No. 20-5629

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

Lester Donnie Waller — PETITIONER
(Your Name)

vs.

State of Georgia — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Lester Donnie Waller
(Your Name)

P.O. Box 466
(Address)

Alamo, GA 30411
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

Did the Trial Court err when it determined Defendant's waiver of counsel was valid thus violating his Sixth Amendment Right to Counsel and his Fourteenth Amendment Right to Due Process of Law?

Did the Trial Court err by denying Defendant's right to counsel as guaranteed by the United States Constitution (Sixth Amendment) and the Georgia State Constitution (Article I, Section I, Paragraphs XIV, Benefit of Counsel)?

Did the Trial Court's colloquy to Defendant meet the Faretta Standard?

Did the Trial Court err in failing to require the recording of bench conferences?

Was Trial Counsel ineffective in failing to object to prosecutorial misconduct during the State's opening and closing arguments?

Did the Trial Court err in failing to grant Defendant's Motion to Suppress Tapes? Did the Trial Court improperly admit the State's witness testimony without properly establishing a foundation for it?

Did the Trial Court err in allowing evidence in the form of a telephone conversation without first authenticating the parties involved?

Did the Trial Court fail to determine that the State withheld scientific evidence from the crime scene favorable to Defendant thus violating his Fourteenth Amendment Right to Due Process of Law?

Did the Trial Court err in failing to determine that the admission of photos of the victim's autopsy was highly prejudicial?

Did the Trial Court abuse its discretion in allowing Angela Whitmore to testify as an expert witness in violation of his due process rights by failing to disclose to Defendant prior to trial that Whitmore would be called to testify as an expert witness? Whitmore was not on the witness list in violation of Georgia statutes 17-16-3, 17-16-6, and 17-16-8(a).

Did the Trial Court err in failing to honor the mailbox rule in the filing nature of an appeal? Is a one-day delay not resulting from fault or negligence of Defendant, mailroom personnel, or court personnel sufficient for Defendant to lose his right to direct appeal or any appeal particularly when the merits of the case outweigh the finality of the case?

Did the Trial Court convict based on insufficient evidence?

## 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 Wheeler 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 March 13, 2020
A copy of that decision appears at Appendix A.

[ ] 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

United States Constitution Sixth Amendment
United States Constitution Fourteenth Amendment

Georgia Constitution Article I, Section I, Paragraph XIV

28 USC 1746
28 USC 2254(d)

Federal Rules of Evidence 704(b)

OCGA 17-8-75
OCGA 17-16-3
OCGA 17-16-6

## STATEMENT OF THE CASE

In this instant case, Defendant was both actually and constructively denied effective assistance of trial counsel. Counsel from both sides, Trial and Appellant, for the Defense, failed to secure Defendant's Six Amendment Right to confront the witness against him, by Trial counsel participation in the reading of (two) of the state witness pre-trial testimonial statements into the record. By Appellant Counsel's failure to address this issue in post-conviction proceedings, (Motion for New Trial), Defendant was deprived of his right to a full and vigorous cross-examination of one of the state's key witnesses without objection which in turn violated Defendant's *Six Amendment Right* to confront the witness against him and his *14th Amendment Right* of Due Process of Law. Defendant moved to substitute Appellant Counsel because of communication problems, but instead Trial Judge allowed Appellant Counsel to withdraw and compelled Defendant to proceed pro se. At no time did Defendant waive his right to effective assistance of Appellant Counsel. Also Trial Judge over objection of Trial Counsel allowed (*Angela Whitmore*) to testify as an expert witness in (*Battered Women Syndrome*) "Here and after (B.W.S.), violating the rule of Discovery and Defendant's 14th Amendment Right to Due Process of the Law, while creating a severe case of abuse of discretion by Trial Judge. Trial Judge colloquy to Defendant did not reach Faretta Standards. And Trial Court erred in failing to grant Defendant's motion to suppress tapes and state's witness testimony entered without proper foundation hearing having been established prior to the state's admission of the evidence. Trial Counsel was ineffective in failing to object to prosecutorial misconduct during the State's opening and closing arguments. Trial Court erred in failing to address the State's repeated prosecutorial misconduct in the form of leading questions asked of all state witnesses. Also Trial Court erred in allowing evidence of telephone conversations without authentication of parties on phone. Trial Court erred in allowing photographs that were more prejudicial than probative. Trial Court erred in failing to determine that State withheld evidence favorable to the Defendant in the form of scientific evidence from the crime scene violating Defendant's 14th Amendment to Due Process of Law. There was no physical evidence linking Defendant to the crime charged and the State's case was built solely on circumstantial evidence and that evidence was insufficient to convict.

## REASONS FOR GRANTING THE PETITION

Did the Trial Court err when it determined Defendant's waiver of counsel was valid thus violating his Sixth Amendment Right to Counsel and his Fourteenth Amendment Right to Due Process of Law?

Appellant prior to Motion For New Trial (here and after (MFNT)), held Jan 11, 2013 requested new counsel several times, (see) Motion for Substitute of Counsel, filed (Sept 5, 2012 Ex A) because Counsel failed to meet with Appellant privately and discuss issues for MFNT. During (MFNT), Appellant tried to explain to the Trial Judge that he and Counsel were not seeing eye to eye on issues to be raised at said hearing because of the lack of communication (see MFNT) held January 11, 2013 (T4) lines 7 thru 25 (T5) lines 1 thru 25 (T6) lines 1 thru 25. Appellant only wanted Appellant's Counsel to read over issues that Appellant wanted raised, but was told by Trial Judge that he either take appointed counsel or proceed pro se to get in Appellant's issues in on appeal. (See MFNT) held Jan 11, 2013 (T26), lines 1 thru 25, (T27) lines 1 thru 25, (T28) lines 1 thru 25. Defendant was compelled to proceed pro se because Appellant had no other choice. The failure of the State to provide counsel was exacerbated by compelling Appellant to represent himself. Tyner v. State, 334 Ga App 890.

