

No. : 24-5562

FILED
AUG 15 2024
OFFICE OF THE CLERK SUPREME COURT, U.S.

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IN THE SUPREME COURT OF THE  
UNITED STATES

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PRESTON M. YOUNG

Petitioner/Appellant,

v.

STATE OF GEORGIA, SECRETARY FOR THE  
DEPARTMENT OF CORRECTIONS and ATTORNEY  
GENERAL

Respondents.

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ON WRIT OF CERTIORARI TO THE GEORGIA  
SUPREME COURT

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PETITION FOR CERTIORARI

Riverbend C.F.  
196 Laying Farm Rd.  
Milledgeville, Ga. 31061

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## Questions for Review

1. Does a defense attorney provide effective assistance of counsel as guaranteed under the Sixth Amendment when he fails to demur to an indictment to end the prosecution and any future prosecutions for the same offenses?
2. Does a defense attorney provide effective assistance of counsel as guaranteed under the Sixth Amendment by using a trial strategy that allows the State to shore up defects in their case by not having to prove any of the essential elements of the predicate offense in which the charges were indicted upon because the charges lack all of the essential elements of their predicate offense?
3. Does a defense attorney provide effective assistance of counsel as guaranteed under the Sixth Amendment when he fails to request a directed verdict for acquittal at the close of the State's case when the State's evidence was insufficient to prove any of the essential elements of the predicate offenses the crimes ~~were~~ indicted upon?
4. Is an indictment materially amended when the greater offenses on the indictment are heightened by the predicate offense they were indicted upon because the greater offenses lack all the essential elements of the predicate offense and the predicate offense is then removed?
5. Does a fatal variance exist when the State fails to prove material allegations as to how the crime was committed as indicted by the grand jury?

## LIST OF PARTIES

Supreme Court of Georgia  
330 Capitol Ave. suite 1100  
Atlanta, Ga. 30334

Superior Court of Baldwin County  
Hon. Judge Terry N. Massey  
121 N. Wilkinson St.  
Milledgeville, Ga. 31061

Superior Court of Henry County  
One Courthouse Square (Hon. Judge Wade Crumbley)  
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Atlanta, Ga. 30309

Appeal attorney  
Dell Jackson  
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## CASE CITATION

Young v. State, 305 Ga. 92, 92-93 (823 S.E.2d 774, 776-77) 2019

Smith v. State, 340 Ga. App. 457, 464 (2) (797 S.E.2d 679) 2017

Delacruz v. State, 280 Ga. 392, 396-397 (3) (627 S.E.2d. 579) 2006

Gersin v. State, 127 Ga. App. 811 (1) (195 S.E.2d, 211) 1973

Smith v. Hardrick, 266 Ga. 54, 54 (1) (464 S.E.2d. 198) 1995

Young v. State, 239 Ga. 53, 60 (236 S.E.2d, 1) 1977

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

Grissom v. Gilkerson, 262 Ga. 374 (418 S.E.2d 27) 1992

State v. Eubanks, 239 Ga. 483 (238 S.E.2d 38) 1977

Brooks v. State, 178 Ga. 784, (3) (175 S.E. 6) 1934

Stirone v. United States, 361 U.S. 212, 216-217, 80 S.Ct. 270, 272-273, 4 L.Ed.2d 252 (1959)

Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)

Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)

State v. Heath, 308 Ga. 836, n.2 (843 S.E.2d. 801) 2020

Heath v. State, 349 Ga. App. 84, (2019)

Stone v. State, 166 Ga. App. 245, (1) (304 S.E.2d 94) 1983

## FEDERAL STATUTES

28 U.S.C. § 1251 (b) (2)

28 U.S.C. § 1254 (1)

28 U.S.C. § 1257 (a)

28 U.S.C. § 1746

## UNITED STATES SUPREME COURT RULES

Rule 83.2

## GEORGIA CRIMINAL CODE

O.C.G.A. 5-6-30

O.C.G.A. 15-9-83

O.C.G.A. 17-7-51

O.C.G.A. 17-7-54

O.C.G.A. 17-7-70

O.C.G.A. 16-1-7

O.C.G.A. 16-1-8

## CASE CITATIONS FOR THIS CASE

State v. Preston M. Young 2011 SU CR 983-WC

Young v. State S 18 A 1468

Preston Young v. Eric Sellers, Warden et al. 19 SU CV 49170

Preston M. Young v. Eric Sellers, Warden et al. S 24 H 0363

## BASIS FOR JURISDICTION

Petition alleges this Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1251(b)(2), 1254(1), and 1257(a).

