No. 13-_____

In the Supreme Court of the United States

QUASHON MIDDLETON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant's federal constitutional rights to a jury trial and due process of law prohibit application of harmless error analysis when a trial judge fails to instruct the jury on a lesser included offense which was undisputedly supported by the evidence?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Supreme Court were Petitioner Quashon Middleton and Respondent State of South Carolina.

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PETITION FOR WRIT OF CERTIORARI

Counsel for Quashon Middleton petitions the Court to issue a writ of certiorari to review the judgment of the South Carolina Supreme Court affirming his convictions for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime.

OPINION BELOW

The opinion of the South Carolina Supreme Court (App. A1) is reported at 755 S.E.2d 432.

JURISDICTION

The South Carolina Supreme Court issued its opinion on February 26, 2014. Petitioner filed a timely petition for rehearing, which was denied on April 2, 2014. (App. A11). This Court has jurisdiction pursuant to 28 U.S.C §1257(a) because Petitioner Middleton is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2, cl. 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury ...." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The Fourteenth Amendment provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Factual Background

Around three o'clock in the afternoon of September 28, 2010, Stephanie Mack and Ryan Stephens sat stopped in a car on Brittlebank Road in Colleton County. R. 43 lines 13-23; R. 61 lines 11-20; R. 44 lines 2-4; R. 62 lines 10-12. Petitioner, riding on a moped, drove up behind Mack and Stephens, brandished a gun, and began shooting in the direction of Mack's car. R. 44 lines 4-22; R. 62 lines 12-14. R. 44 lines 4-9; R. 62 lines 16-17. After moving from the passenger seat to the driver seat, Stephens sped off hitting Petitioner's leg with the car. R. 47 lines 9-15; R. 55 line 23 – R. 56 line 10; R. 62 lines 19-20; R. 70 lines 20-21; R. 76 lines 12-14; R. 47 lines 16-22; R. 62 lines 22-24. Mack and Stephens then drove to Stephens' home. R. 48 lines 11-12; R. 64 lines 2-4.

The paramedic who arrived at the scene reported that Petitioner stated he had been run over by a car and the occupants of the car had shot at him. R. 38 lines 2-6. In fact, testing conducted on the gunshot residue (GSR) kit collected by local law enforcement from Petitioner revealed "[t]he quantities of metals found in [Petitioner's] kit d[id] not indicate the presence of gunshot residue." R. 104 lines 18-21.

Mack and Stephens claimed they did not have guns and did not shoot at Petitioner. R. 50 lines 5-6; R. 77 lines 16-19. However, the GSR kit from Mack's right and left palms provided "quantities of metals that may be associated with

gunshot residue." R. 104 line 23-25; R. 105 lines 2-3. Similarly, the quantities of metals found on Stephens' right and left palm and the back of his left hand "may be associated with gunshot residue." R. 105 lines 7-9; R. 105 lines 11-14.

At the conclusion of the evidence, the trial judge agreed to charge the jury on the lesser included offenses of assault and battery of a high and aggravated nature and assault and battery in the first degree as to Mack, but refused to charge assault and battery in the first degree as to Stephens because the judge mistakenly believed a touching and/or injury was required under state law. R. 116 lines 6-9; R. 116 line 21 – R. 117 line 7; R. 117 lines 12-24; R. 118 lines 2-12; R. 120 lines 21-25; R. 173 line 24 – R. 174 line 4; R. 174 lines 17-24. Without the opportunity to consider assault and battery in the first degree, the jury, not surprisingly, found Petitioner guilty of attempted murder of Mack and Stephens and possession of a weapon during the commission of a violent crime. R. 176, line 15 – R. 177, line 7. The trial judge sentenced Petitioner to imprisonment for thirty years on each count of attempted murder and five years for possession of a weapon during the commission of a violent crime. R. 178, lines 2-17.

There is no question that assault and battery in the first degree is a lesser included offense of attempted murder. S.C. Code Ann. § 16-3-600(C)(3).[1] There is also no question the trial judge erred in failing to charge the jury on the lesser included offense of assault and battery in the first degree as to Stephens because the evidence in the record supported submission of the charge. State v. Middleton,

[1] South Carolina defines assault and battery in the first degree as "offer[ing] or attempt[ing] to injure another person with the present ability to do so, and the act (i) is accomplished by means likely to produce death or great bodily injury." S.C.

