

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From The South Carolina Court of Appeals

John D. Alexander,

Petitioner,

v.

The State,

Respondent.

Opinion No. 2012 - 211390

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

John D. Alexander, #194748
Department of Corrections

RECEIVED

JUN 24 2015

S.C. SUPREME COURT

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CERTIFICATION OF PRO SE PETITION

The Petitioner certifies that a Petition For Rehearing was filed in the South Carolina Court of Appeals on . The Petition for Rehearing was denied by Order filed

STATEMENT OF QUESTIONS PRESENTED

The Petitioner submits that he has presented overwhelming facts, material evidence, Federal and State Constitutional Laws, Statutes and citations before the Post Conviction Relief Court as well as the Court of Appeals to substantiate and confirm each and every one of the below claims :

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MOORE JAMES

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the trial Judge's four denials for requests for a charge on the law of self-defense where such a charge was supported facts and evidence and was material to a fair presentation of the case?
2. Did the Court of Appeal err in finding that trial counsel was not ineffective for conceding with the trial Judge that there was insufficient evidence for a foundation layed to support a self-defense charge which entirely failed to subject the prosecution's case in any adversarial testing pursuant to United State v. Chronic?
3. Did the Court of Appeal err in finding that trial counsel was not ineffective for failing to inform or explain to the Appellant the true nature and elements of the crimes (Assault and battery with intent to kill and Assault and battery of high and aggravated nature) which he was being held to answer for, or the elements of self-defense or defense of another?

4. Did the Court of Appeals err in finding that trial counsel was not ineffective for negotiating with the trial Judge at the beginning of the criminal proceeding, outside the presence of Appellant, during an in-chambers meeting, not to present or argue a meaningful self-defense case on the Appellant's behalf?
5. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to explain to the Appellant the practical implications, its obligations and the benefits of testifying on his own behalf following the trial Judge's denial of all requests for a self-defense charge, and thereafter affording trial counsel an opportunity enlighten the Appellant of the detriment it had on the trial counsel inadequate self-defense trial strategy?
6. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the excluding and absencing Appellant from a very critical stage of his criminal proceeding i.e., during the beginning of the trial in an in-chambers meeting where the trial Judge decided there would be no self-defense charge given at the conclusion of the State's case and Appellant's

defense in addition to the trial counsel's placing the trial Judge on Notice that no profound effort would be executed to obtain a self-defense charge?

7.

Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to request a State v. Fennell Jury Charge of presence of malice does not preclude a finding on Assault and battery of high and aggravated nature?

8.

Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the prosecution during Closing Arguments, proclaiming to the Jury, "South Carolina does not consider assault and battery of high and aggravated nature as a crime of violence"; Contrary to Statute Section 16-3-620 S.C. Code Ann. (1976)?

9. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the prosecution's voluntarily and knowingly giving a false impression to the trial Judge and Jury by using perjured statement that involve a corrupt-

ion of the truth seeking process of the criminal trial proceeding?

10. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the prosecution's three (3) false, misleading and deceitful statements to the trial Judge and Jury during Closing Arguments that Mr. Freeman sustained life threatening injuries to his stomach but rather all medical, surgical and examination reports, along with all trial evidence, facts and testimony demonstrating that Mr. Freeman (victim) received non-life threatening injuries to the pelvis?

11. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to pursue a Brady violation where the prosecution failed to disclose and unlawfully suppressed a 911 Emergency Tape. Or in the alternative, where trial counsel failed to obtain, utilize or even present as mitigating evidence the 911 Emergency Tape?

12. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to pursue a Missouri v. Seibert violation where the investigating detectives

executed unconstitutional Federal and State police tactics of inserting Miranda warning in the midst of coordinating and continuing interrogations that was designed to mislead and deprive Appellant of truthful knowledge essential to the ability to understand the nature of his right to remain silent or the consequences of abandoning them?

13. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object or request a curative instruction on the trial judge's partial, bias and highly prejudicial General Intent Charge which created a Federal and State unconstitutional shifting the burden of proof upon the Appellant on the element of intent?
14. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object where the prosecution failed in accordance with Statute Section 17-25-45 S.C. Code Ann (1976) to serve the Appellant with a timely Notice to Seek Life Without Parole at least ten days prior to his criminal trial?
15. Did the Court of Appeals err in finding that trial counsel

was not ineffective for failing to discover, utilize, or present to the trial Court and Jury critical exculpatory material evidence i.e., a Voluntary Statement of Appellant's defense witness, that profoundly supports and establishes the elements of self-defense?

16. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the prosecution's invading on the province of the Jury by opining on an ultimate issue i.e., malice and criminal intent, of the law which infected the trial with unfairness by arousing the passion and prejudice of the Jurors to wit, injecting an arbitrary factor into the Jury's deliberations and being bent on misleading, deceiving and seducing the Jury to reach an improper and wrongful verdict by unlawfully alluding to an unrelated and irrelevant guilty defendant who committed a separate statutory offence of armed robbery. And thereafter pleading with the Jury to use such illustration as an rationale in the instant case?

17. Did the Court of Appeals err in finding that trial counsel

was not ineffective for failing to object to the trial Judge's repeatedly injecting his personal opinion i.e., (1) "I CAN ONLY ASSUME that you (prosecutor) intend to address that in your closing argument, that I'll (the trial Judge) will not be instructing them (the jury) on self-defense. They cannot consider that or legal justification. And so I ASSUME YOU'LL BE ABLE TO HANDLE THAT. THOUGH SOME PERSUASIVE CLOSING ARGUMENT." (2) "So that's why I'm (the trial Judge) saying, IF I WERE THE PROSECUTOR I'D ARGUE that THIS IS NOT A SELF-DEFENSE CASE. And I won't be instructing them on the law of self-defense. And there is NOTHING WRONG, IN MY VIEW. I'M TALKING ABOUT THATS ARGUMENT." Into Appellant's criminal trial?

18. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the trial Judge answering the jury's question on the law of malice through the bailiff, off the record and without counsel nor Appellant present to hear the supplemental Malice charge?

19. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the trial Judge's highly prejudicial, improper and bias coercive Jury Charge of; "all twelve of you Jurors MUST BE IN AGREEMENT BEFORE ANY DECISION MAY BE RETURNED?"
20. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to the trial Judge's unconstitutional Malice Charge of; malice may be inferred from the use of a deadly weapon? See State v. Moose, 313 S.E. 2d 507 (1984)
21. Did the Court of Appeals err in finding that trial counsel was not ineffective for failing to object to or seek to quash the indictment, prior to the criminal trial, where it did not notify Appellant concisely of any of the Twenty Six (26) inferences, opinions nor act or acts of malice the trial Judge charged to the Jury. Nor of any of the Sixteen (16) opinions, inferences or act or acts of malice that the prosecution advised the Jury that they could consider?
22. Did the Court of Appeals err in finding that trial counsel

was not ineffective for failing to move the Court for court-appointed psychiatrist examination and expert witness to assist in preparation, utilization and presentation of the evidence demonstrating that, at the time of the incident, Appellants Twenty-Seven (27) years of mental health in-patient - outpatient mental health treatments and defects yields mitigating evidence which relates directly to the elements of malice and criminal intent of the crime Assault and battery with intent to kill as well as Assault and battery of high and aggravated nature?

was not ineffective for failing to move the Court for court-appointed psychiatrist examination and expert witness to assist in preparation, utilization and presentation of the evidence demonstrating that, at the time of the incident, Appellants Twenty-Seven (27) years of mental health in-patient - outpatient mental health treatments and defects yields mitigating evidence which relates directly to the elements of malice and criminal intent of the crime Assault and battery with intent to kill as well as Assault and battery of high and aggravated nature?

SCRPC. By Order dated May 3, 2012, Judge Hayes denied the Motion For Reconsideration because Petitioner's Court-appointed attorney failed to file or consent to Petitioner filing the Motion To Alter or Amend. Rule 11, SCRPC.

The Petitioner submitted a timely Notice of Appeal. Also, Petitioner filed his initial Pro se Petition For Writ of Certiorari dated July 19, 2012. Mr. Pachak, Appellate Defender was appointed to represent the Petitioner and submitted a Petition For Writ of Certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E. 2d 201 (1988). September 4, 2012 on the Petitioner's behalf. Further, on September 8, 2012 Petitioner received a Notice from the South Carolina Supreme Court to submit any issues he wanted the Court to review within (45) days.

LEGAL MAIL
MAIL ROOM

Consequently, on October 18, 2012 the Petitioner filed a timely second Pro se Petition For Writ of Certiorari. Followed by a Supplemental Pleading on November 16, 2012. Because there was absolutely no cooperation or communication from Mr. Robert Pachak, the Petitioner Submitted a Motion Seeking To Relieve Counsel. And Appointment of New Counsel on March 7, 2013. Mr. Pachak made a Return on March 20, 2013. And the State made its Return on March 22, 2013. Thereafter, on April 4,

2013 the Petitioner made his Reply.