Trial Court abused its discretion in denying Defendant's post-waiver request for counsel during (MFNT), it is a structural Sixth Amendment violation and is not subject to a harmless error analysis on direct appeal. Making no adequate inquiry into the cause of Appellant's dissatisfaction with Counsel or taking any other steps which might possibly lead to the appointment of substitute Counsel in whom Appellant would repose his confidence, the result was that Appellant was forced into a trial with the assistance of a particular lawyer with whom he was dissatisfied and with whom he did not have adequate communication with. Thus, the attorney was understandably deprived of the power to present any adequate defense on Appellant's behalf. This error requires relief as a structural error, therefore Defendant asks that relief be granted based on the findings that Appellant was denied counsel as guaranteed by the Sixth Amendment of the U.S. Const. And under Ga Const 1983 Art 1, Sec 1, Para XIV Benefit of Counsel and waiver of counsel was not valid (see) Thomas v. State, 331 Ga App 641. Appellant only proceeded Pro se because he felt he had no other choice. And the Trial Judge's firm and commanding statement that Appellant had to proceed Pro se in order to get his issues in on appeal influence his decision to proceed without counsel (see) (MFNT) held Jan 1, 2013) (T25) lines 1 thru 25

(T26) lines 1 thru 25 (T27) lines 1 thru 25. Citing Satterwhite v. Texas, 486 US 249, 256, 1085 S Ct 1792, 100 L Ed 2d 284 (1988). "We state that a pervasive denial of Counsel casts such doubt on the fairness of trial process that it can never be considered harmless error because the fundamental importance of the assistance of counsel does not cease at the prosecutorial process moves from the trial to the Appellant stage, the presumption of prejudice must extend as well to the denial of counsel on appeal. Two key elements in the Court's reasoning control this decision here. First, because the Sixth Amendment violation left petitioner (entirely without) the assistance of counsel. The Court held that both Strickland's prejudice requirements and Chapman's harmless error analysis are inapplicable. Second, the Court justified this holding by analogizing the need for Counsel on appeal to its "paramount importance" at trial.

After being denied counsel Defendant appeared before the Courts once again on October 8, 2013 where he again expressed that he did not want to proceed Pro se and was again informed by Trial Judge that he was not getting another attorney and he had to go on and proceed Pro se against his free will (see MFNT) held October 8, 2013) (T3) lines 1 thru 25, (T5) lines 1 thru 25, (T6) lines 1 thru 25, (T7) lines 18-25, (T8) lines 1 thru 25, (T9) lines 1 thru 25, (T10) lines 1 thru 25, (T11) lines 1 thru 25. Citing Seagraves v. State, 259 Ga 36, 38, 376 SE 2d 670 (1989), Miller v. State, 219 Ga App 213, 214 (1), 464 SE 2d 621 (1995). The Court held that an indigent lawyer does not have a right to be represented by counsel and to also serve as co-counsel. However it is error to advise an Appellant wishing to proceed Pro se that thereafter he cannot reverse his decision once trial begins. The Trial Court has discretion to appoint counsel for Pro se Defendants during trial. The potential for disruption to the trial. Accordingly the better practice for Trial Courts is to appoint standby Counsel for the Defendant who chooses to proceed to trial without counsel. United States v. Wood, 487 F 2d 1218, 1220n.2 (5th Cir 1973) (Trial Court has responsibility to make inquiry of Defendant's appointed counsel concerning Defendant's claim of lack of communication and preparation). United States v. Young, 482 F 2d 993, 955 (5th Cir 1973) (reversible error for Trial Judge not to conduct thorough inquiry into source and factual basis of Defendant's complaint.

In the instant case, Trial Judge refused to give Defendant counsel after Appellant made the Court aware that he did not want to proceed Pro se (see MFNT) held October 8, 2013 (T3) lines 19-25, (T4) lines 1 thru 25, (T7) lines 18 thru 25. Citing Clark v. Zant, 247 Ga 194 (1981). In determining whether or not an accused has adequately waived his right to counsel and elected to exercise his constitutional right to represent himself, the Court will apply the standard set forth in Johnson v. Zerbst, 304 US 458

( 58 S Ct 1019, 82 LE 1461) (1937). Faretta v. California, supra. Taylor v. Ricketts, 239 Ga 501 (238 SE 2d 52) (1977). Brewer v. Williams, 430 US 387, 97 S Ct 1232, 51 L Ed 2d (1977). United States v. Wood, 487 F 2d 1218 (1973).

Appellant's uncontradicted objection to the denial of effective counsel while disclaiming any ability or desire to represent himself did not constitute a knowing or intelligent waiver of his right to effective assistance of counsel while disclaiming any ability to represent himself.

In this instance case, Defendant was a reflection of Woods where he disclaimed any ability or desire to represent himself (see MFNT) held October 8, 2013 (T8) lines 1 thru 25, (T9) lines 1 thru 25. In this instant case Appellant never wanted to proceed Pro se, Appellant only wished for Appellant's Counsel to review issues he wanted raised on appeal. Appellant did ask for replacement of counsel only because counsel had never had a face-to-face consultation with Appellant. Appellant only proceeded Pro se because that was the only way he could get ineffective assistance of counsel issue on the record.

Appellant shows that his waiver was the result of "coercion" by a seasoned Trial Judge and DA and his Appellant Counsel. Adams v. US exrel McCann, 317 US 269, 279, 63 S Ct 238, 87 L Ed 268 (1942). The Court must consider the Defendant's age and education and other background experience and conduct. The Court must ensure that the waiver is not the result of coercion or mistreatment of the Appellant and must be satisfied that accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right he is waiving. United States v. Martin, 790 F 2d 1215, 1218 (5th Cir) (1986). In this instant case Defendant made the Court aware of the problem he was having with Appellant's Counsel, and was told by Trial Judge from the outset that the Court would not appoint new counsel and merely advised the Appellant about his desire and ability to represent himself, violating Appellant's 6th Amendment Right to Counsel and Defendant's waiver was not valid (see MFNT) held January 11, 2013 (T25) lines 1 thru 25, (T26) lines 1 thru 25, (T27) lines 1 thru 25, (T28) lines 1 thru 25, (T29) lines 1 thru 25. Citing Stokes v. Wolfenbanger US Dist Lexis 12300 (2008). When a criminal defendant moves for replacement of counsel and is told that he must choose between his current Counsel and proceeding Pro se, his waiver of right to counsel may not be voluntary, depending on the circumstances. See US v. Patterson, 140 F 3d 767, 776 (8th Cir 1988) see also Gilbert v. Lockhart, 930 F 2d 1356, 1360 (8th Cir) (1991).