755 S.E.2d 432 (S.C. 2014); (App. A1); see also, State v. Watson, 563 S.E.2d 336, 337 (S.C. 2002)(mandating a jury instruction on a lesser included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed); State v. Geiger, 635 S.E.2d 669, 673 (S.C. Ct. App. 2006)(holding a jury charge to a lesser included offense is required when the evidence warrants such an instruction; the evidence must allow "a rational inference" that the defendant committed the lesser offense); State v. Patterson, 522 S.E.2d 845, 854 (S.C. Ct. App. 1999) (providing that "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts.").

The State Appellate Decision

Explaining that it was "undisputed" the elements of the lesser included offense of assault and battery in the first degree were met in this case, the South Carolina Supreme Court unanimously held the trial judge erred in refusing to charge the lesser included offense as to Stephens. Middleton, 755 S.E.2d at 435; (App. A1). However, only four of the five justices found it was appropriate to apply a harmless error analysis to the admitted error. Id. Specifically, the majority explained that it must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." Id. (internal citation omitted). According to the majority, it was "elemental that the failure to charge the lesser-included offense is subject to a harmless error analysis." Id. at 435 n.2. To support this proposition, the majority cited this Court's decision in Neder v. United States, 527 U.S. 1, 15-16 (1999).

Code Ann. § 16-3-600(C)(1)(b).

Although the majority recognized that Neder concerned a failure to charge an element of an offense, and not the complete failure to charge a lesser included, the majority relied upon it to support its application of harmless error. Id. Additionally, the majority rejected the dissent's reliance upon Beck v. Alabama, 447 U.S. 625 (1980) and Hopper v. Evans, 456 U.S. 605 (1982). Id.

The majority then undertook a "fact-intensive inquiry." Id. Thus, the majority concluded

> the evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that [Petitioner] was guilty of attempted murder, given the facts that [Petitioner] deliberately drove up to the passenger window and shot into the vehicle at least five times, and Stephens testified that the only reason he and Mack were not injured is because he had the wherewithal to jump into the driver's seat and run [Petitioner] off the road.

Id. at 436. Tellingly, the majority held, "In our view, there is no other way to construe the evidence in this case but that [Petitioner] was attempting to kill Stephens and Mack." Id. The majority further held "any error in failing to charge the lesser-included offense harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt." Id.

In a powerful dissent, Justice Pleicones wrote that "refusal to give a jury charge on a lesser-included offense that is supported by the evidence is always reversible error and not subject to harmless error analysis." Id. (Pleicones, J. dissenting). Justice Pleicones explained that it is not the "prerogative" of the reviewing court "to weigh the evidence and usurp the jury's function." Thus, "[t]he failure to give a lesser-included offense where it is both supported by the evidence and

requested by the defendant is ipso facto reversible error." Id. He cited Hopper, supra, and Beck, supra, to support his position. Id. at 436. Justice Pleicones rejected the majority's reliance on Neder, supra, by explaining this Court's decision on harmless error was guided by the fact that the materiality element not charged to the jury was not contested by the defendant and evidence of it was overwhelming. Id. Justice Pleicones explained this was "not a case where an uncontested element of a crime was not charged to the jury, but rather one where the evidence would have supported a conviction for a lesser offense, a decision the jury was entitled to make." Id. at 437.

Petitioner filed a timely petition for rehearing challenging application of harmless error analysis to the constitutional error presented. (App. A11). Four justices voted to deny the petition, while Justice Pleicones voted to grant rehearing. App. A 9).

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for this Court to (1) resolve a split among the states and the circuits concerning whether harmless error analysis applies to a failure to instruct the jury on a lesser included offense where the evidence supports its instruction; and (2) ensure lower courts stop distorting this Court's jurisprudence concerning the application of harmless error analysis in the context of jury instructions.

The question of whether application of harmless error analysis to a failure to instruct on lesser offenses when the evidence warrants such an instruction violates a criminal defendant's federal constitutional rights to a jury trial and due process of

law are violated requires an examination of this Court's jurisprudence concerning harmless error analysis and instructions on lesser included offense.

Constitutional Right to Lesser Included Offenses

In Stevenson v. United States, 162 U.S. 313 (1896), this Court reversed a conviction for capital murder where the trial judge failed to instruct the jury on the lesser included offense of manslaughter. Of importance to the matter presented herein, this Court did not consider whether the error was harmless beyond a reasonable doubt. This Court stated that in failing to instruct the jury on the lesser included offense, where the evidence supported the charge, the trial judge "passed upon the strength, credibility, and tendency of the evidence, and decided, as a matter of law, what, it seems to us, would generally be regarded as a question of fact." Id. at 315-316. When a matter "is not to be so asserted, as a matter of law, then it becomes a question of fact in such case, and that question must be answered by the jury." Id. at 322. "Whether the witnesses told the truth in regard to such circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them, if proper for the consideration of the jury." Id. Although a trial judge may be satisfied from the evidence that

> the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet, if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of the mind was, and to say whether the crime was murder or manslaughter.