The first address of jurisdiction will be the direct appeal from a plenary order of the Georgia Supreme Court which denied collateral attack of the Baldwin Superior Court's ruling of the habeas issues presented to that court which are in direct conflict with U.S. Constitutional Amendments 5, 6, and 14 and the Georgia Constitution 1983 Art. I, Sect. I, Para. 1, XIV, and XVIII. The Baldwin Superior Court ruling was on October, 19 2023 and the Georgia Supreme Court ruling was on June 11, 2024.

The second address will be of original jurisdiction. The petition is alleging there is a direct conflict between the Georgia Constitution and their Criminal Rules of Procedure §§ 16-1-7, 16-1-8, 17-7-51, 17-7-54, and 17-7-70 against the Baldwin Superior Court's ruling on the issues of fatal variances, ineffective assistance of counsels, materially amending an indictment, and double jeopardy in violation of the forementioned U.S. and Georgia Constitutional rights and statutes.

## CONSTITUTIONAL PROVISIONS

The petitioner alleges that the respondents have violated his U.S. Sixth Amendment Right to counsel and the right to have effective counsel which is enforced upon the States pursuant to the U.S. Fourteenth Amendment's due process of law and equal protection clauses.

The petitioner alleges that the respondents have violated his U.S. Fifth Amendment Right to only be tried for a capital offense upon an indictment, this right is recognized in the State of Georgia but was not applied in this case which is a violation of the petitioner's rights to due process of law and equal protection of the laws pursuant to the U.S. Fourteenth Amendment.

The petitioner alleges that the respondents have violated his U.S. Sixth Amendment Right to be informed of the nature and cause of the accusation against him and to be protected from another prosecution for the same offense when the indictment failed to include the essential elements of the lesser included offense it was indicted upon in violation of the petitioner's rights to equal protection and due process of law pursuant to the U.S. Fourteenth Amendment.

The petitioner was denied due process of law, pursuant to the U.S. Fourteenth Amendment, by the State of Georgia's habeas court and Supreme Court of Georgia because they did not fully address the claims put forth to them by the petitioner, which would have mandated a remand or reversal, as proven by prior rulings in the Supreme Court of Georgia, the lower courts of Georgia, and the U.S. Supreme Court.

## STATEMENT OF THE CASE

Appellant was arrested on August 31, 2011 for the murder of his wife which occurred on August 11, 2011. He was indicted by a Henry County grand jury on November 17, 2011 charging him with Malice Murder, Felony Murder, Aggravated, Assault and Cruelty to Children in the third Degree all based on allegations that a child witnessed appellant commit the crimes. The first trial in June of 2013 was declared a mistrial due to a hung jury. A second trial in November of 2014 resulted in guilty verdicts for Felony Murder and Aggravated Assault, not guilty for Malice Murder, and the charge of Cruelty to Children in the third Degree had been nolle prosequi just prior to the start of this second trial. Appellant was sentenced to life imprisonment for Felony Murder and a concurrent term of 20 years for aggravated assault.

On appeal to the Georgia Supreme Court the sentence and conviction for aggravated assault was vacated due to the court's finding that there was "no deliberate interval between the non-fatal injuries that form the basis for the aggravated assault and the fatal injury that forms the basis for felony murder." The sentence and conviction for Felony Murder was affirmed on February 4, 2019 in *Young V. State*, 305 Ga. 92, 92-93 (823 SE 2d 774, 776-77) 2019.

Appellant then filed a habeas petition in Baldwin County Superior Court, case no. 19 SU CV 49170, on February 21, 2019 alleging ineffective assistance of trials' and appeal counsels for failing to properly challenge the indictment with the trial court and on appeal. An evidentiary hearing was held on February 15, 2023 at which time the court ordered the parties to file proposed orders which will include facts and conclusions of law to support our positions. On October 19, 2023 the habeas court denied relief without addressing all of the facts and conclusions of law cited in appellants proposed order. The denial was appealed to the Georgia Supreme Court by certificate of probable cause which was denied without review in case no. S24H0363 on June 11, 2024.

## Argument of Issues

The appellant of this case received ineffective assistance of counsel as guaranteed under the Sixth Amendment of the U.S. Constitution and the Georgia Constitution of 1983 Art. I, Sect. I, Para. XIV. Both trials' counsels and appeal counsel failed to properly challenge the indictment in this case or to bring the issue forth on appeal.

