson v. Zerbst*, 58 U.S. 458 (1938) "The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance if his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." "The core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." (quoting *United States v. Ash*, 413 U.S. 300 (1973)).

New York Criminal Procedure Law section 70.10 defines "Legally sufficient evidence" as, "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence when corroboration required by law is absent." New York Criminal Procedure Law section 70.20 sets forth standards of proof for conviction as, "No conviction of offense by verdict is valid unless based

upon trial evidence which is legally sufficient and which establishes beyond reasonable doubt every element of such offense and the defendant's commission thereof."

The evidence in this case, as described by the Appellate Division, even when viewed in the light most favorable to the people, (see *People v. Danielson*, 9 NY 3d 342(2007); *Jackson v. Virginia*, 443 U.S. 307 (1979)) reflects a major deficiency in proving that Trappler was guilty of murder in the second degree. "Winship predisposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." (*Jackson*). Later concession by the People, by abrupt alteration of the prosecution's theory and facts of case and evidence presented at trial further emphasize the fundamental fairness negated by the *Hines; Lane* standing. Even the Appellate Division acknowledged that, "a different result would not have been unreasonable in view of defendant's testimony disavowing any knowledge of the shooter's plan to shoot the victim." (App. Div. Dec. at 2). (Appx. C). The testimony of the co-defendant (Hand) of the deceased shooter (Borden) was that he initially understood that he and the shooter were going to beat someone up. Later, the shooter (Borden) told him (Hand) that he "was going to kill the victim." (App. Div. Dec. at 4). (Appx. C). The conflicts presented by the People, let alone available of review, 'competent evidence' calls into question and refutes co-conspirator exception.

In Trappler, key compounded issues exist absent required corroboration, including violation of Sixth Amendment right to confront, among others in CPL § 330.30 Motion to set aside verdict, Appellate Briefs, and Motion for reconsideration to the Court of Appeals. (Appendices) For example, permitted hearsay testimony was quadruple hearsay; witness Hand

stated “he said”- [deceased co-defendant Borden] - “she said” [Trappler] - “he said” [deceased victim]. Later, completely opposite the prosecution’s presented theory, the People claim Hand was a ‘dupe’ and did not have knowledge removing hearsay qualification. Within, statements testimonial in nature from a deceased co-defendant Borden were relied, admitted, and claimed as *res gestae* at one point, to argue admissibility of co-conspirator exception based on content the deceased may, or may not, have said. No cross-examination had taken place of deceased co-defendant Borden. This course of trial events serves to show that prohibition of legal sufficiency redress as defined by New York State law not only violated Due Process, but thwarted much needed full and proper scrutiny of an illegal conviction.

Exceedingly relevant to the legal insufficiency forfeiture in Trappler, who is charged exclusively by accessory liability, is the statutory requirement of “acting with the mental culpability required for the commission thereof, …” (Penal Law § 20.00 Conduct liability for another) The co-conspirator exception to the hearsay rule exercised here to establish charges against Trappler is fatally flawed. Insufficiencies raised at the appellate level and Court of Appeals, unpreserved and unreachable per *Hines; Lane*, were validated when the People changed the theory of the case by conceding that the co-defendant “Hand was not a party nor privy to the agreement between appellant [Trappler] and Borden” but was a “dupe” recruited by Borden.

(Appx. ) Prosecution’s late stage on record assertion to the Court of Appeals removes admissibility of the heavily disputed co-conspirator exception at issue, and is in stark contradiction with the People’s previously presented argument below where the People argued that Borden “recruited Hand several hours before the murder to be part of the conspiracy.” (People’s Brief at 48.) adding that “the conspiracy commenced between Borden and defendant and grew to include Hand...” Trappler offers this example showing solid insufficiency of

evidence beyond a reasonable doubt grounds that is indisputably provided here. Based on disparate evidence, even the People are not clear on legal sufficiency elements called into question.

Another point offered to show prejudice and lost viable legal insufficiency argument is within the prosecution's theory presented to establish element of "aiding" (PL § 20.00). The prosecution presented deceased co-defendant Borden traveled to Trappler's mother's home, where Trappler then provided a shotgun the evening of the shooting, and at that time defaced the weapon with a file purchased by Borden at Home Depot packaged in a box (emphasis) at the time of purchase-then Trappler had the "box". No box existed and was proven so. The manufacturer and retailer of the prosecution's presented file supplied proof that their product (file) had never been packaged in a box, but rather sold only "shrink wrapped". (see Trappler's CPL § 330.30 Motion to set aside verdict). Trappler had no file box. Prosecution's star witness, co-defendant Hand, stated in testimony that the shotgun was in his apartment 3 days before, the "Tuesday" prior to time alleged of the presented "aiding". Trappler did not provide this weapon. Evidence and proof elicited removed essential elements on which the second-degree murder and all underlying charges stemmed from. Prejudice resulted where essential elements of accessorial liability were eliminated but failure to move, then the resulting *Hines; Lane* unknowing "waiver" deprived opportunity to rectify the ambiguous, then disproved conduct alleged against Trappler.