A criminal Defendant's request to be relieved of counsel in the form of a general statement of dissatisfaction wit his attorney's work does not amount to an invocation of the right to represent one's self, especially when made on the morning of trial. See Mereno v. Estell, 717 F 2d 171, 176 (5th Cir)

(1983). See also Sawick v. Johnson, 475 F 2d 183, 184-85 (6th Cir 1973). Defendant who, in notice of dismissal complained of inadequate representation by appointed counsel and was advised without investigation, was entitled to federal habeas corpus hearing on allegations of denial of representation. In particular, a Defendant's waiver of the right to counsel may not be clear and unequivocal in situations likes this where the Trial Court indicates at the outset that it will not appoint new counsel and merely advises the Defendant about his desire and ability to represent himself. See US v. Jones, 452 F 3d 223, 230 (3rd Cir) (2006). From a cursory review of the transcripts, it does not appear that Appellant's waiver of the right to counsel and to represent himself was clear and unequivocal. The US Supreme Court has held that a waiver of the Sixth Amendment Right to Counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. Patterson v. Illinois, 487 US 285, 292, 108 S Ct 2389, 101 L Ed 2d 261 (1988) quoting Johnson v. Zerbst, 304 US 458 464, 58 S Ct 1019, 82 L Ed 1461 (1938). In other words the accused must know what he is doing so that his choice is made with eyes open. Adams v. United States, exrel McCann, 317 US 269, 279, 63 S Ct 236, 87 L Ed 268 (1942).

A Trial Court's determination as to the propriety of a Defendant's waiver of his Sixth Amendment Right to Counsel should appear on the record. See Fowler v. Collins, 253 F 3d 244, 249 (6th Cir) (2001) citing Johnson, 304 US at 465. "On Habeas Review, the Court must indulge every reasonable presumption against waiver of an individual's fundamental Constitutional rights. Additionally a Court in order to decide if a waiver of counsel was valid, must look to see if the Appellant made the choice with eyes open or proceeded Pro se because he felt he had no other choice. See United States v. Calabro, 467 F 2d 973, 985 (2nd Cir) (1972), Saba v. INS, 52 F Supp 2d 1117, 1124 (ND Cal 1999), Ballinger v. Stovell, 2007 US Dist Lexis 84407, 2007 WL 3408582, ED Mich. November 15, 2007.

Did the Trial Court err by denying Defendant's right to counsel as guaranteed by the United States Constitution (Sixth Amendment) and the Georgia State Constitution (Article I, Section I, Paragraphs XIV, Benefit of Counsel)?

Defendant, prior to Motion for New Trial (here and after (MFNT)), requested new counsel several times because counsel failed to meet with him privately to discuss issues for MFNT with him privately and Appellant tried to explain to the Trial Judge that he wanted new counsel, but was told by Trial Judge either he take appointed counsel or proceed Pro se to get in his issue on appeal.

Appellant was forced to proceed Pro se without standby counsel. The waiver of counsel did not comply with the requirements of Faretta v. California, 422 US 806, 45 L Ed 2d 562, 95 S Ct 252 (1975). The failure of the State to provide counsel was exacerbated by compelling Defendant to represent himself. This error requires relief as a structural error. Therefore Appellant asks that relief be granted based on the finding that Appellant was denied counsel as guaranteed by the Sixth Amendment of the US Const and under Ga Const 1983, Art I, Sec I, Para XIV, Benefit of Counsel. Mitchell v. Mason, 60 F Supp 2d 655 (1999). Petitioner never had private communication with Counsel prior to his trial. And the Courts determined that rendered Mitchell without representation Appellant cites error where he was also denied counsel. Mr. B Lewis from the time period of September 5, 2011 until September 5, 2012. There has never been any private conversation between Appellant and appointed Counsel. The fact is Appellant "never" met Mr. B Lewis (Appellant Counsel) prior to the MFNT held January 11, 2013 and October 8, 2013 (See MFNT) (T4) lines 1-25 (T5) lines 1-25 where he asked to have Counsel removed because of communication issues. Defendant brought it to the Court's attention that he had filed a Motion to Substitute Counsel in August in 2012 where the motion was not heard (see MFNT) held October 8, 2013 (T6) lines 1 thru 25, (T7) lines 1 thru 25, (T8) lines 1 thru 25, (T9) lines 1 thru 25 because the Courts decided that Defendant was not allowed an attorney of his choice. Appellant was arguing that Appellant and Appellant's Counsel had not communicated before said hearing nor was there any kind of private consultation. Appellant had an 8 to 10 minute conversation with Counsel that took place in the Courtroom's holding cell just before the MFNT which left no time to form a client and attorney relationship (see MFNT) (T5) lines 1 thru 25, Mitchell v. Mason, 60 F Supp 2d 655 (1999). The great length to which the system extends to protect attorney client communication demonstrates the

importance of conversation between attorneys and clients in the legal world. Meaningful, confidential, and private conversation creates the attorney-client relationship and without communication, the attorney can only posture as one, the communication derives an attorney necessary element composing a lawyer, See Lakin v. State, 44 F Supp 2d 897 (1999).

Appellant just as Mr. Lakin, was faced with the Hubson choice, Court Rule MCR 6005(E) is the Michigan codification of the Faretta requirements either proceeding with an attorney only in name but not in relationship or representing himself. Such a predicament violated the Constitution's VI Amendment guaranteed to be represented by counsel. A defendant's communication with counsel is critical to the attorney's representation. The Right to Counsel encompasses the right to confer with an attorney and the denial of that right to confer is a constitutional violation. Geders v. United States, 425 US 80, 91, 47 L Ed 2d 592, 96 S Ct 1330 (1976). Denial of this opportunity is a constitutional error requiring reversal.

Did the Trial Court's colloquy to Defendant meet the Faretta Standard?

Defendant is seeking relief because Trial Court Judge did not conscientiously conduct the appropriate inquiry and under the applicable precedents, therefore Defendant's waiver to counsel was invalid. See MFNT held January 11, 2013 (T22) lines 4 thru 25, (T26) lines 1 thru 25, (T24) lines 1 thru 25, (T25) lines 1 thru 25, (T26) lines 1 thru 25, (T27) lines 1 thru 25, (T28) lines 1 thru 25, (T29) lines 1 thru 25.

Trial Judge made a miniscule attempt at a proper Faretta Colloquy. Although Trial Court emphasized that there are consequences of not having counsel, it did not describe those consequences in a way to satisfy Faretta. Having said that insistence on maintaining counsel is not the same as instructions on the need for counsel. Nor did the Trial Judge explain the specific dangers and disadvantages of self-representation in a way that satisfies Faretta. In determining whether the Defendant legitimately waive counsel, a Trial Judge must focus on the Defendant's understanding of the importance of counsel, not Defendant's understanding of substantive law or procedural details. Citing United States v. Erskine, 353 F 3d 1161 (2003). The Court found that Defendant's waiver of his Sixth Amendment Right was invalid because the Court failed to advise him correctly at the Faretta hearing of the possible penalties he faced and the record did not show that he had an accurate understanding of potential consequences at the time he agreed to waive that right. Pouncy v. Palmer, 846 F 3d 144 "if" a choice presented to a Petitioner is constitutionally offensive, then the choice cannot be voluntary (quoting Wilks v. Israel, 627 F 2d 32, 35 (7th Cir) (1980).

