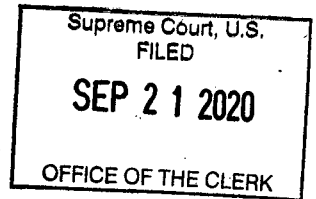


No. **20-6558**

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Sonya Bamberg — PETITIONER
(Your Name)



VS.

State of Georgia — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

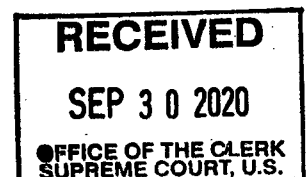
PETITION FOR WRIT OF CERTIORARI

Sonya Bamberg 1000104010
(Your Name)

C2-50B, LASP, Box 709
(Address)

Alto, Georgia 30510
(City, State, Zip Code)

N/A
(Phone Number)



QUESTION(S) PRESENTED

Sonya Bamberg was denied due process because she was denied a full and complete record to review for appeal. Bamberg was denied a meaningful opportunity for appellate review of her convictions due to the lack of transcript of the first day of trial. The question to be answered is whether a judge who did not preside over the trial may certify a supplemental record of testimony from witnesses eight years after conviction where the defendant is no longer represented by trial counsel and the prosecution was totally replaced.

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:

Honorable Jackie Johnson
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701 W. Street
Box 301
Brunswick, GA 31520

Honorable Paula Smith
Senior Assistant Attorney General
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 as MSR, H. followed by page numbers

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☐ is unpublished.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 _____ to the petition and is

☒ reported at Bamberg v. State 839 SE 2d 640 (2009); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

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

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☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

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

☐ 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 Feb 28, 2020.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: March 23, 2020, 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 30 SEP 2020 (date) in Application No. ____ A _____.

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

STATEMENT OF THE CASE

Ms. Sonya Bamberg, along with her son, Damon Bamberg, were indicted on charges of malice murder, felony murder, two counts of aggravated assault, a possession of a firearm during the commission of a crime, criminal damage to property in the second degree, and cruelty to children in the first degree. (R.5-9) After a trial which lasted from August 31, 2009 to September 3, 2009 Sonya Bamberg, and her son, Damon Bamberg, were convicted of murder, felony murder, two counts of aggravated assault, possession of a firearm during commission of a crime, and criminal damage to property (Trial Transcript 1-968.) Judge Amanda Williams presided over the trial. (TT 1-968). Ms. Bamberg was tried by a jury in Jeff Davis Superior Court alongside her son and codefendant, Damon Bamberg, for charges of Murder (Malice), Felony murder, Aggravated Assault (2 Counts), Possession of a Firearm During the Commission of a Crime, and Criminal Damage in the Second Degree. The jury convicted Ms Bamberg of all the above charges and acquitted her on Cruelty to Children in the 1st Degree charge. Ms Bamberg was sentenced to life in prison for the murder convictions, plus twenty consecutive years for Aggravated Assault. Ms Bamberg was sentenced to 5 years consecutive on the Possession of a Firearm by a Convicted Felon charge, and 5 years consecutive on the charge of Criminal Damage in the Second Degree (R.485-486, 494-500)

Counsel for Ms Bamberg timely filed a Motion for a New Trial on October 22, 2009 (R 527-528) Ms Bamberg, through her counsel, thereafter requested the transcript from her trial for appellate purposes. On June 24, 2011 an order signed by Judge Amanda Williams, Superior Court Judge for Jeff Davis County was filed that ordered, "the court reporter [to] make a transcript of the entire jury trial including jury selection and provide same to the Defendants' counsel." (R 600-604)

Ms Bamberg, through counsel, filed the Motion for a True, Correct, and Complete Transcript when four years passed with no transcript. (R 661-689)

In August of 2014, a hearing was set for a Motion for a True, Correct, and Complete Transcript and an Amended Motion for a New Trial which Ms Bamberg had filed. On the date of the hearing, a transcript was filed with the clerk of court in Jeff Davis County Superior Court. The transcript was filed without the jury selection and with a stenographers not indicating that the first day of trial was unavailable for transcription due to a

recording equipment failure (Trial Transcript Vol I, p1-5).