The New York Appellate Division conducted a "weight of evidence review" upon request. This review is distinctive and separate from legal insufficiency grounds for appeal. It is neither a substitute, nor a vehicle equally exonerative on the law. Additionally prohibitive and prejudicial is that the New York Court of Appeals cannot review matters involving weight of

evidence decisions. The weight of evidence review is not in lieu of, or an alternate means to legal satisfaction of prosecution's burden to prove beyond a reasonable doubt all elements included in the definition of the offense of which defendant was charged. *Sullivan v. Louisiana*, 508 U.S. 275 (1993) "What a fact finder must determine to return a verdict of guilty is prescribed by the due process clause; prosecution bears burden of proving all elements of offense charged and must persuade fact finder beyond a reasonable doubt of facts necessary to establish each of those elements; the beyond-a-reasonable-doubt-requirement applies in state as well as federal proceedings." Bearing in mind that the fact finder should have charges meeting the legal sufficiency standard, with elements satisfied per Judge's inspection and decision, presented to them for deliberation. A collateral consequence of counsel's failure in Trappler, is that the in-moment oversight of the judicial intermediary power, the State Supreme Court Judge, is circumvented and also forever lost. "The *Winship* doctrine requires more than simply a trial ritual." *Jackson v. Virginia*, 443 U.S. 307 (1979).

Every later challenge of the State's proof of guilt standard under the current holding manifests unknowingly, involuntarily, and without participation of the defendant in this decision. Purported state court's "waiver" qualifies as neither recognized by United States Supreme Court standard: *Johnson v. Zerbst*, 58 U.S. 458 (1938) "A waiver is ordinarily an intentional relinquishment or abandonment of a known (emphasis) right or privilege." The direct result of prejudice and fundamental unfairness is evident in the Trappler case.

Per *Strickland v. Washington*, 466 U.S. 668, Trappler must show that "counsel failed to act reasonably considering all the circumstances" (*id.* at 688). and must prove the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*id.* at 694). Even with the required "highly differential" look at

counsel's performance, the failure to move for Trial order of dismissal, the procedural device vital for then and there, and every evaluation forward, demonstrated deficient performance and unreasonable application of federal law and applied standards on effective assistance review.

As Trappler has shown, New York State courts have unreasonably concluded that Trappler was not prejudiced by counsel's inaction. Ineffectiveness caused unaided Trappler to unknowingly waive entire constitutional protections essential to her defense, and gaps, omissions, and deficiencies in the prosecution's required elements of charged crimes went unchecked at trial.

These will remain so according to New York Law by illegally obtained right's forfeiture.

United States v. Cronic, 466 U.S. 648 (1984) provides Constitutional principle and mandate applicable in the Trappler case. "... counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt." New York State practice of constitutional rights forfeiture is not in accordance with this steadfast established law. "Right to effective assistance of counsel is recognized, not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." (*id.*). And, "Trial is unfair if the accused is denied counsel at a critical stage of the trial." (*id.*). "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights which makes adversary process itself presumptively unreliable." (*id.*). Trail counsel's failure to move pursuant to CPL § 290.10; Trial order for dismissal based on legal insufficiency was "actual performance that prejudiced the defense" as this alleviated the prosecution of their legally sufficient proof burden then, and by *Hines; Lane* practice, for evermore.

Trappler identifies constitutional questions and the adverse impact the constitutional undermining application of *Hines; Lane* permits. When trial counsel neglects to move on CPL § 290.10, elemental facts required for proof standard are no longer called into question and the

fundamental fairness is lost. “[T]ruth” Lord Eldon said, “is best discovered by powerful statement son both sides of the question.” This dictum describes the unique strength of our system of criminal justice. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 U.S. 853 (1975) It is that ‘very premise’ that underlies and gives meaning to the Sixth Amendment. It “is meant to assure fairness in the adversary criminal process.” *United States v. Morrison*, 499 U.S. 361 (1981) Unless the accused receives the effective assistance of counsel, “a serious risk of injustice infects the trial itself.” (*Cuyler v. Sullivan*, 446 U.S. at 343)

Despite “mode of proceedings error” segue available for insufficiency review, the New York Courts decline to remedy the failure to preserve this constitutional necessity for valid conviction. [Appx. F) As the Trappler case demonstrates, the gravity of insufficient proof suffices as an “error that would affect the organization of the court or mode of proceedings prescribed by law.” *People v. Becoats*, 17 NY 3d 643 (2011), Errors that “go to the essential validity of the process and are so fundamental that the entire trial is irreparable tainted.” *People v. Rivera*, 23 NY 3d 827(2014); *People v. Kelly*, 5 NY 3d 116 (2005). As in the Trappler case, the Courts consistently have declined to recognize the “irreparable taint” and later mode of proceedings upset halting full and fair appellate review of legal sufficiency in accordance with constitutional mandates prescribed by law.