Ultimately, the Supreme Court denied the Motion April 6, 2013. So, on April 11, 2013 the Petitioner filed a Final Brief. And an Amendment to the Final Brief dated June 12, 2013. Subsequently, July 29, 2013 the Supreme Court transferred the Post Conviction Relief case to the South Carolina Court of Appeals. The Court of Appeals denied the Petitioner's pro se Petition, the Johnson Petition and granted counsel's request to withdraw, on May 21, 2015. On June 4, 2015 the Petitioner submitted a timely Petition For Rehearing. However, on June 11, 2015 the Court of Appeals sent the Petitioner a Remittitur dated June 8, 2015.

Finally, on June 11, 2015 the Petitioner submitted a letter before the Court of Appeals requesting a disposition on his timely Petition For Rehearing. Also, on June 12, 2015 the Petitioner filed a Motion To Rescind the Remittitur pending a rehearing. Nevertheless, on June 16, 2015 the Petitioner received a letter from the Court of Appeals alleging that it received the petition for rehearing six (6) days after it was notarized, dated, stamped and mailed out of the McCormick Correctional Institution by Postal Director, Ms. J. Franklin. As such, no action will be taken on Petitioner's Petition For Rehearing.

ARGUMENT

I. The Appellate Court erred in finding that trial counsel was not ineffective for failing to object to the trial Judge four denials for a request on a charge on the law of Self-defense where such a charge was supported by facts and evidence and was material to a fair presentation of the case.

Petitioner contends that trial counsel (hereinafter referred to as Mr. Boggs) without any objection allowed the trial Judge to unconstitutionally and impermissibly saddle him with the burden of proof on the defense of self-defense as well as place an unreasonable burden of proof by a preponderance of evidence of self-defense.

Initially, outside the presence of the Jury and petitioner, at the beginning of the criminal trial, during a secret in-Chambers meeting trial counsel submitted facts and evidence which layed a foundation for a self defense Jury Instruction. However, the trial Judge denied such motion/request for a self-defense charge for lack of absolute and overwhelming proof of self-defense.

Again, later during Petitioner's criminal trial, trial counsel introduced additional facts and evidence of self defense by way and through solicitation of trial

testimony from Petitioner's defense witness. (Trial Tr. pp. 118, Lines 6-21 and pp. 119, Lines 4-10) Here, the trial Judge denied the second request for a self-defense charge based on the conclusion that "there was not enough evidence" to prove self-defense.

In addition, trial counsel for a third attempt to obtain a self-defense Jury Charge, made a request as well as argued against the trial Judge weighing and deciding upon the facts and evidence whether self-defense had been proven to no avail. (Trial Tr. pp. 40 Lines 14-25; Pp. 141, 142 to Pp. 143, Line 18) Simply stated, the trial Judge concluded: the evidence and facts are "insufficient to prove self-defense and may confuse the Jury as to whether or not Petitioner acted in self-defense."

A fourth and final effort to attain a self-defense Jury Instruction was made by trial counsel at the close of the State's case by renewing all motions. At which the trial Judge denied.

In spite of the fact that trial counsel repeatedly requested a charge on the law of self-defense; on Direct Appeal, the South Carolina Court of Appeals declined to consider the issue of self-defense where Mr. Boggs never objected to the trial Judge's repeatedly denying Petitioner of the only defense i.e., self-defense raised during his criminal trial. See Unpublished Opinion No. 2010-UP-265 (April 29, 2010).

As such, the PCR Court erred in finding that trial counsel was not ineffective for allowing Petitioner to be denied and deprived Due Process and Equal Protection of Law under the 5th, 6th and 14th Amendments of the United States Constitution as well as Article 1 Section 3 of the South Carolina Constitution. Behind Mr. Boggs failing to object and preserve for appellate review whether the trial Judge abused his discretion by depriving Petitioner a charge on self-defense based on the below conclusions on clearly established Federal and State laws.

Pursuant to Griffin v. McElroy, 785 F.2d 1172 (4th Cir. 1986) 'South Carolina Law has sought to impose the burden of persuasion on self-defense on the Petitioner.' E.g., State v. Judge, 208 S.C. 497, 507, 38 S.E. 2d 715, 720 (1946); State v. Bolton, 266 S.E. 444, 449, 273 S.E. 2d 863, 865-66 (1976) " but that was held constitutionally impermissible." Also the Court concluded: " Self - defense annihilates unlawfulness and malice and consequently absence of it must be proven by the prosecution beyond a reasonable doubt."