When it was discovered that there were substantial omissions from the record, Ms Bamberg, through counsel, requested any additional portions of the trial, including jury selection, be transcribed. The Trial Court ordered Defendants to file their amended motions for new trial by November, 2015 and scheduled a hearing on the amended motions for December, 2015 (LR 797-796). Unfortunately, the trial transcript was still missing an entire day of testimony and the entire voir dire although the evidence suggested that voir dire had been taken down as a matter of course. Counsel for Sonya Bamberg and Damon Bamberg further requested a transcript from the sentencing hearing. The Defendants received the transcript from the sentencing hearing on February 11, 2016.

On August 5, 2016, Counsel for Ms Bamberg filed an Amended Motion for True, Correct and Complete Trial Transcript, or in the Alternative, a New Trial (R.816-823) Counsel filed an Amended Motion for a New Trial on August 10, 2016 (R.832-836) In February 2017, the court reporter informed the state that the first day of trial was not recoverable to be transcribed and that the jury selection was lost due to the same recording equipment failure.

The lower court also held that "there is no need to attempt to supplement the records regarding the voir dire." The Appellant maintained that she is entitled to a transcript of the objections that were recorded during voir dire.

The State requested to be allowed to Supplement the Record and the Counsel for Ms Bamberg opposed the motion (R.885-894) On July 10, 2017, the Trial Court held a hearing on the state's motion to supplement the record. (R.905-910). On July 19, 2017, the Trial Court ordered that the State would be permitted to supplement the record (R.905-910)

Sonya Bamberg sought and the Trial Court permitted a certificate of immediate review to the Supreme Court of GA (R.926-928) On September 20, 2017 the Georgia Supreme Court issued its remittitur denying interim review of the Trial Court's order, and declined to review the issue at that time (R.937-940). On November 6, 2017, there was a hearing on the State's Motion to Supplement the record of the Trial Proceedings (MSR, H 1-162) The Trial Court filed a certificate supplementing the record even though the Trial Court was not the trial judge for the trial and the trial judge was not present at the motion to Supplement hearing (R.968-969) Also trial counsel for Sonya Bamberg was

not present and did not give evidence at the motion to Supplement the Record. Trial counsel for Damon Bamberg, Sonya Bamberg's co-defendant, was not present and did not give evidence at the motion to Supplement the Record. The only counsel at the motion to Supplement hearing who had been at the actual trial was one of the prosecuting attorneys.

Sonya Bamberg, through her counsel, filed a Second Amended Motion for Trial on February 21, 2018 (R970-972). The Court scheduled a hearing for May 9, 2018 (R973-975). Because Damon Bamberg was assigned new appellate counsel, the motion for a New Trial hearing was continued to August 6, 2018 (R978-979). This hearing was continued to October 9, 2018 to allow the new appellate counsel an opportunity to review transcripts and to review the issue of the missing portions of the record. (R985-987; R988-989.) On October 9, 2018, there was a hearing on the motion for New Trial and Amended Motions for New Trial. On November 21, 2018, Counsel for Sonya Bamberg filed a Brief in Support of her motions for New Trial and a Request to Re-open evidence due to ~~a~~ newly discovered evidence which took place years after the trial from a government witness which contradicted his testimony during the trial. (R1010-1015)

The trial Court denied the motion for New Trial and the motion to Reopen Evidence on December 19, 2018 and the Order was filed and file stamped on December 27, 2018 (R1036-1039; R1040-1041). The Notice of Appeal was filed on January 28, 2019. The Thirtieth day would fall on January 26, 2019 and January 28, 2019 was the first business day following January 26, 2019. The case was docketed in Georgia Supreme Court on April 11, 2019. On April 13, 2019, Sonya Bamberg moved for an extension of time to file her brief and enumerations of error, which the Court granted on April 16, 2019. The time to file was extended until May 21, 2019. The appeal was denied on February 28, 2020. Reconsideration denied on March 25, 2020.