Id. at 323.

Almost a century later, this Court revisited the issue of lesser offenses in Beck v. Alabama, 447 U.S. 625, 627 (1980), finding that an Alabama statute forbidding a jury from considering a lesser included non-capital offense in a capital trial where the evidence supported such a verdict was unconstitutional. The state conceded that the evidence entitled Beck to a jury instruction on the lesser included offense of felony murder as a matter of state law. Id. at 630. In analyzing Alabama's statute, this Court noted the state's failure "to afford capital defendants the protection provided by lesser included offense instructions [was] unique in American criminal law." Id. at 635. The Beck Court observed that federal courts[2] and state courts universally held that a defendant was entitled to a lesser included offense instruction where the evidence warranted it. Id. at 635-636. Notably, this Court did not review the error for harmlessness or remand for such a review.

Shortly after Beck, this Court was asked to examine the Alabama statute again, but in the context where the evidence did not support a charge on a lesser offense. In Hopper v. Evans, 456 U.S. 605, 613-614 (1982),[3] this Court held the

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[2] In Keeble v. United States, 412 U.S. 205, 208 (1973), which was a federal trial of an Indian charged with the commission on an Indian reservation of certain specifically enumerated offenses, this Court stated "it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater."

[3] Petitioner readily admits that in Rose v. Clark, 478 U.S. 570 (1986), this Court cited Hopper as an example of a case in which harmless error had been applied. In the parenthetical explaining the case, this Court stated "citing Chapman[v. California, 386 U.S. 18 (1967)] and finding no prejudice from trial court's failure to give lesser included offense instruction." Id. at 577. This Court's parenthetical was correct in that this Court found no prejudice in the defendant's failure to receive an instruction on a lesser offense due to the statutory prohibition; however, the prejudice finding was predicated upon the lack of evidentiary support of a lesser

defendant was not prejudiced by Alabama's unconstitutional statute prohibiting jury instructions as to lesser offenses in capital trials because the evidence failed to support a charge on any lesser offense. In other words, the defendant would not have been entitled to a jury charge on a lesser offense because no evidence in the record supported such a charge; therefore, the defendant could not have been prejudiced by the statute's prohibition. Id. In explaining its prior decision in Beck, this Court stated "Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." Id. at 611 (emphasis in original).[4]

Harmless Error Jurisprudence

The apparent genesis of harmless error analysis to constitutional errors is Chapman v. California, 386 U.S. 18, 22 (1967) when this Court concluded "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the

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included offense. The prejudice analysis in Hopper did not concern the failure to give lesser included instructions where the evidence warranted the instruction and Hopper does not hold that harmless error applies to the failure to give lesser offense instructions where warranted by the evidence. Thus, the instant case is easily distinguished from Hopper.

[4] In a subsequent case construing Beck, this Court explained that the federal constitution required instructing a jury on lesser offenses when the evidence supported such a charge. Hopkins v. Reeves, 524 U.S. 88, 96-97 (1998)(explaining that Nebraska's law provided for instructions only on those offenses that had been deemed to constitute lesser included offenses of the charged offenses and that this Court had "never suggested that the Constitution required anything more."

conviction." In order for constitutional error to be deemed harmless, it must be determined beyond a reasonable doubt the error did not contribute to the verdict. Id. at 24. Chapman recognized prior decisions of this Court that some constitutional rights are so basic to a fair trial that their infraction could never be treated as harmless error. Id. at 23. At the time, those included introduction of a coerced confession, a denial of counsel, and proceeding before a partial tribunal. Id. at 23 n. 8.

As this Court's harmless error analysis jurisprudence continued, development of a system of labeling errors either "structural" or "trial" arose to determine the application of harmless error. In Arizona v. Fulminante, 499 U.S. 279, 303 (1991), a plurality of this Court held the admission of an involuntary confession at trial was subject to harmless error analysis, overruling precedent. After cataloguing a list of cases in which this Court had applied harmless error, a pattern emerged that these involved "'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 307-308. The plurality distinguished trial errors, which were subject to harmless error analysis from "structural errors," such as the deprivation of the right to counsel and a partial judge. Id. at 309. "[S]tructural defects in the constitution of the trial mechanism ... defy analysis by 'harmless-error' standards." Id. In addition to the right to counsel and an impartial judge, this Court noted other cases within the "category of constitutional errors ...

not subject to harmless error," including unlawful exclusion of members of the defendant's race from the grand jury, the right to self-representation at trial, and the right to a public trial. Id. at 310. "Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id.