Thereafter, under Holloway v. McElroy, 632 F.2d 605 (1980) the Court held: " It cannot be overemphasized that it is the Jury's Function, not the Court's, to decide whether absence of self-defense had been proven beyond a

reasonable doubt." Further, the Holloway v. McElroy Opinion explained why the well settled law must always be the case; "The Petitioner is not required to negate any of the elements of the crime which the State must prove to convict. Under South Carolina Law, unlawfulness is an essential element of both ABWIK and ABHAN, but self-defense and unlawfulness are mutually exclusive propositions. To require the Petitioner to prove self-defense (lawfulness) would relieve the prosecution from proving an essential element of the crime charged (unlawfulness)." "Under South Carolina Law, the absence of self-defense is an element of the crime which the prosecution must prove beyond a reasonable doubt. Unlawfulness under South Carolina Law is an ingredient of ABWIK and ABHAN. The burden of proof cannot constitutionally be imposed upon the Petitioner. 'Such shifting of the burden of persuasion upon the Petitioner with respect to a fact which the State deems so important that it must be either proven or presumed is impermissible under the Due Process Clause'"

See Griffin v. Martin supra; also see Patterson v. New York, 432 U.S. 215, 97 S.Ct. at 2329.

Overmore, Holloway, supra, 632 F.2d at 625 stated: 'Since unlawfulness and malice indubitably are essential elements of the South Carolina Crime of AB-

WIK, and absence of self-defense is consequently also an ingredient of the crime; the State may not place the burden of persuasion on those elements upon the Petitioner if the truth of the defense would necessarily negate an essential element of the crime charged." The substantial plausibility of the claim that absence of self-defense is constitutionally required to be proven by the prosecution beyond a reasonable doubt in all events is recognized in Engle v. Isaac, 456 U.S. 107, 122, 102 S.Ct. 1558, 71 L. Ed 2d 783 (1982) "The Due Process Clause would compel the prosecution to prove absence of self-defense because that defense negates malice, lawfulness and criminal intent of assault and battery with intent to kill."

Additionally, pursuant to Morris v. State of Maryland, 715 F.2d 106, 110 (4th Cir. 1983) Judge Ervin, speaking for the Court held: "The 14th Amendment requires that the State" (not the trial Judge) "shoulder the burden of proving beyond a reasonable doubt all the elements of a crime." See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d (1970). This necessarily forbids the State to put the burden of proving the negation of one of those elements on the Petitioner, for "that is but another way of requiring Petitioner to disprove an element of the crime charged." See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L. Ed.

2d 508 (1975), 715 F.2d at 110; Gurthrie v. Warden Maryland Penitentiary, 683 F.2d 820, 824 (4th Cir. 1982).

The present case mimic Griffin supra, in that Petitioner self defense defense came down to the absence of malice,^u lawfulness and criminal intent, which is demonstrated whenever self-defense exists. Petitioner reduces this allegation concisely to whether the burden of proof on self-defense, or more precisely the absence thereof, fell upon the trial Judge once the issue of self-defense was activated by the introduction of facts and material evidence into the Jury Trial.

In the instant case, Petitioner contends that he met standard of proving the existence of facts and evidence sufficient to form a basis for a self-defense Jury Charge. Particularly where the facts and evidence substantiated that Mr. Freeman (the victim) had been convicted of physically assaulting his girlfriend prior to meeting Petitioner's sister (April) on many occasions. Even shooting her on one incident. That Petitioner was aware prior to his criminal trial that for four (4) long years Mr. Freeman had been convicted numerous times for beating (April) severely. Chasing her out of the house, which she payed^{pe} all²⁵

her bills, with knives on one occurrence. But most pertinent and relevant; where (April) testified during trial that: "Mr. Freeman threatened to take Petitioner's 'Fucking head off' immediately prior to engaging a fight which resulted in him being wounded."

Mr. Boggs had a legal duty to object where the trial Judge not only denied and deprived Petitioner of a self-defense charge, but even more so, when the trial Judge instructed the prosecution to tell the Jury that they could not even consider the above mentioned facts and evidence with respect to legal justification or self-defense. See Trial Tr. Pp. 118 Lines 8-25; Pp. 119 Lines 1-10; Pp. 140 Lines 24, 25; Pp. 141 Lines 1-8, 13; and Pp. 142 Lines 16-20.

Also, Mr. Boggs had a legal obligation to object because pursuant to State v. Fuller, 377 S.E. 2d 328 (S.C. 1989) under current, correct and applicable law; "the trial Judge particularly erred in not charging several elements of self-defense." "First, Petitioner, in a self-defense case, had a right to act on appearances." This Court articulated the rule concerning appearances in Jackson v. State, 227 S.C. 271, 87 S.E. 2d 681, 684 (1955); thusly:

"Petitioner must show that he believed he was in imminent danger, not that he was actually in such danger, because I had the right to act on appearances, and under the circumstances as they appeared to me, I believed I was in such danger and a reasonable prudent man of ordinary firmness and courage would have entertained the same belief." See State v. Rivers, 186 S.C. 221, 196 S.E. 6, 10 (1938).