Petitioner made several arguments in support of his involuntary waiver of counsel claim and those arguments are premised on the theory that his waiver of counsel was involuntary due to the lack of meaningful alternative to self-representation. Therefore this Court should review Petitioner's Faretta claim without reference to 28 USC 2254(d). In this instant case, Petitioner was lulled into proceedings Pro se by coercion and because he felt he had to no other choice. Trial Court Judge colloquy was below Faretta Standard (see MFNT transcript held January 11, 2013). Citing Marshall v. Dugger, 925 F 2d 378 (1973).

Petitioner was a reflection of Marshall where he never stated he wanted to represent himself, but instead of having attorney "Lewis" as standby Counsel for MFNT, the Trial Court simply told the Petitioner that he had to proceed Pro se. And made a finding that Petitioner's dissatisfaction with Appellant Counsel's non-communication issues was a knowing and intelligent waiver of counsel. Trial Court never made the attempt to figure out what was going on with Appellant and his Appellant's Attorney. Here Appellant was not given a choice, just to take an attorney that had not responded to him

in months before said hearing or proceed Pro se. It is clear evidence that Petitioner did not unequivocally assert his desire to represent himself. Under US Const Amend VI and thus did not waive his right to counsel. The miniscule attempt to quote Faretta was not a proper description of federal law in place at the current times. The failure to meet the requirement for a valid Faretta waiver constitutes per se prejudicial error and the harmless error standard is inapplicable.

Did the Trial Court err in failing to require the recording of bench conferences?

Petitioner's counsel was constructively denied because his motion for recordation of proceedings was denied. None of the unrecorded bench conferences were followed by objection even after trial counsel had filed pre-trial motion for recordation of all proceedings. Rulings of importance were made during the unrecorded conferences allowing the court to improperly restrict Defendant rights to make further objection in post conviction proceedings including on direct appeal which cause defendant prejudice. Even after trial counsel had filed pre-trial motion for recordation of all proceedings, trial counsel still participated in unrecorded bench conference without any objections to the unrecorded conference causing defendant prejudice because it allows the court to improperly restrict Defendant rights to make further objections in post conviction proceedings including on direct appeal. The court found that "it is poor grave for counsel to participate without objection in unrecorded bench conference. Regarding counsel's performance pertaining to the unrecorded bench conference issue, there is reasonable probability that if counsel would have objected to the unrecorded bench conference instead of participating in them, trial counsel then could have secured the record to serve for direct appeal review. Citing eg Harrison v Thaler, 2012 US Dist Lexis 56559 (2012). Citing eg Covaliere v Quarterman, 2009 US Dist Lexis 26317 (2012). The fact that the bench conferences were unrecorded shows that the state trial was not impartial but was bias. Adjudication before a biased trail judge falls withing the very limited class of cases that represents a structure error, subject to automatic reversal. Citing eg Bigby v Drothe, 402 F 3d 551, 559 (5th Cir 2005) (quoting Nerthere v US , 527 US 1, 7-8 (1999). See T314 lines 6-9, T433 lines 6-8, T464 lines 1-4, T488 lines 3-5, T512 lines 9-11, T567 lines 19-21, T872 lines 13-15, T899 lines 13-16, T905 lines 6-8, T912 lines 7-10, T1042 lines 5-7, T1139 lines 17-19, see also Kirkland v State, 206 Ga App 27 (1992). Citing Chatman v Mancil, 280 Ga 253 (2006) also see Capps v Cousley, 63 F 3d 982 (1) (10 Cir 1995). Petitioner asserts that the unrecorded bench conferences prejudice the defense regarding his ability to have issues reviewed on appeal and in post-conviction proceedings; the bench conferences pertained to very material issues in the course of the trial. Citing US v Renton, 700 F 2d 154, 158-159 (5th Cir 1983).

Was Trial Counsel ineffective in failing to object to prosecutorial misconduct during the State's opening and closing arguments?

During Opening Argument (Prosecutorial Misconduct)

(1) T379 lines 20-21 "from the time they met, and begun to date the defendant almost immediately became possessive (no evidence supports this statement by the prosecutor)

(2) T380 lines 3 thru 15 stating facts not in evidence

(3) T381 lines 8 thru 15 bolstering credibility of state witness and case

(4) T386 lines 2 thru 25 bolstering witness testimony, before the jury ever even heard it

(5) T381 lines 20 thru 25 name calling and bolstering

(6) T387 lines 11 thru 15 last text it was about some apartments; and that is what they are talking about..."ADA" stating facts not in evidence

(7) T389 lines 3 thru 9 bolstering witness testimony

(8) T389 lines 24 thru 25 stating facts not in evidence, the last contact of anyone alive with shenna is at 3:21 on Tuesday

(9) T391 lines 20 thru 22 and she tells me she can't remember who gave him a ride, but finally about 11 o'clock the defendant's get a ride out of there ("stating facts not in evidence; and misrepresenting the facts")

(10) T392 lines 16 thru 23 stating facts not in evidence and misrepresenting that defendant's initial arrest was for murder when he was in Florida

Closing Argument (Prosecutorial Misconduct)

(1) T1245 lines 1 thru 25 thru T1246 lines 24 thru 25 "I want somebody to tell them (the trial jury) when you're back there, you are not – we're not back here looking for doubt, we're back here looking for truth (ADA invading province of the jury)

(2) T1247 lines 22 thru 23 "the photos are relevant because they show you what a coward like him (defendant) can and will do (stressing the autopsy photos to show the reason the state admitted them and name calling for the sole purpose of inflaming jury's passion, also to bias the jury and prejudice the defendant)

(3) T1248 lines 13 thru 19 "let's talk about that the defendant's statement on that telephone call. She (defense counsel's argument) wanted to tell you that's an alibi, that an effort to set up an alibi. Oh you know where I was that night right? All night right? I guess folks ain't willing to come and lie (ADA stating her personal opinion and belief that defense alibi was a lie and she the State did not produce nor present any evidence to support the ADA's claim that the tapes were cryptic effort on the part of the

defense to set up an alibi. No witness as the state mislead the jury to believe, was presented who testified as an expert, and translated the tapes, testifying that the tape's language in the tapes meant that the defendant was setting up an alibi

(4) T1249 lines 13 thru 16 "I submit to you the only reason Shenna wasn't stabbed five or six times is because they couldn't get the knife out, not because they had a desire to stop doing harm to her" (ADA stating her beliefs and personal opinion to the jury).

(5) T1250 lines 13 thru 14 "Did that coward have the right to take her life?" (ADA name-calling for no other reason than to inflame the passion of the jury and cause bias).