The first trial's indictment consisted of four counts;

1. Malice Murder
2. Felony Murder
3. Aggravated Assault
4. Cruelty to Children in the third degree (alleging the crime was committed in a child's presence)

The first trial ended in a mistrial due to a hung jury. Prior to the second trial's start the State removed count (4.) from the indictment. My attorney then filed a motion to quash the indictment based on the materially false information presented to the grand jury. The motion was denied because my attorney did not have the transcripts. Had either trials' attorney demurred the indictment it would have been granted on grounds that it did not protect from double jeopardy, the greater offenses of counts 1, 2, and 3 failed to properly allege all the essential elements of cruelty to children in the third degree, which the -

State was still required to prove, and that removing Count 4 constituted a material amendment. It is well settled in Georgia that "averments in an indictment as to the specific manner in which a crime was committed are not mere surplusage, and such averments must be proved as laid, or the failure to prove the same will amount to a fatal variance and a violation of the defendant's right to due process of law" Smith v. State, 340 Ga. App 457, 464 (2) (997 S.E.2d 679) 2017. The allegations of the trials' indictments failed to inform the accused as to the charges against him to present his defense and not be taken by surprise, did not protect him against another prosecution for the same offense, and because the allegations fail to meet these tests the variance in this case is fatal as in Delacruz v. State, 280 Ga. 392, 396 - 397 (3) (627 S.E.2d 579) (2004).

The State improperly manipulated the grand jury to indict by putting a void count on the indictment, Count 4 which alleges the State had a witness that was present to see or hear the accused committed the crimes in the indictment. Contrary to this, none of the aggravated assaults alleged in counts 1, 2, or 3 could be prosecuted in that manner prescribed by the grand jury because they all lacked the essential elements of the lesser offense of Count 4, rendering it void. The Georgia Supreme Court ruled that the aggravated assaults were all the same because there was "no deliberate interval between the non-fatal injuries that forms the basis for the aggravated assault and the fatal in-

jury that form the basis for murder" Young v. State, 305 Ga. 92, Count 4 was void because in Georgia "The general rule concerning lesser included offenses appears to be: 'To warrant a conviction of a lesser offense on an indictment or information charging a greater offense, it is essential that all the allegations describing the greater offense contain all essential averments relating to the lesser offense or that the greater offense necessarily include all the essential ingredients of the lesser,'" Gearin v. State, 127 Ga. App. 811 (1) (195 S.E. 2d 211) 1973. The variance in this case was fatal to the indictment and prosecution of the case because it lacked the essential elements of Cruelty to Children in the third degree, the State did not prove the aggravated assaults happened independently nor was there a child witness. This is a clear violation of appellant's Fifth, Sixth, and Fourteenth Amendment Rights under the U. S. Constitution which states that criminal defendants shall "be informed of the nature and cause of the accusation against them." It is established in Georgia that satisfaction of this fundamental principle requires that a criminal indictment which does not recite language from the Code must allege every essential element of the crime charged, Smith v. Hardrick, 266 Ga. 54, 54 (1) (464 S.E. 2d 198) 1995. First and second trial counsels and appeal counsel were ineffective for failing to file a motion in arrest of judgment which would have been granted due to the State's failure to prove the crimes happened in the presence of a child or that the aggravated assaults happened independently of one another as required by the grand jury's indictment for the prosecution of this case. The petitioner was prejudiced because the motion in arrest would have been granted instead of a conviction for crimes the petitioner did not committ. on an indictment that

could have been declared void, and the outcome of the proceedings different.

During direct examination of trial counsel Rickey Richardson at the habeas hearing it was clearly established why he didn't file a general demurrer or motion in arrest of judgment, he failed to see how count 4 was material to the indictment or any of its' counts. He was unaware that even though count 4 was removed the State still had to prove that the aggravated assaults happened in the presence of a child and or independently of one another as laid in the original grand jury indictment of the first trial.

The most problematic issue for the State at the first trial was in trying to prove these crimes happened in the presence of a child because she repeatedly told EMS, police, and then the jury that she never saw the appellant or any crime at all. So from a strategic standpoint trial counsel, Richardson, felt that it would be better for the appellant if the State was given a second chance at trial and not have to prove the most problematic issue -

of their case. There is no conceivable way that any competent attorney working on behalf of his client would ever make such an immoral decision. Richardson's decision to strategically turn a blind eye to what the law requires of him and an indictment and prosecution violated the appellant's rights to effective assistance of counsel as guaranteed under the Sixth Amendment to the United States Constitution, Georgia Constitution of 1983 Art. I Sect. I Para. XIV, Young v. State, 239 Ga. 53, 60 (236 S.E.2d 1) (1977), and Strickland v. Washington, 466 U.S. 668, 1984.