Second, Mr. Boggs was ineffective for failing to object where the trial Judge erred in not charging the Jury that "words alone accompanied by hostile acts, may, depending on the circumstances," e.g. my prior knowledge of Mr. Freeman's violent nature and history, "establish a plea of self-defense." See State v. Harvey, 220 S.C. 506, 68 S.E. 2d 409 (1951); and State v. Mason, 115 S.C. 214, 105 S.E. 286 (1920).

Third, Mr. Boggs was ineffective for failing to object where the trial Judge refused to instruct the Jury: "one can bring on difficulty by using language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on."

See State v. Woodham, 162 S.C. 492, 502, 160 S.E. 885, 889 (1931) (internal Quotations omitted); Am. Jur. 2d Homicide Section 147 (1968).

Under Ellison v. Parts Distributors, Inc., 302 S.C. 299 395 S.E. 2d 740 (Ct. App. 1990) because trial counsel failed to object to either of the trial Judge's rejecting Petitioner's four request for a self-defense charge, bias and prejudice must be presumed because the trial Court was allowed to place an unattainable and unreasonable burden of proof and persuasion "upon the trial Judge", instead of the trial Jury, that the shooting was lawful, without malice or criminal intent and the result of self-defense. (See Trial Tr. Pp. 139 Lines 22-25; Pp. 140 Line 1-3; and Pp. 143 Lines 12-25; and Pp. 144 Line 1.

The Due Process and Equal Protection Clause of the 14th Amendment Construed in Mullaney v. Wilbur supra, 421 U.S. 684, 95 S.Ct. 1881, 44 L. Ed. 2d 508 (1975) require that the State persuade the Jury beyond a reasonable doubt as to all elements of the crime, including malice, criminal intent, unlawfulness and the absence of self-defense. But where Mr. Boggs failed to object to the trial

Judge's refusal to instruct the Jury on the law of self-defense, the prosecution was not held to meet the burden of proof beyond a reasonable doubt or absence of self-defense requirement.

Because under Mullaney supra, "Under South Carolina law unlawfulness is an essential element and ingredient of assault and battery with intent to kill as well as assault and battery of high and aggravated nature. Therefore, the Due Process Clause require that if there is any evidence in the record to support self-defense, the issue must be submitted to the Jury. See State v. Hill, 315 S.C. 260, 433 S.E. 2d 848 (1993); Cohens v. Atkins, 333 S.C. 345, 509 S.E. 2d 286 (Ct. App. 1998).

In the instant case, the record demonstrates that the prosecution NEVER OBJECTED TO or ARGUED AGAINST EITHER ONE OF PETITIONER'S REQUEST TO CHARGE SELF-DEFENSE. But rather it was the trial Judge who kept insisting: "there was 'insufficient evidence to prove self-defense'; 'no legal justification'; or 'no self-defense'"

In nearly "all State Courts" considering the prosecution's burden of proof have held that Petitioner is entitled to a self-defense Jury Charge, See State v. Wiggins, 330 S.C. 538, 506 S.E. 2d 489 (1998); Willia-

ms v. State 538, S.E. 2d 544 (2000); Miller v. State, 720 N.E. 2d 696 (Ind. 1999); State v. Osborne, 775 So. 2d 607 (La. App. 4th Cir 2000); Commonwealth v. Beauchamp, 49 Mass. App. Ct. 591, 732 N.E. 2d 311 (Mass. 2000); State v. Plante, 623 A. 2d (Me. 1993); State v. Cooper, 561 N.W. 2d 175 (Minn. 1997); State v. Santamaria, 145 N.H. 138, 756 A. 2d 589 (2000); State v. Garcia, 18 P.3d 1123 (Utah App. 2001); State v. Walden, 131 Wash. 2d 469, 932 P. 2d 1237 (1997).

In essence, because trial counsel failed to object to the trial Judge's denying and depriving Petitioner of a self-defense instruction, what Petitioner receive was a Bench Trial instead of a Jury Trial. All issues as concerning legal Justification, sufficiency of the evidence and Facts, self-defense were decided upon by the trial Judge (not the trial Jury).

The South Carolina Supreme Court as well as the 4th Circuit Court of Appeals under Holloway v. McElroy, 632 F.2d 605 (1980) determined;

"Our legal system entrusts the Jury with the important Fact-Finding Function, assigning the burden of persuasion beyond a reasonable doubt on all elements of the crime charged to the prosecution." "When the Jury's

right to make the finding pursuant to that standard has been invaded, a court of law cannot properly excuse the lapse through resort to a conclusion that, although two results in direct opposition to one another were permissible, guilty or not guilty, the jury certainly would have convicted."