(6) T1252 lines 14 thru 15 "I guess it takes the late 30's when you know a fool when you see it." (ADA name-calling again)

(7) Further name-calling: T1252 lines 21 thru 23, T1253 lines 3 thru 4, T1253 lines 23-24, T1254 lines 15 thru 19

(8) T1253 lines 8 thru 9 "We probably be on trial for my father, if he did this to me." Outrageous prosecutorial misconduct to draw sympathy from the jury.

(9) T1256 lines 10-11 "It's sorry, don't you all abandon her because she's worthless, like they did the police." Outrageous prosecutorial misconduct to draw sympathy from the jury.

(10) Name calling T1257 lines 17 thru 25

(11) T1258 lines 11-18 Tells you that on Tuesday, May 26 at 3:21 PM, Sheena texts her for the last time about apartment they can move into. ("No evidence supports this statement"). And see Sheena about to get on with her life, what's so important about that text; they are talking about getting an apartment together ("No evidence supports this statement)!" They are talking about leaving this fool. (More name-calling). That's what she says that the last text is about, moving on. (ADA mis-stating witness testimony).

(12) See T1260 lines 4 thru 6 (name calling) T1261 lines 1 thru 25 (assuming prejudicial facts not in evidence); T1212 line 15 name-calling; T1262 line 24 name-calling; T1263 lines 9 thru 25 name-calling; T1265 line 22 name-calling; T1267 line 17 name-calling; T1268 lines 14 thru 15 name-calling; T1273 line 1 name-calling; T1276 line 17 assuming facts not in evidence; T1283 line 17 name-calling.

(13) T1276 lines 18 thru 24 "I suggest to you that's his signature. He was feeling bad and apologizing. I guess to the Lord, for what he did. (Assuming prejudicial facts not in evidence; and stating her personal religious belief to the jury).

(14) T1270 lines 4 thru 8 (assuming facts not in evidence, to bolster the testimony of a state witness)

(15) T1277 lines 12 thru 15; T1279 lines 12 thru 13; T1285 line 19; T1291 lines 10 thru 11; T1287 line 4; T1288 line 25; T1290 lines 24 thru 25; T1292 line 10; T1293 lines 14 thru 25 (No cellphone

introduced in evidence, name-calling another outrageous conduct). See also T1295 line 25 (name-calling).

Citing US v Cronic, 466 US 648 (1984) – Trial Counsel was ineffective in failing to object to prosecutor's outrageous misconduct, during state's opening and closing arguments. Prosecutor's narrative form of opening argument, and name calling the defendant, and reference to defense counsel's performance during state's arguments. And in closing argument the prosecutor argued facts not in evidence such as the cell phone screen, which belonged to the defendant, was misrepresented as having shown the same Psalm as was displayed in a Bible found at the crime scene, and many other misstatements of facts and evidence. No objection was made by the defense counsel and no curative instructions were given. Citing Durden v Wainright, 477 US 168, 181-182 (1986). Counsel was ineffective in failing to object to misstatements of facts during closing arguments when the prosecutor manipulated and misstated the evidence presented during the trial. Citing Tak SunTan v Runnels, 413 F 3d 1101, 1112 (9th Cir 2005). A prosecutorial misconduct claim is decided on the merits, examining the entire proceeding to determine whether the prosecutor's remarks so inflect the trial with unfairness as to make the resulting conviction a denial of due process. Citing Johnson v Sublet, 63 F 3d 926, 929 (9th Cir 1995), Napue v Ill, 360 US 264, Shaw v Terhac, 380 F 3d 473, 478 (9th Cir 2004). Prosecutorial misconduct which rises to the level of due process violation may provide the grounds for granting relief only if that misconduct is deemed prejudicial under the harmless error test. E.g. prosecutor must have a reasonable explanation for calling defendant names repeatedly. Under no objection from defense counsel, defendant's character was brought into issue and seriously tainted. In Napue 360 Us at 769, the US Supreme Court held that a conviction obtained through the use of false evidence, known to be such by representative of the state violated the defendant's right to due process under the 14th Amendment. Citing Alcorta v Texas, 333 US 28 (1957) and Mooney v Holohan, 294 US 103 (1935). Napue encompasses the knowing presentation of false evidence even where the witness used to transmit the false information was unaware of its falsity Hayes v Brown, 399 F 3d 972, 980-981 (9th Cir 2005). In order to prevail on such due process claim "the Petitioner must show that (1) the testimony or evidence was actually false (2) the prosecutor knew, or should have known the testimony was actually false, and (3) the false testimony was material. See US v Zuno-Prico, 339 F 3d 886, 889 (9th Cir 2003) cert den, 540 US 1208.

"There is no occasion and no excuse for attempting to influence the jury in advance by improper statements as to evidence which counsel knows (she) cannot prove, or will not be permitted to introduce." citing Rodriguez v State, 184 Ga App 819 (1) (363 SE 2d 23) (1987), and the closing argument was replete with references to the prosecuting attorney's beliefs. It has long been the rule that a

district attorney may not state to the jury his personal belief in the defendant's guilt. Citing Castell v State, 250 Ga 776 (8) (a) (301 SE 2d 234) (1983). "Patent misrepresenting of fact, such as the prosecuting attorney's use of a cell phone screen falsely, and of jail tapes falsely indicating that a (state's alleged) expert had (agreed) with specific opinion by the state prosecutor; see OCGA 17-8-75 (is violative). "While a district attorney may draw conclusions from facts proven, it is improper for the district attorney to urge the DA's personal belief as to the defendant's guilt. Citing US v Young, 470 US 1 (1984). Hoerner v. State, 246 Ga 374 (271 SE 2d 458) (1988); Davis v McNest 2009 US Dist Lexis 10060 (2009). Arguments urging the jury to decide the matter based upon factors other than those it is instructed to consider is improper. The Courts have therefore, condemned arguments that is inflammatory, or appeal to bias or prejudicial reasons. See US v Childress, 58 F 3d 693, 715 (313 US App DC 133 (DC cir 1995) cert den; 516 US 1098 (1996). "It is well established that a prosecutor may not use the bulky pulpit" of closing argument to inflame the passion or prejudice of the jury or to argue facts not in evidence. See also Lee v US, 2009 US Dist Lexis 21209 (2009).

"Classic example of prosecutorial misconduct are...misstating facts; misstating the witness's testimonies, suggesting that a witness made out of court statements when there is no evidence of such a statement, assuming prejudicial facts not in evidence...presenting perjured testimony...misstating law. See Williams, 504 US 36, 60-61 (1942).