Statement of the Facts

There was testimony presented at the trial that officers responded to a call to 911 saying there had been a shooting, Sheriff Payton (Montgomery Co) turned his patrol unit around to meet with Damon Bamberg about being assaulted by the victim (TT Vol, p 225-226) Sheriff Payton testified that Sonya Bamberg was there with Damon Bamberg and the children (TT Vol p 230) Sheriff Payton told Sonya Bamberg to take the children home after Sheriff Payton had a chance to look in the vehicle (TT Vol 1, p 231) Sheriff Payton testified that he looked in the car being occupied by Damon Bamberg, along with Damon's two children. Sheriff Payton was told he could search in the car. (TT Vol, 231) Damon's two children were in the car and they were acting normal. (TT Vol, p 245) Sheriff Payton testified that he did not smell any gun powder and that he found no evidence after searching the car (TT Vol 1, p 246-248)

GBI agent Kendra Lynn testified that she met with Sonya and Damon Bamberg (TT Vol 1, p 103-104) She testified that she was notified the victim was killed while she was meeting with the Bambergs (TT Vol 1, p 104) She noted that Damon Bamberg was upset and that he and Sonya Bamberg asked to have their vehicle searched (TT Vol p 109-111, 112) The testimony was that Damon and Sonya Bamberg had just come from meeting with the victim to exchange their children.

GBI agent Debra Rollins testified about a statement that Damon Bamberg made about the victim injuring his hand and reporting the incident to the sheriff's department (TT, Vol 1, p 130-133). Rollins testified that she discovered bullets near the defendant's chicken coop that were consistent with the same type of weapon

used to kill the victim (TT, Vol I, pp 153, 158-159; Vol II p 321-325) Officers arrested Damon Bamberg based on shoe impressions which turned out not to match his shoes (TT, Vol I, p 181-182)

The victim was on her cell phone with her father when she was killed (Motion to Supplement the Record Hearing p 12) The cell phone call happened between 6:10 and 6:12 PM (TT, Vol I, p 331) The sheriff's log showed that Damon Bamberg, along with his mother, Sonya Bamberg, arrived at the sheriff's office around 6:16 PM (TT, Vol II, p 421) Investigator Lee testified that based on those times, there is no way Bamberg, along with his mother, could have been in both places to kill the victim (TT, Vol II, p 422) Investigator Lee testified that it would not have been possible for Damon Bamberg (or anyone who was in the car with him, including Sonya Bamberg) to be at the shooting and then at the sheriff's office. (TT Vol II pp 425-426, 428) He then concluded that the log had to be in error. (TT Vol II p 450) Sheriff dispatcher Prater testified that he was accurate when he put the entry in the log, including the time of 6:16 PM (TT Vol III, p 792.)

Burtis Taylor, a professional government informant and jail house snitch testified that Sonya Bamberg told him that Damon Bamberg had shot the victim (TT Vol II p 533) The time Taylor was serving at the time he befriended Sonya Bamberg was Taylor's 38th time in jail (TT, Vol II p 533) Burtis Taylor enjoyed trustee status. Burtis Taylor had been convicted each time he had been in jail previously. (TT, Vol II p 528) Burtis Taylor's sentence after testifying at the Bamberg trial was six months rehab. (TT, Vol II p 531)

Damon's brother, Marc Bamberg, testified that he owned the same type of gun that was used to kill the victim, but he testified that Damon did not know about it (TT, Vol II 504, 521-522) Marc Bamberg had reported the gun stolen and the incident

report was filed on January 23, 2008 (TTJ Vol II p 523)
This was the third gun Marc Bamberg had had stolen from
his home in Vidalia, GA.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sonya Bamberg has been deprived of due process because the state has failed to create and file a true, correct and complete trial transcript of the entire trial, including the first day of trial proceedings. The motion to supplement proceeding did not comply with the statutory requirements and the trial court for the trial was not the trial court which certified the record. The Trial Court for the trial was not present at the motion to supplement the transcript proceedings. A complete and accurate transcript is essential to the Defendant's right to appeal, and the only remedy for a deficient transcript is to grant the Defendant a new trial.