The errors in the indictment also violated petitioner's rights to due process of law under the 14<sup>th</sup> Amendment of the U.S. Constitution which states that no state shall "deprive any person of life, liberty, or property without due process of law: nor deny to any persons within its jurisdiction the equal protection of the laws." The equal protection clause of the Georgia Constitution 1983 and the United States Constitution is coextensive; yet this court has interpreted the equal protection clause in the Georgia Constitution to offer greater rights than the federal equal protection clause as interpreted by the U.S. Supreme Court, Grissom v. Gleason, 262 Ga. 374, (418 S.E.2d 27) (1992). The State of Georgia failed to provide a proper indictment in which the appellant was tried upon for capital offenses per Georgia criminal rules of procedure D.C.G.A. §§ 17-7-51, 17-7-54, and 17-7-70, Georgia. Const. of 1983 Art. I Sect 1 Para 1 (due process).

Because counts 1, 2, and 3 of the second trial lacked the essential elements of count 4, which they were indicted upon, removing count 4 constituted a material amendment. Child cruelty in the third degree was material to every count of the indictment because each alleged the same aggravated assault incorporated into count 4. The removal was a clear violation of appellant's Fifth Amendment rights under the U.S. Constitution and Georgia Constitution of 1983 Art. I Sect. I Par. XVIII. In Georgia "It is well established in this and other jurisdictions that an indictment can not be materially amended by striking from or adding to its allegations, except by the grand jury, and only before it is returned into court. It is bad practice for the court to do either; and if such additions or subtractions materially affect the indictment, it becomes void and can not be the basis of a conviction", State v. Eubanks, ~~239~~ 239 Ga. 483 (238 S.E. 2d 38) 1977; Brooks v. State, 178 Ga. 784(3) 175 S.E. 6 (1934). Federal courts hold that the substantive amendment of an indictment, particularly if the amendment broadens or alters the offense charged, is reversible error since it violates the defendant's Fifth Amendment right to stand trial only on the charges made by the grand jury in its indictment, Stirone v. United States, 361 U.S. 212, 216-217, 80 S.Ct. 270, 272-273, 4 L.Ed. 2d 252 (1959). Count 4 was the only way for the jury to know what had to be proved in the prosecution of the aggravated assaults contained in counts 1, 2, and 3 because they all lacked the essential elements of cruelty to children in the third degree.

The appellant did not foreclose his right to bring forth the fatal variance in the habeas petition because all the questions presented to second trial's counsel, Rickey Richardson were about his in-

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ability to recognize the fact that the State removed allegations from the indictment that were material and that count 4 removal changed the prosecution of the remaining counts which all alleged aggravated assault which is a fatal variance and because the child cruelty allegations were never proven at either trial nor was it proven that there were two independent aggravated assaults. All of these "facts and conclusions of law" were presented to the habeas court as ordered by the judge but never addressed on the merits in that court or the Georgia Supreme Court.

Appellant has clearly shown that he received ineffective assistance of counsels;

First trial attorney Kenneth Sheppard:

1. Did not challenge the indictment's fatal variances and counts 1, 2, and 3 lacking the essential elements of count 4 to have it declared void because it also failed to protect from double jeopardy or apprise appellant of what he was defending against at trial.

2. Did not file a motion in arrest of judgment or a directed verdict of acquittal at the close of evidence when the State failed to prove any of the aggravated assaults happened in a child's presence or independently of one another a fatal variance.

Second trial attorney Rickey Richardson:

1. Failed to do the same as first trial attorney

2. Failed to file a demurrer when the State removed count 4 materially amending the indictment in order to conviction less than all the required elements of cruelty to children in the third degree.

3. His trial strategy was based on the false premise that the State did not have to prove the aggravated assaults happened in the presence of a child as dictated by the indictment which was indicted with cruelty to children as the lesser included offense of the aggravated assaults.

Appeal Counsel Dell Jackson

1. Failed to allege ineffective assistance on both trial attorneys for their deficient performances and prejudices, as stated throughout this petition on direct appeal to the Georgia Supreme Court.