In 1993, a split among the Justices of this Court appeared to emerge concerning how to determine whether harmless error applies to a given constitutional error and whether the "structural versus trial" error dichotomy continued to govern. This Court held a constitutionally defective reasonable doubt instruction was not subject to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275 (1993). After noting the interrelatedness of the Fifth Amendment's requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict, this Court held harmless error was inapplicable because "there ha[d] been no jury verdict within the meaning of the Sixth Amendment." Id. at 278-280. Thus, the appellate court had no verdict upon which to apply harmless error scrutiny. Id. at 280. This Court held "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instruction error consists of a misdescription of the burden of proof, which vitiates all the jury's findings." Id. at 281 (emphasis in original). When this occurs, a "reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" Id.

Using the dichotomy of structural versus trial error as an alternative analysis, the majority concluded the denial of the right to a jury verdict of guilt beyond a reasonable doubt was a structural error because the right to a jury trial is a basic protection, without which a criminal trial cannot reliably serve its function. Id.[5]

In Neder v. United States, 527 U.S. 1 (1999), the split among the Justices of this Court emerged more distinctly. A plurality held the trial court's error to charge the jury as to materiality, an element of the charge against Neder, was harmless in light of the facts presented. The plurality held that "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Id. at 9 (emphasis in original). Contrasting the case to Sullivan, the plurality determined the jury instruction error did not vitiate all the jury's findings. Id. at 11. Recognizing the absence of a complete verdict on every element of the offense due to the trial court's error in failing to submit the materiality element to the jury, the plurality held harmless error analysis was appropriate because prior decisions regarding misdescriptions of elements had been subjected to such analysis. Id. at 11-12.

Justices Scalia, Souter, and Ginsburg dissented, explaining that when this

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[5] Chief Justice Rehnquist's concurrence emphasized the classification of constitutional violations as either trial errors or structural errors as determinative of whether harmless error analysis applied. After expressing serious doubts with the majority opinion, the Chief Justice accepted the decision "that a constitutionally deficient reasonable-doubt instruction is a breed apart from the many other instructional errors that we have held are amenable to harmless-error analysis." Sullivan, 508 U.S. at 284 (Rehnquist, C.J. concurring).

Court deals with the right to a jury trial, "it is operating upon the spinal column of American democracy." Id. at 30 (Scalia, J. dissenting). The dissent determined "that depriving a criminal defendant of the right to have a jury determine his guilt of the crime charged – which necessarily means his commission of every element of the crime charged – can never be harmless." Id. at 30 (emphasis in original). The dissent emphasized the plurality's application of harmless error in this context usurped the role of the jury "because we judges can tell that he is unquestionably guilty." Id. at 31 (emphasis in original). Justice Scalia emphasized our Founding Fathers' distrust of judges in making determinations of guilt culminating in the right to a jury trial. Id. at 32. The application of harmless error where no jury finding exists supplants findings by judges for those of a jury. Id.

A Split Among the Circuit Courts of Appeal and States

A split among the Circuit Courts of Appeal and the states exists concerning the application of harmless error. According to the Sixth Circuit, if a defendant is entitled to an instruction on a lesser-included offense it is reversible error not to give it. United States v. LaPointe, 690 F.3d 434, 439 (6th Cir. 2012); see also, United States v. Waldon, 206 F.3d 597, 604 (6th Cir. 2000)(citing Keeble v. United States, 412 U.S. 205, 208 (1973)). The Tenth and Fourth Circuits have held similarly. Hogan v. Gibson, 197 F.3d 1297, 1312 n. 13 (10th Cir. 1999)(stating that a Beck error, which the Court limited to capital cases, can never be harmless); Vujosevic v. Rafferty, 844 F.2d 1023, 1028 (3d Cir. 1988)(finding reversible error where the trial court refused to charge aggravated assault, the evidence supported

the instruction, and the request for the instruction was made); United States v. Baker, 985 F.2d 1248, 1258-1259 (4th Cir. 1993)(holding the district court has no discretion to refuse to give a lesser-included instruction if the evidence warrants the instruction and the defendant requests it).