Five years after the trial it became clear that the transcript was missing a significant portion of the trial, the first day of the trial and voir dire. A year and a half after that, it was concluded that the recording had malfunctioned and that testimony from the first day and the voir dire could not be recovered for transcription. The State requested to be allowed to Supplement the Record and the Counsel for Sonya Bamberg opposed the Motion (R 882-894). On July 10, 2017 The trial Court held a hearing on the state's motion to supplement the record (MSR # 1-162). On July 19, 2017, the Court filed an order granting the state's request to supplement the record by calling witnesses (R 905-910). At the Motion to Supplement the Record Hearing which took place on November 6, 2017, the State failed to produce trial counsel for either defendant, Sonya Bamberg or Darnon

Bamberg (MSR, H. 1-162). The trial judge, Amanda Williams, was not present (MSR, H. 1-162). The only counsel from the 2009 trial who was present was one of the prosecuting attorneys, Jan Kennedy. Jan Kennedy herself testified about the difficulty of remembering the evidence when so much time has elapsed. Specifically, she stated "I know it's hard to remember that long ago." (MSR, H. 116) The hearing was taking place over 12 1/2 years after the trial for Sonya Bamberg and Damon Bamberg.

The State presented five witnesses at the Motions to Supplement the Record hearing. The State said they "believed" five witnesses were called the first day (MSR, H. 7)

The state introduced testimony of Gary Ovin, the victim's father who testified about the phone call he received while the victim was being followed and subsequently shot (MSR H 8-31) The next witness was GBI agent Brian Hargett who testified about tire and shoe impressions which did not match Damon Bamberg (MSR H 31-46) The next witness was 911 dispatcher Sheryl Foskey who played Ovin's 911 call (MSR, H 46-65, 95-100) Deputy Preston Bohannon then testified that he found the victim dead in her car (MSR, H. 65-75) Then Emergency Responder Roger Ogilvie testified (MSR, H. 75-88) The Clerk of Court Murphy was called to testify about notes she took during the trial (MSR, H 88-94) ADA Jan Kennedy then testified about redactions made during the 911 call. (MSR, H. 101-124)

There were also several exhibits the State sought to introduce Appellate Counsel for Bamberg objected to the admission of some of the exhibits into evidence. The trial court sustained some of those objections. Ultimately, the exhibits were let in because it was believed that on the first day, those

exhibits were admitted. It is still unclear whether there were objections to the testimony the state sought to introduce, whether there were objections to the exhibits including the photographs from the scene the prosecution sought to introduce into evidence. In the end, the issue with needing separate appellate counsel from trial counsel in order to do a meaningful review of Sonya Bamberg's trial was evident. The process also revealed how much is still missing from the record.

The lack of a complete transcript is a structural problem. There is no requirement that harm be shown in order to show a new trial is the appropriate remedy and that supplementation through new trial testimony has not cured the defect. The lack of a complete transcript or record deprives the defendant of the opportunity of meaningful review of her trial.

The trial court erred by ordering that the state may supplement the record using a procedure not sanctioned by OCGA § 5-6-41(g) and by certifying the record as complete. (R 968-969) There was also no stipulation by the parties agreeing to the missing portions of the trial transcript.

OCGA § 5-6-41(g) states explicitly, "If the trial judge is unable to recall what transpired the judge shall enter an order stating that fact." The appropriate remedy for repairing the harm-caused by the lack of complete record is a new trial.