Did the Trial Court err in failing to grant Defendant's Motion to Suppress Tapes? Did the Trial Court improperly admit the State's witness testimony without properly establishing a foundation for it?

See T762 lines 2-25. The Court had determined that the State had not laid the foundation for admitting the tapes.)

See T778 lines 12-17 (T778 lines 12-17). The Court had determined again that there was an insufficient basis, ie, foundation for admitting the tapes. See T 1030 lines 16-17 (The Court states the ADA had not laid proper foundation for admission of Osceola, FL jail tapes; state's exhibit 64); See T1034 lines 9-14 (Counsel objects to tapes being played), See T1146 lines 3-25 (Judge allows State to use transcript as interpreter for the tapes) (over Defense Counsel objection) See T1147 lines 3-4 (tape played without foundation having been laid) (again over Defense Counsel objection).

Defense Motion to Suppress the tapes and state's witness testimony regarding the tape should have been granted because no foundation was ever laid for the admission of the tapes. No proper foundation was laid by the State to allow the witness testimony regarding the meaning of the tapes; the witness never said the tapes meant what the prosecutor claimed. The state did not prove that the words at issue meant that the Petitioner was planning an alibi defense. "The ADA made that argument without any evidence to support the argument in evidence just to taint the Petitioner's character. Furthermore Appellant has every right to assert an alibi defense. The proper foundation was not laid for admission of recorded tapes because actual translator (witness) did not testify to the accuracy of translation; relevant facts:

(A) No government witness translated the tapes

(B) No witness testified to listening to every taped conversation and checking the accuracy of the tape's translation

(C) State did not satisfy its burden of producing evidence that is sufficient to support a finding that matter in question regarding the tape's conversation is what the state claimed that the tape conversation meant, allegedly that Defendant was preparing an alibi defense. Citing e.g. US v Balderas (2007 CA5 Tex) 2007 US App Lexis 15123 (See T778 lines 12-17).

No evidence supported the State's argument and claim, there is no translator, and there is no translation of the tapes to support the state's argument and claim, there is no translator, and there is no translation of the tapes to support the State's argument that the taped conversation meant the Defendant was "planning an alibi".

Did the Trial Court err in allowing evidence in the form of a telephone conversation without first authenticating the parties involved?

(1) T347 lines 10-13; State's witness Woodson's testimony about how she knew who Petitioner was talking to while he was at the phone booth was admitted without authenticating who the person was on the other end of the phone. (2) T702 lines 8-25; ADA question State's witness Woodson about phone booth conversation; and her testimony is different from the one she gave during her pre-trial testimony (These transcripts were read into the record in place of her oral testimony during cross-examination). See (3) T706 thru T717, Trial Counsel question State witness Woodson about phone booth conversation, but did not use the witness's prior statement to impeach that witness. Citing Myers v Brown, 74 Ga App 5354, 536 (40 SE 2d 391) (1996). "Generally communication by telephone are not admissible in evidence, unless the identity of the person with whom the conversation was had is established by direct or circumstantial evidence. Citing Marrow v State, 272 Ga 691 (532 SE 2d 78) (2008). The Trial Court admitted testimony by a witness who overheard the victim talking to an unidentified person on the phone, allowing the witness to express an opinion that it was the Petitioner. The Georgia Supreme Court indicated that admission based solely on the content of the conversation was error. In this instant case, there was no basis offered to authenticate the conversation (only the witness's opinion).

Did the Trial Court fail to determine that the State withheld scientific evidence from the crime scene favorable to Defendant thus violating his Fourteenth Amendment Right to Due Process of Law?

(1) T1090 lines 1-8 On cross-examination, Detective Colman stated he did no follow up on Defendant's cell phone records which would have tended to show from cell phone towers that Defendant was in a whole different part of the county when crime was committed. (2) T1092 lines 1-25 Detective Coleman on cross-examination stated that a knife found at the crime scene was not sent to the crime lab to be tested after having been swabbed and collected State's exhibit 41, 38, 36, and 39. (4) T1096 lines 7-25 thru T1097 line 1 On cross-examination Detective Coleman stated that a blanket found at the crime scene also was not sent to the crime lab for testing. (5) T1097 lines 19-25 On cross-examination Detective Coleman admitted that he did not do a complete check of the crime scene for fingerprints and admitted that if he had done so it could have yielded other fingerprints had he done so. (6) T17 lines 1-20 See probable cause hearing transcript held July 23, 2009 Detective Coleman when questioned testified that the crime scene had been contaminated due to extreme traffic. (7) T26 lines 1-20 Detective Coleman when questioned about the phone records stated that he had received the phone records and checked them. He later stated that he had never received the phone records to do a check of the cell phone of the victim See Trial Transcript T1090 lines 1-8 The State withheld evidence which would have tended to prove Defendant's innocence; scientific evidence from the crime scene was not developed. Citing US v Agurs, 427 US 97 The US Supreme Court held "that the evidence was material and that nondisclosure required a new trial because the jury might return a different verdict if the evidence had been received. Petitioner in his pre-trial request sought all evidence resulting from scientific testing. The suppression of the evidence was a violation of due process clause that evidence had been requested and it was material and the suppressed evidence might have affected the outcome of the trial. Citing US v Bagley 473 US 667, 676 (1985) Impeachment evidence as well as exculpatory evidence falls within "Brady Rules" as well as exculpatory evidence falls with "Brady Rule" and Giglo v US, 405 US 150, 154 (1972) Hoas v State 146 Ga App 729 (247 SE 2d 507) cert den, 440 US 922 (1988) Any evidence is relevant which logically tends to prove or disprove and material fact which is at issue in case and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant.

Did the Trial Court err in failing to determine that the admission of photos of the victim's autopsy was highly prejudicial?

Defendant was prejudiced by the admission of the photos of the victim. The grisly photographs depicting the mutilation of the victim's face and body through decomposition is spectacularly gruesome and is clear not evidence essential to the proof of the State's case. Citing Ramey v State, 250 Ga 455, 457, 458 (298 SE 2d 503) (1983). The material facts the State contends that these photographs establish could have been proven by other witnesses available to the State...and in fact were established by testimony of the pathologist who performed the autopsy. The only purpose for the introduction of the photographs was to inflame the jury both during trial and during the jury's deliberation in violation of the right to Fundamental Fairness (1) (T728 lines 4-5) Over objection Trial Court allowed photos to be admitted. State's exhibits 54, 55 Trial Counsel moved for mistrial because of the admission of the photographs into evidence (T729 line 5) Court denied the Motion (T737 lines 1-5) Counsel objected and moved for Mistrial. (2) (T747 lines 6-7) Defense again objected to photographs and was over-ruled. The Court allowed the introduction of the autopsy photographs over objection (T728). The photographs showed a wrapped up bloated body (T727) Citing McClane v State, 278 Ga 411 (2004) and McCullough v State, 255 Ga 672 (1986). The Georgia Supreme Court found that the Trial Court committed reversible error in admitting two post autopsy photographs just as in McClane and McCullough the photographs admitted were irrelevant to the State's issue at trial and were introduced with the sole purpose of prejudicing the defense and biasing the trial jury against the Petitioner.