Further ramification on Trappler, under *Hines; Lane* is an interrelated departure from sound constitutional principles. Upon a criminal defendant’s unknowing waiver of legal insufficiency, burden shifting occurs. As a result, defendant’s testimony and any defense presented are then taken into consideration as a whole-evidence conglomerate at the intermediate

appellate level by weight of evidence review. Again this risks absolving the prosecution from their only entrusted duty to alone prove every element of every charged lodged against the accused. The post-trial amalgamation of presented defense into weight of evidence could infringe on Fifth Amendment protections against compulsory incrimination. An inherent error of New York State Appellate Division use of weight of evidence review as interchangeable is apparent when it falls short of, and is clearly distinguishable from, doctrine of law upholding sufficiency review. This practice method has become commonplace, routine even, per *Hines*; *Lane* standard.

Nothing bears greater deference in the criminal justice system than proof beyond reasonable doubt of every fact necessary to constitute crime with which the accused is charged. The current New York State practice results in criminal defendants unknowingly forfeiting legal insufficiency of the criminal charges against them, not only then in trial court, but for any future proceeding, state or federal thus precluding any further examination of the most vital principle in fundamental fairness and catalyst for loss of liberties. Trappler's Motion for reconsideration makes apparent that the Court of Appeals has no ambition to review the *Hines*; *Lane* rule of legal insufficiency forfeiture; even after objective examples of Due Process violation and demonstration of unknowing waiver was imposed causing loss of constitutional rights.

In conclusion, the writ of certiorari should be granted.

Respectfully submitted,



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Date: January 15, 2020

REASON FOR GRANTING THE WRIT

The writ should be granted to address unconstitutional *Hines; Lane* standard. Without motion at trial (NY Criminal Procedure Law § 290.10), systematic unknowing forfeiture of legal sufficiency, by uninformed automatic waiver strips criminal defendants; here Trappler, then and forever of their most basic fundamental right protecting the accused, proof beyond a reasonable doubt of every fact necessary 'every element of an offense charged and the defendant's commission thereof.' New York State law under *People v. Hines*, 97 NY 2d 56 (2001); *People v. Lane*, 7 NY 3d 888 (2006) negate fundamental indelible constitutional rights.

Nothing bears greater deference in the criminal justice system than proof beyond reasonable doubt of every fact necessary to constitute crime with which the accused is charged. The current New York State practice results in criminal defendants unknowingly forfeiting legal insufficiency of the criminal charges against them, not only then in trial court, but for any future proceeding, state or federal thus precluding any further examination of the most vital principle in fundamental fairness and catalyst for loss of liberties.

Trappler evinces that the Court of Appeals has no ambition to review the *Hines; Lane* rule of legal insufficiency forfeiture; even after objective examples of Due Process violation and demonstration of unknowing waiver imposed causing loss of constitutional rights.

Imperative public importance exists where this New York State practice continues without possibility of rebalancing; re-leveling the trial practice, to reinstate fundamental fairness and retention of indelible rights of the accused. Counsel's failure to present a procedural device, here CPL § 290.10, should never free the prosecution from their burden of proof beyond a reasonable doubt nor circumvent trial in-moment judicial evaluation to assure legal sufficiency has been established.

Trappler's forfeiture of legal sufficiency by unknowing waiver dilutes adversary process and all appeals of right to the point of hollow formality. To what measure will New York prosecutors be held if not legal sufficiency and their burden of proof? Trappler presents points of resulting prejudice and where effective assistance is not recognized when the most fundamental constitutional rights are unknowingly relinquished under *Hines; Lane*. This permitted New York standard systematically has eroded the pillar of truth finding; the presumption of innocence, and proof required against the accused.

Forfeiture that relieves prosecution of their burden should not be permitted under any circumstances. Sufficiency of evidence as defined is the very core and intrinsic to the worth of the justice process. Unproven or unsatisfied elements of a criminal prosecution eligible for later examination should be retained, never forfeited. At the very least, if counsel fails to motion for dismissal on insufficiency grounds, as in Trappler, a hearing must commence to inform defendants of their imminent loss of protective rights by forfeiture, with acceptance of only an informed, knowing, voluntary waiver.

The constitutional claims presented by Trappler and presumption of unconstitutionality is properly before you to the best of this pro se litigant's ability. This case is compelling as United States Supreme Court intervention will answer the unheard cry of "foul" and prevent choreographed constitutional rights forfeiture that forever bars review of lost fundamental constitutional right; perhaps the most basic, proof beyond a reasonable doubt of every fact necessary to constitute crime with which he is charged.