In the event trial counsel would have objected and secured a self-defense charge, at least one or more jurors would have found that Petitioner's use of force was necessary to defend himself against a reasonable belief of immediate use of unlawful force or, Petitioner use no more force than appeared reasonably necessary in the circumstances, or that, as an whole, Petitioner acted in self-defense or, in the alternative, with only enough force to constitute assault and battery of high and aggravated nature. See U.S. v. Span, 75 F.3d 1383 (9th Cir. 1996); State v. Burk Hart, 565 S.E.2d 298 (S.C. 2002); State v. Addison, 343 S.C. 290, 293, 540 S.E.2d 499, 451 (2000); and State v. Davis, 330 S.C. at 544, 500 S.E.2d at 492.

II. The Appellate Court erred in finding that trial counsel was not ineffective for failing to

function as an adversary of the State where he completely abandoned Petitioner during the criminal trial by conceding with the trial Judge that, there was "insufficient evidence to prove self-defense"; failing to prepare a defense against the crime Assault and Battery With Intent To Kill or, in the alternative, argue that Petitioner's actions only constitute the lesser included offense of Assault and Battery of High and Aggravated Nature in violation of United States v. Cronk, 466 U.S. at 658, 104 S.Ct. at 2046 (1984).

Trial counsel (Mr. Boggs) was put on Notice by the trial Judge at the onset of Petitioner's criminal trial during an secret (absent Petitioner) in-chambers meeting that no Self-defense Jury Charge would be given at the close of Petitioner's trial. Trial counsel failed to object to the trial Judge's Ruling during that in-chambers meeting. Trial counsel never informed Petitioner of the trial Judge's Ruling. And trial counsel failed to object despite presenting material evidence and facts of self-defense where the trial Judge reminded Mr. Boggs of the Decision made during the in-

chambers meeting that no self-defense charge would be issued or, where the trial Judge continued to deny and deprive Petitioner of a charge on the law throughout the criminal trial. See Trial Tr. Pp. 131 Lines 23-25; Pp. 132 Lines 17-25; Pp. 133 Lines 1-4; Pp. 139 Lines 17-21; Pp. 142 Lines 3-12.

Consequently, the record demonstrates that Mr. Boggs was well informed that no amount of facts or evidence produced during Petitioner's Jury Trial would warrant a self-defense instruction from the trial Judge. For at one Junction of the trial 'Mr. Boggs himself stated: "Your Honor you stated (during the in-chambers meeting) that he (Petitioner) could argue 'THAT THERE IS NO SELF-DEFENSE' and that you was going to give a charge along that line."

Henceforth, prejudice must be presumed where trial counsel engaged Petitioner's Jury Trial clearly aware that the trial Judge would not issue a self-defense charge; (2) failed to object^{to} each of the four times a request was made and denied by the trial Judge; (3) conceded with the trial Judge that there was insufficient evidence to prove self-defense to the Jury; (4) failed to object,

but rather allowed the trial Judge to pit Petitioner against the supporting facts and evidence of self-defense without the trial Judge or Mr. Boggs explaining to Petitioner the four elements of self-defense or defense of another; (5) but most critical, withdrew all request for a self-defense charge; (6) failed to develop or present any sort of defense against the State's case for assault and battery with intent to kill (ABWIK); (7) or develop and present a defense to persuade the jury to find that the facts and evidence only support the lesser included offense of assault and battery of high and aggravated nature (ABHAN).

In essence, Mr. Boggs nullified the adversarial process and failed to require the prosecution's case to survive any crucible of meaningful adversarial testing. Because Mr. Boggs completely abandoned Petitioner's sole defense of self-defense; literally trial counsel voided the adversarial quality of this fundamental issue and denied and deprived Petitioner the right to have the question of self-defense, legal justification, innocence or assault and battery of high and aggravated nature presented to the Jury as an adversarial issue.

The High Court in United States v. Cronin, addressed such issue and held; "The adversarial process protected by the 6th Amendment require that Petitioner have Mr. Boggs acting in the role of an advocate." See Anders v. California, 386 U.S. 738, 743, 87 S. Ct. 1396, 1399, 18 L. Ed. 2d 493 (1967). Likewise, pursuant Wiley v. Sowders, 647 F.2d 642 (1981) Upon pleading not guilty, Petitioner was entitled to have the issue of self-defense or actual innocence presented to the Jury (and not the trial judge) as an adversarial question.

Essentially, the constitutional guarantee was violated when Mr. Boggs conceded with the trial Judge that Petitioner's self-defense case did not warrant a self-defense Jury Instruction. Plus, where Mr. Boggs abandoned and waived any defense against the State's case nor offered any sort of trial strategy to reduce and mitigate Petitioner's culpability, the criminal trial process lost its character and potential quality as an confrontation between adversaries i.e. (State v. Alexander).