Did the Trial Court abuse its discretion in allowing Angela Whitmore to testify as an expert witness in violation of his due process rights by failing to disclose to Defendant prior to trial that Whitmore would be called to testify as an expert witness? Whitmore was not on the witness list in violation of Georgia statutes 17-16-3, 17-16-6, and 17-16-8(a).

The State introduced Ms. Whitmore as an expert witness in Battered Women Syndrome. The defense objected based on her lack of qualification. The witness had never worked with an organization dealing with the subject of Battered Women Syndrome (T928). Her own thesis was not on the subject, she had never published articles or research on the subject (T928). She admitted that on several occasions she had failed to be qualified as an expert on the subject of Battered Women Syndrome (T929). Facts: Rather than assisting the jury to understand evidence presented or complicated fact issues in the case Angela Whitmore states alleged expert witness presented the jury with a simple generalization (T936 thru T942) of her opinion. Expert may testify about the significance of certain conduct or methods or operation unique to the case at hand so long as the testimony is helpful and its relevance is not substantially outweighed by the possibility of unfair prejudices or confusion. Facts: After the alleged State's domestic violence expert witness testified about circumstances which she could not say really applied to the Defendant and the alleged victim. The State's witness never examined neither prior to rendering her opinion. Thus she could not illustrate the state of feelings between the Defendant and the alleged victim nor the bend of mind and course of conduct of the Defendant in this case. More importantly Defense believes Angela Whitmore (State's witness) testimony crossed the borderline long recognized by this Court between a "mere explanation of the expert's analysis of the facts" and a "forbidden opinion on the 'ultimate legal' issue" in the case. Although admittedly witness (Angela Whitmore) did not say the magic words--"In my expert opinion Defendant killed the alleged victim" Defense strongly believes her testimony amounted to the functional equivalent of such a statement (T938 thru T942). An expert may testify in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data (2) the testimony is the product of reliable principle and methods and (3) the witness has applied the principles and methods reliably to the facts of the case. Facts: Appellant contends that the testimony of Ms. Whitmore opinion did not rely on sufficient facts or data because (1) Ms. Whitmore admits she never had any firsthand dealings with the case at hand (T960 lines 4-11) (2) And though the principles and methods of her testimony do exist they were unreliable

statements given by Ms. A Whitmore because she has never worked with an organization dealing with the issue she gave her testimony to (T928). And her own study was not on that subject (T928) (T929). (3) And the State's witness never examined neither the alleged victim or the Defendant prior to rendering her opinion so the principles and methods she testified about were never applied to the case at hand (T941, lines 6-19) (T942 lines 3-14). Furthermore an expert in a criminal case may not, however, offer an opinion or interference as to whether the Defendant did nor did not have the mental state or condition constituting an element of crime charged. Fed R Evid 704 (b). Such an issue are matters for the trier of facts alone. Also State's alleged expert witness Angela Whitmore's testimony as an expert violated the rules of discovery. See (T918, lines 5-11) (T919 lines 14-21). Defense moved for mistrial (T920, lines 6-10). State's witness Angela Whitmore was sworn in and allowed to testify completes the violation. (T921, lines 21-22). Witness Whitmore also worked for the DA's office (T925, lines 10-13 thru T937).

The witness was not disclosed in accordance with the statutes. See OCGA 17-16-3 and OCGA 17-16-6 citing Corben v State, 240 Ga App (1999) and Barker v State, 283 Ga App 285 (1997) withheld evidence which is disclosed for the first time at the start of trial, the Defendant is presumed to be prejudiced. "In this instant case the State never made it known until the day of testimony that State's witness Angela Whitmore would testify. To prevail on a claim of discovery violation brought under Brady, a petitioner must demonstrate (1) the government possessed evidence favorable to the Defendant (2) the evidence was suppressed willfully or inadvertently and (3) prejudice resulted because Defense was not permitted an opportunity to have a rebuttal witness for the State's alleged expert witness, and the motive that the State would call an expert witness (A Whitmore) came too late for Defense counsel to effectively counter the State's tactical advantage maneuver (T920 lines 6-10). "A more particular attack on the witness credibility is effected by means of cross-examination directed towards revealing possible biases, prejudices, or ulterior motives, of the witness as they may related directly to issues or personalities in the case at hand." AJ Wigmore, Evidence 940, p. 775 (Chadboum rev 1970). (1) The record reflects that alleged expert witness Angela Whitmore was working for the DA's department giving that information it is clear that outside of the discovery violation and the fact that the witness did not qualify as an expert in the filed she gave her testimony on. That biases tendencies, prejudices, and ulterior motives exist because the witness had personal reasons that she would want to see the State prevail and for the Defense to fail. Citing US Dist Lexis 47596 Berryman-Dages v City of Gainesville, FL. A discovery violation is not harmless if the importance of the information at issue and its late disclosure causes prejudice to the opposing party. Id. Prejudice generally occurs when late disclosure deprives the opposing party of meaningful opportunity to perform discovery and depositions related to

the documents or witnesses in question. See e.g. Mitchell v Ford Motor Co; 318 Fed Appx 821 (11th Cir 2009) Citing 2014 US Dist Lexis 30360 Hill v Ford Motor Co March 10, 2014. The Court has broad discretion to determine whether a party's discovery violation is harmless. See Silvertein v Procter and Gamble Mfg Co; 700 Supp 2d 1312 (SD GA 2009) (Wood, J). Its decisions is guided by five factors: (1) The surprise to the party against whom the evidence would be offered, (2) the ability of that party to cure the surprise, (3) the extent to which allowing the evidence would disrupt the trial. (4) The importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence. Abdulla v Klosinski, 898 F Suppl 2d 1348, 1359 (SD Ga 2012) (Hall J).

(1) The Appellant contends that the surprise brought on by admission of the expert witness was overwhelming to the Defense because Defense counsel had no time to properly prepare for this testimony.

(2) There was no way to cure the surprise because it would take another expert witness to rebut the State's alleged expert witness testimony.

(3) Appellant contends that the allowing of the State's alleged expert witness to testify disrupted the trial so much that the unfair prejudice and confusion it cause outweighed the relevance of its testimony.