While the Trial Court relied on Mosley, the Mosley case is distinguishable from the instant case; in our case the Trial Court cannot certify from recollection what transpired during the missing portions of the trial

There is no stipulation by the parties agreeing to the missing portions of the trial transcript OCGA 5-6-41(g) states explicitly, "If the trial judge is unable to recall what transpired, the judge shall enter an order stating that fact."

The Trial Court ordered that the State could supplement record and relied on OCGA 5-6-41(g) and *Mosley v State* 300 Ga 521 (2007) as precedent. OCGA 5-6-42(g) states that where the trial is not transcribed as required or is not obtainable, the transcript may be prepared from "recollection." When the parties or counsel agree to a supplemented record, the trial court can certify that record. However, where the parties cannot agree "to the correctness of such a transcript, the decision of the trial judge thereon shall be final and not subject to review; and if the trial judge is unable to recall what transpired, the judge shall enter an order stating that fact." In essence there are three options available when a substantial portion of the trial record is missing: 1) the parties can stipulate to a transcript made from their recollections, 2) the trial judge can certify a transcript made from recollection without agreement from the parties, or 3) where the trial court does not recall the proceedings, it must enter an order stating that fact.

The parties could not agree to a transcript prepared from "recollection," because neither party was represented by the same counsel as was involved at the trial. Counselors for both parties were unable to "recall" what happened.

Like wise, the second option was not available because the Trial Court could not recall the proceedings.

The case at bar is easily distinguished from Mosley. In the Mosley case the "same judge who presided over the [missing] day of trial presided over the hearing," where the supplemental record was produced, Mosley at 524. There are numerous cases which state plainly that the Trial Court may supplement a record, but that it must be done from memory. *Glass v. State*, 289 Ga 52, 545 (2011); *Turner v. State*, 226 Ga App 348, 349 (1997). The law requires either the parties or the trial court to recall what transpired before. Otherwise, no reliance can be placed upon any testimony intended to supplement the record.

In another case, this Court found an attempt to supplement a record insufficient, even when the supplement was made by the trial judge *Sheard v. State*, 350 Ga 117 (2016). In that case, despite the court's factual findings in the post-conviction proceedings related to the contents of the missing transcript, "those findings were reached more than 15 years after [the defendant's] trial and without benefit of any trial notes." *Id.* at 121. This Court concluded the age of the conviction, the reassigning of appellate counsel and the reality of fading memories revised "the specter of due process concerns." *Id.* There are still more concerns in this case. Ms Bamberg was convicted in 2009, but her transcript was not filed until five years later. It took two additional years to confirm that no more transcript would be forthcoming.

The supplemental testimony in Mosley was not relevant because it replaced the prior testimony. It was deemed relevant to refresh the trial court's recollection of what happened. The Trial Court, having the ability to recall the prior testimony was able to certify the new testimony as being representative of the old. There were no

guarantees that the supplemental testimony from the motion to Supplement hearing in the Bamberg was the same as the 2009 testimony. If these witnesses testified differently the Trial Court had no means of independently evaluating the correctness of the supplemental record. Appellate counsel was completely unable to assist the trial court in that determination by demonstrating inconsistencies or impeaching the new testimony with accounts of the old. Counsel could not meaningfully cross-examine these witnesses about their prior testimony. The relevance of the testimony presented at the Motion to Supplement hearing was limited to whether or not it will be the same as the testimony from eight years ago, i.e., whether the supplemental testimony can be certified as correct as required by OCGA 5-6-41(g). The trial court did not have sufficient available information to make such a determination, from recollection.

Read together, OCGA 5-6-41(g) Mosley and Sheard indicate a new trial is required where otherwise the defendant will be deprived of meaningful appellate review. Mosley, as stated Bamberg's case, neither the trial court nor appellate counsel participated in the 2009 trial. The proceedings missing from the trial transcript could not be recalled as required by statute.