The Supreme Court proclaimed; "Due process commands that no man shall lose his liberty unless the State has borne the burden of producing evidence and convincing the fact-finder of his

guilt." "But if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of 6th Amendment rights that makes the adversarial process itself presumptively unreliable." See Speiser v. Randall, 78 S.Ct. 1332, 1344 (1958).

III.

The Appellate Court erred in finding that trial counsel was not ineffective for failing to inform Petitioner of the elements and true nature of the crime of assault and batter with intent to kill; assault and battery of high and aggravated nature; Self-defense and defense of another.

Pursuant to Henderson v. Morgan, 96 S.Ct. 2253 (1976) "the most universally recognized of Due Process is that Petitioner be advised real Notice of the True Nature and Elements of the charge against him." The 7th and 8th Circuits addressed the above issue and held: "reading the indictment can never constitute an adequate determination of Petitioner's understanding of the elements or true nature of the charge against him." See Madko v. United States, 457 F.2d 790 (7th Cir. 1972); United States v. Cody, 438 F.2d — (8th Cir. 1971);

- United States v. Smith, 60 F.3d 595 (9th Cir. 1995) "Even if we assume (without deciding) that the Judge may delegate to defense counsel the responsibility to explain the charge, it is necessary that counsel inform the Petitioner in open court."

Incidentally, prejudice is presumed where Mr. Boggs admitted to the PCR Court that Petitioner was never informed of the elements and true nature of ABWIK nor ABHAN. Muchmoreso, prejudice is presume pursuant to McCarthy v. United States, 89 S.Ct. 1166 (1969) "A Petitioner may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court must address the Petitioner personally and determine that the plea is made with understanding of the nature and elements of the charge;" where neither the trial Judge conducted nor performed the above procedure.

Under the Wetterlin Court's holding: "The trial Judge should not have assumed that Petitioner already knew and understood the charge, but rather the court should have assumed Petitioner was ignorant of the charge and thus use the trial to inform the Petitioner

--of some aspect of legal argot and other legal concepts that are esoteric to an accused." United States v. Wetterlin, 583 F.2d 350 (1978).

Herein, because trial counsel failed to explain to Petitioner the elements and true nature of assault and battery with intent to kill (ABW-~~IK~~); assault and battery of high and aggravated nature (ABHAN); Self-defense; or Defense of another it was literally impossible for Petitioner to know or understand legally what law was necessary to prove or, more importantly, disprove malice, malice aforethought, criminal intent (expressed or implied), Self-defense or defense of another. But most critically whether or not trial counsel was effectively or ineffectively defending Petitioner on those elements.

Thence, because trial counsel failed and refused to object, the prosecution was allowed to dilute and/or misdefine the essential elements of malice, malice aforethought, criminal intent, legal provocation and Justification during their Closing Arguments without Petitioner aware that objections were crucially warranted. Particularly the following exerts;

Trial Tr. Pp. 157 Lines 4-7

- (1) "no-legal justification for walking in that night and pulling a gun and shooting it to someone..... That's is an unlawful act of violence."

Lines 10, 11

- (2) "The second element is against another person. That's probably one of the easiest things to understand."

Lines 12, 13

- (3) "The next is malice aforethought. What that means, malice can be described in several ways."

Lines 14-17

- (4) "...in this definition is that there's no specific intent to kill in here. It's a general intent to do violent serious injury to another person."

Lines 19, 20

- (5) "With malice aforethought? That's the legal one at the very end."

Lines 22-25

- (6) "The first malice is ... pulling out a gun and pointing it and shooting it ... malice."

Trial Tr. Pp. 158 Lines 1-5

- (7) "The next definition you can look towards malice is.... Went over there heated, angry, upset with a loaded weapon, pulled it, pointed, shot. That's malice."

Lines 6-8

- (8) "The next one is it does not necessarily imply ill will towards the individual but signifies a rather general malignant recklessness of the lives and safety of others."

Trial Tr. Pp. 159 Lines 1-4

- (9) "assault and battery of a high and aggravated nature, which is just an assault and battery with an aggravated circumstance, use of a deadly weapon or bodily injury or something like that."

Line 5-9

- (10) "I forgot to mention what aforethought means as the third element of assault and battery with intent to kill. With malice aforethought, aforethought basically means that he had to have malice."

Lines 17-19

- (11) "He had it when he got in the car with his sister and went over there with a gun. That's what malice aforethought is.

Lines 22-25

- (12) "I'll tell you that in our state we qualify assault and battery with intent to kill as a crime of violence. The lesser included charge?.....

Pp. 160 Lines 1, 2

- "is not considered a crime of violence in our

state."