However, the Ninth and Eighth apply harmless error when a judge fails to instruct on a lesser offense. United States v. Hernandez, 476 F.3d 791, 801 (9th Cir. 2007)(stating that it is not clear whether failure to provide a lesser included jury instruction in non-capital cases is constitutional error and, that if it is, then it must be harmless beyond a reasonable doubt); Cooper v. Campbell, 597 F.2d 628, 631 (8th Cir. 1979)(finding any error in failing to instruct the jury on the lesser included offenses of voluntary and involuntary manslaughter harmless because the jury was charged on the lesser included offense of second degree murder but returned a verdict of murder in the first degree).

The several states differ concerning application of harmless error. Many states hold that failure to submit a lesser offense to the jury where the evidence supports its submission is reversible error. See e.g., State v. Williams, 313 S.W.3d 656, 660 (Mo. 2010)(declining to submit a lesser included offense that is supported by the evidence is reversible error); State v. Lawrence, 530 S.E.2d 807, 819 (N.C. 2000)(holding that a trial court must give instructions on all lesser included offenses supported by the evidence even in the absence of a special request for such an instruction, and failure to so instruct constitutes reversible error); Warren v. State, 709 So.2d 415 (Miss. 1998)(holding a trial court's refusal to grant a

defendant's properly requested lesser included offense instruction, which is a correct statement of the law and supported by sufficient evidence constitutes reversible error); Rainey v. State, 837 S.W.2d 453 (Ark. 1992)(finding reversible error when a trial court failed to give a lesser included instruction when there was a rational basis for a verdict acquitting a defendant of the offense charged and convicting him of the lesser offense).

Florida embraces an amalgamation of harmless error analysis and per se reversible error dependent upon the number of steps removed a lesser offense is from the charged offense. See State v. Abreau, 363 So.2d 1063, 1064 (Fla. 1978)(failure to instruct on the next immediate lesser included offense (one step removed) constitutes per se reversible error, but where the error relates to an offense two or more steps removed, harmless error applies). Virginia applies a harmless error standard to the failure to charge lesser included offenses only if the reviewing court can do so without usurping the jury's fact finding function. Turner v. Commonwealth, 476 S.E.2d 504, 507 (Va. Ct. App. 1996).

Just as the Circuits are split, the states are divided on this issue. See e.g., State v. Sinica, 764 N.W.2d 111, 119 (Neb. 2009)(holding that to establish reversible error from a court's refusal to give a requested instruction, a defendant must show prejudice); Javorina v. State, 180 P.3d 205, 209-210 (Wyo. 2008)(finding reversible error when the trial court refused to submit a lesser included offense to the jury and there was at least minimal evidence that could cause the jury to convict on the lesser, rather than the greater); State v. Locke, 90 S.W.3d 663, 671

(Tenn. 2002)(applying Chapman harmless error analysis to a failure to instruct on lesser included offenses); McNabb v. State, 887 So.2d 929, 977 (Ala. Crim. App. 2001)(stating that a failure to charge on a lesser included offense may be harmless error); Edwards v. State, 442 S.E.2d 444, 445-446 (Ga. 1994)(holding that a trial judge's failure to instruct on a lesser offense was harmless where in light of the overwhelming evidence of guilty "it is highly probable that the failure to give this charge did not contribute to the verdict").

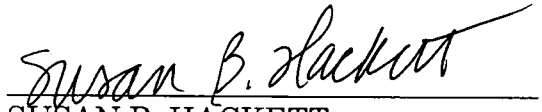
This case presents an ideal vehicle for resolving the split in state and federal courts and to ensure the lower courts stop distorting this Court's jurisprudence concerning the application of harmless error analysis in the context of jury instructions. Resolving whether to employ the dichotomy of structural versus trial error or examine the record for a vitiation of the jury's findings would assist the lower courts in applying harmless error appropriately so as not to violate a defendant's federal constitutional rights to a jury trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article III's right to a jury trial. The South Carolina Supreme Court's conclusion that the evidence presented entitled Petitioner to a charge on first degree assault and battery, but that the failure to give such a charge was harmless because "the only conclusion established by the evidence is that Petitioner was guilty of attempted murder" begs this Court's intervention to decide this important constitutional question. If Petitioner were entitled to the instruction on the lesser-included offense in light of the evidence before the jury, then the federal

constitution requires the jury to decide this structural issue, or harmless error can be used to substitute appellate judges' views on the facts for that of a jury of the defendant's peers.

CONCLUSION:

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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