REASONS FOR GRANTING THE PETITION

"A person convicted has a right of appeal. Inherent therein is the right to a transcript on appeal." See *Griffin v Illinois*, 351 U.S. 12 (76 SC 585, 100 L.E. 891) See *Montford v State*, 298 S.E.2d 319, 321, 164 Ga App 627, 628, 629 (1982) where there was a similar circumstance where the record was lost. We would argue it is a similar situation to the one we have here "The evidence is undisputed that the transcript in this case cannot be delivered in accordance with the order of the trial court. Thus there is no recourse under those circumstances but to order the appellants a new trial." *Montford v State*, 298 S.E.2d 319, 321, 164 GA App. 627 628 (1982)

The purpose of the transcript is to provide a defendant with a meaningful opportunity for appellate review of her conviction. "A person convicted of a crime has a right to appeal. Such an appellant has a right to a transcript of the trial for use on appeal." *Wilson v State*, 246 Ga 672, 676 (1980) (citing *Griffin vs Illinois* 351 U.S. 12 (1956)). Due process requires the preservation of a defendant's right to appeal. *Griffin vs Illinois* 351 U.S. 12, 18-20 (1956) "The failure of the state to file a correct transcript, through no fault of the [defendant] effectively deprives the defendant of his right to appeal. *Montford v State*, 164 Ga App 627, 628 (1982) "Where the missing transcript prevents adequate review of the trial below, a new trial is warranted." *Sheard vs. State*, 300 Ga 117, 120-21 (2016)

In order to review a case on appeal, this Court and any future appellate courts must be able to review motions and ruling made by the parties and the trial court, the

admission of evidence for legal and constitutional errors, objections and the rulings thereon, jury misconduct, improper judicial comments, and improprieties in opening and closing statements,

Without the presence or recollection of the trial attorneys and the trial court, it is impossible to review the record to discover whether there were any errors requiring a new trial for the missing portion. The supplemental portion of the record cannot prove or disprove whether any reversible errors occurred on the first day of the trial in 2009.

Appellants are entitled to conflict free counsel in order to review the entire record for errors which occurred during trial. The motion to Supplement the Record did not comply with the explicit formula set forth in OCGA 5-6-34(b) for making a record for appeal. If this approach was sanctioned, it would create new precedent and a new pathway for parties to avoid issues which happened during trial by allowing the state to introduce new trial testimony, to introduce a new trial record.

As the Supreme Court of Georgia found in Sheard, "forcing appellate counsel who was not involved in the original trial to divine error without the aid of a transcript is not only fruitless but also hinders counsel's ability to adequately and zealously represent the defendant. Sheard at 121, citing *United States v. Selva*, 559 F2d 1303 (5th Cir 1977) The Eleventh Circuit has held that where the defendant is no longer represented by trial counsel and there is a "substantial and significant" omission from the trial transcript, "prejudice may be presumed. *United States v. Preciado-Cordoba* 981 F2d 1206, 1212-13 (1993)

The state had the burden to provide a record of

Ms. Bamberg's trial and it failed to provide a complete record, As a result she has been denied meaningful appellate review of her case. Because the trial judge is no longer the trial judge presiding over this case, the procedure set out in OCGA 5-6-41(g) is not applicable. The trial court could not recall or recreate the record from memory.

If Ms. Bamberg's due process rights were violated during the first day of trial due to ineffective assistant of counsel, due to the introduction of improper evidence, due to improper comments to the jury by the trial judge, Bamberg is now even further deprived by having no means through which to remedy the violations which occurred during the first day of evidence.

For the reasons stated above including the lack of a complete trial record and the errors which occurred during the course of Sonya Bamberg's trial which prevented her from receiving a fair trial and due process of law, the conviction and sentence against Sonya Bamberg need to be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Sonya Bamberg

Date: September 20, 2020