(4) Appellant contends the importance of the evidence the state sought to introduce was clearly an attempt to gain a tactical advantage.

(5) Appellant contends that the State had no excusable explanation for its failure to disclose the witness. The State knew from the beginning of trial that they would produce an expert witness but chose not to list said witness in their discovery until the day of witness testimony in an effort to gain a tactical advantage and deny Defendant a chance to prepare a rebuttal to witness the testimony.

Ms. Angela Whitmore, State's alleged expert witness, testimony about the cocooning and metamorphosis stages of a butterfly which she uses to narratively describe the stages of a domestic violence relationship was very prejudicial before the jury.

Did the Trial Court err in failing to honor the mailbox rule in the filing nature of an appeal? Is a one-day delay not resulting from fault or negligence of Defendant, mailroom personnel, or court personnel sufficient for Defendant to lose his right to direct appeal or any appeal particularly when the merits of the case outweigh the finality of the case?

Defendant's final supplemental motion for new trial was heard October 8, 2013 and denied on November 21, 2013 making his notice of appeal due no later than December 23, 2013. Defendant filed a pro se notice of appeal which was entered in to the prison's designed legal mail system on December 19, 2013. It was delivered in an envelope bearing a December 20, 2013 postmark, but was not file stamped by the clerk of court until December 26, 2013. Petitioner contends that his notice of appeal should have been timely when he placed notice into the prison's legal mail systems. And once it was seen that it arrived bearing a December 20, 2013 postmark by the US Postal Service. Petitioner argues that if an institution has a system designed for legal mail, a pro se inmate confined there must use that system to receive the benefit of it. If a pro se inmate files a notice of appeal in either a civil or criminal case the notice is timely if it is deposited in the institution's mail systems on or before the last day for filing and it is accompanied by a declaration in compliance with 28 USC 1746 or a notarized statement setting out the date of deposit and stating that first-class postage is being prepaid. Evidence (such as a postmark or date stamp) showing that he notice was so deposited should cure any delay it may have taken for the notice to reach the Court. Some procedural rules must give way because of the unique circumstance of incarceration. Citing Fex v Michigan, 507 US 43 also Johnson v Johnson 488 US 806, 102 L Ed 2d 18, Miller v US, 488 US 807. Mailing is completed by depositing pleading with United States Postal Service. Petitioner contends that mail should have been deemed filed the day it was postmarked, not the date that the Court received it. Pro se prisoners' motions are deemed filed the date it is delivered to prison authorities for mailing to the courts. See Adams v State, 173 F 3d 1339, Also see Washington v US, 243 F 3d 1299, 1301 (11th Cir 2001). Because a prisoner proceeding pro se has virtually no control over the mailing of his pleading it is deemed to be filed at the time the prisoner deliver the pleading to prison or jail officials to be mailed. See Houston v Lack, 487 US 266 also Blair v Gentry US Dist Lexis 133604 (2016). Inmate's notice of appeal is deemed filed upon delivery to prison officials whether proceeding is civil or criminal and irrespective of whether inmate is represented by counsel US v Moore (1994) (A4 W VA) (24 F 3d 624). Because the time lapse between the day the notice was mailed and the day the Court stamped filed the notice was out of Petitioner's control. Violatory denial of this issue would significantly injure Petitioner by forcing him to undergo the delay. Appeal postmarked five (5)

days beyond appeal period would be considered timely upon affidavit of Appellant and statement of his representative that Appellant signed and mailed appeal on 18th day of filing period and the Postal Service's reorganization and implementation of remote bar coding in his area made mail flow sluggish; Appellant would not be held responsible for speed of mail service. Williams v United States Postal Service (1994, MSPB) 61 MSPR 213. Here Petitioner is a reflection of Williams where the mail became sluggish through the Christmas holidays and returned back to regular flow after the holidays had passed. The situation of pro se prisoners seeking to appeal without the aid of counsel is unique. Such pro se prisoner cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, pro se prisoner cannot personally travel to the courthouse to see that the notice be stamped "filed" or to establish the date on which the court receive the notice. Other litigants may choose to entrust their appeals to the vagaries of the mailing and the clerk's process for stamping incoming papers, but only the pro se prisoner is forced to by his situation and if other litigants do choose to use the mail. They can at least place the notice directly into the hands of the United States Postal Service or a private express carrier and they can follow its progress by calling the court to determine whether the notice was not stamped on the date the court received it. Pro se prisoners cannot take any of these precautions nor by definition do they have lawyers who can take these precautions for them.

Did the Trial Court convict based on insufficient evidence?

The evidence was insufficient as a matter of law. The State's entire case was based on circumstantial evidence; which was based upon evidence of Prior Bad Acts which lacked evidentiary substance. Several State witnesses indicated that they witnessed an argument; however none of them could identify what the argument was about (T450). One State witness testified specifically that the witness could not hear any fighting or hostility (T478). The State's main witness to the ashtray incident was affirmative that she did not see anything in Appellant's hands (T451). She testified that she only believed that an ashtray was involved because it was broken later on (T452). Practically all of the State's witnesses had convictions for crimes of moral turpitude (T532 and T614). One witness testified for the State had a pending charge with the very same Fulton County DA's office; that witness knew that a resulting conviction of that pending charge would result in recidivist treatment and mandatory jail time (T677). The victim's home was also known as a drug house and prostitution house with many different people going in and out of that apartment (T899). Law enforcement testified that drug houses get robbed for their "stash" of either cash or drugs all the time and most of the time people even get injured or killed (T111). There was no physical evidence presented at trial. However there was blood and DNA evidence taken and none of it was submitted for analysis. The State presented only circumstantial evidence. Petitioner's innocence was not excluded. Citing Jackson v Virginia, 443 US 307 (1979).

To determine if the evidence when viewed in the light most favorable to the prosecution was sufficient to support the verdict; the evidence must be sufficient beyond reasonable doubt of the accused guilt. Citing Willis v State, 263 Ga 597 (1993). Jackson does not require that there be no evidence on which a jury might base a verdict of acquitted nor does it require that when confronted with conflicting evidence, the jury is constitutionally required to believe only that relating to the Petitioner's innocence. In Brazle v State, 223 Ga App 504 (1996), the Court found that although the Defendant's presence near the scene was suspicious, the evidence was not sufficient to support his conviction. The Court noted that neither his presence nor flight or both together, without more, is conclusive of guilt. Citing Stabbs v State, 265 Ga 883 (1995).

In a circumstantial evidence case, the State must present evidence to exclude every reasonable hypothesis save the guilt of the accused.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: July 6, 2020