2. Failed to file a motion in arrest of judgment for the fatal variances that exist in the prosecution of this case as stated or to raise the issues on appeal to the Georgia Supreme Court. Her deficient performance caused my appeal to be denied when it would have been granted for appellants release and protect the Constitutional Rights stated in this petition.

By splitting the one aggravated assault up into the separate counts of the indictment she was able to take away double jeopardy protections for multiple prosecutions for the same offense and leave the appellant blinded in his defense against the counts which lacked all the essential elements of cruelty to children in the third degree. The Georgia Supreme Court essentially recognized the fatal variance that exists when they vacated the sentence and conviction for aggravated assault but failed to address the fatal variance in the indictment and prosecution for the felony murder count which also alleged aggravated assault.

The Georgia habeas court failed to fully address all of the facts and conclusions of law to support appellants claim and the Georgia Supreme Court denied appeal without review. The U.S. Supreme Court has determined that the Court must give deference to pro se pleadings because "a document filed pro se is to be liberally construed, ... and pro se complaint however inartfully pleaded, must be held to less -

stringent standards than formal pleadings drafted by lawyers," Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed. 2d 1081 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976)). Georgia's Civil Practice Act require that pleadings are to be liberally construed in favor of the pleader "so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein," O.C.G.A. 5-6-30 under the authority of the Georgia Constitution 1983 Art. VI, Sect. V and VI, and O.C.G.A. 15-9-83 which states "The petition and caveat shall be amendable at all times and in every particular."

### Conclusion and Relief Sought

The petitioner has clearly shown that both trial counsels and appeal counsel were ineffective in providing even the minimal assistance required under U.S. and Georgia Constitutions. Second trial counsel Rickey Richardson's actions just prior to trial were duplicitous when he feigned an attempt to quash the indictment using meritless arguments when he actually had meritorious grounds to quash the indictment but did present them. The counts alleging an aggravated assault were lacking all the essential elements of the Cruelty to Children in the third degree count they were indicted upon.

Rickey Richardson was aware that the State was unable to get a conviction at the first trial due to the fact the the child testified that she never saw the appellant or any of the crimes at all. He was also aware by way of discovery that the child never told anyone at anytime that she saw the defendant or witnessed any crimes which was also confirmed in discovery by written statements of first responders to the scene, police officers, EMS ambulance drivers, and via the several forensic interviews of the child. Richardson was also aware of the fact that there was never any evidence of the child crusing or changing anything about what she said. Richardson's trial strategy to not have the State prove the essential elements of Cruelty to Children in the third degree was purely illogical, unethical, and only worked to harm the appellant and aid the prosecution in obtaining a conviction when he could have demurred the indictment as in *The State v. Heath* 308 Ga. 836, n.2 (843 S.E. 2d 801) (2000) where Georgia courts concluded that "the felony counts of the indictment were void for failure to sufficiently allege the predicate offenses underlying the charges" and thus concluded that trial counsel performed deficiently in failing to challenge the felony counts with a general demurrer and that this failure was prejudicial to Heath's case, *Heath v. State*, 349 Ga. App. 84, 2019. This successful demurrer to the indictment would have also been a bar to any other prosecutions arising from the same offenses because the United States and Georgia Constitutions proscribe a defendant being twice placed in jeopardy for the same offense, United States Constitution; Fifth Amendment; Georgia Constitution, Art 1, Sect. 1, Para XVIII, O.C.G.A. §§ 16-1-7 and 16-1-8 extend the proscriptions of double jeopardy beyond those constitutional limits by placing limitations upon multiple prosecutions, convictions, and punishments for the same offense conduct. *Stone v. State*, 166 Ga App. 245 (1)(304 S.E. 2d 94) (1983). Richardson was also -

aware that a fatal variance existed in the first trial and would also in the second trial for the state's failure to prove the aggravated assaults of counts 2 and 3 happened independant of each other or in the presence of a child as alleged in the predicate offense and yet he failed to request a directed verdict for an acquittal and prejudiced the defendant.

Petitioner, Preston M. Young humbly and respectfully requests this Court to review this case *de novo* and to remand to the State of Georgia for the 2024 right of appeal, or to vacate his conviction and sentence if the right to appeal is not granted within 90 days and or any other relief this Honorable Court deems necessary.

The petitioner Preston M. Young believes all herein to be true, under the penalty of perjury pursuant to 28 U.S.C. § 1746.

Signed, *Preston M. Young*  
10/5/2024

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