Lines 4-7

(13) "What do we have that points to the fact that he committed an unlawful act of violence against another person with malice aforethought? We have his written lie."

Ultimately, the prosecution may have skirted along a fine line on a few actual legal definitions of malice, malice aforethought and criminal intent under South Carolina Law. However, trial counsel failed to object and request curative instructions on the greater number of times the prosecution blatantly lied and mislead the trial jury on the elements of (ABWIK) and (ABHAN). Specifically, during petitioner trial, what South Carolina Law was and what the jury should have been informed that the prosecution was required to prove was:

South Carolina Code of Law Statute Section 16-3-620 (1976)

(1) An act of a violent nature to the person of another with malice aforethought;

(2) "South Carolina Law does not presume everyone that

shot with a deadly weapon was the result of nor constitute a violent nature or serious bodily injury."

(3) "Serious bodily injury is defined as: Serious physical impairment of the human body; esp. bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement or protracted loss or impairment of the function of any body part or organ. An injury meets this standard if it creates a substantial risk of fatal consequences or, when inflicted, constitutes mayhem."³⁹

(4) "Aforethought refers to time evil intent is conceived. While there may be and probably is some distinction between 'malice' and 'malice aforethought,' the latter conveys more the idea of premeditation and design, and being, therefore more tense in respect to the wickedness of heart involved than is word malice alone."

(5) "Every intentional (ABWIK) is with malice aforethought unless under circumstances sufficient to constitute (1) justification, (2) excuse or, (3) mitigation."

(6) "Assault and battery of high and aggravated nature

was classified as a "crime of violence" but rather,
not a "violent crime."

(7) "False statements to an investigator constitutes perjury (not proof of malice aforethought)."

Because trial counsel failed to object to the prosecutions false and misleading statement on the elements of (ABWIK) and (ABHAN) under South Carolina Code of Law Statute Section 16-3-620; and where the trial jury never heard the current, correct or accurate elements; an overwhelming burden of proof was allowed to be placed on the Petitioner to disprove elements and a finding of guilt based on a degree of proof above that required by the Due Process Clause of the 14th Amendment. Additionally, when trial counsel failed to object to the prosecutions' erroneous statements on South Carolina Law and elements of the crime charge, it effectively shifted the burden of proof away from the prosecution upon the Petitioner, depriving him of established constitutional standard of reasonable doubt.

As such, Petitioner was deprived of a fair trial because it is futile in any effort for the

Petitioner to overcome the prosecution's unlawful definitions and opinions of the elements and nature of (ABWIK), (ABHAM), malice, malice aforethought, criminal intent (specific and general), and reasonable doubt.

The 6th Amendment right to effective assistance counsel applied through the 14th Amendment place the obligation upon trial counsel to explain to Petitioner the elements and true nature of the crime charged as well as self-defense and defense of another. That Petitioner may assist trial counsel in the defense; understand trial counsel's trial strategy and; defend himself against any prejudicial, misleading, confusing or bias comment to the Jury from the prosecution and/or trial Judge abuse of discretion, by way of objections and other available legal remedies.

Consequently, it was not immediately obvious to the twelve jurors nor Petitioner, untrained on the law, nor advised by trial counsel or trial Judge that assault and battery of high and aggravated nature is considered a crime of violence in this state or, that a false statement is not proof of malice aforethought nor, that South

Carolina Law did not presume the Petitioner to be guilty of (ABWIK) (and nothing less) solely because Mr. Freeman (the person injured) was injured with a gun. Or, because the prosecution may prove malice, etc.

Consequently, because trial counsel failed and refused to object to any of the prosecutor's unlawful statements on the crime charged, Petitioner's right to have a Jury determine the facts and evidence of the case unpolluted by bias, prejudicial, and false comments from the prosecution was violated, denied and deprived. See Adams v. State, 283 S.E.2d 582 (1981) "Even had the trial Judge given correct instructions after incorrect interpretation, it would have merely fostered confusion and prejudice requiring a reversal."

Lastly, South Carolina Rules of Court, Rule 407 Professional Conduct Preamble: A Lawyer's Responsibility designated to trial counsel the obligation of protecting Petitioner against being convicted based on evidence and facts below that required by the 14th Amendment corroborated by Article 1 Section 3 South Carolina Constitution. Simply stated, trial counsel

failed to meet that standard of effectiveness. Thento, under Rule 407 S.C. Rules of Court trial counsel had a legal duty (which trial counsel neglected) to reasonably consult with Petitioner about the means by which the objectives were to be accomplished; kept Petitioner reasonably informed about the status of the case to include, the elements and true nature of (ABWIK) as well as (ABHAN) to the extent reasonably necessary to permit Petitioner to make informed decisions regarding the representation. And provide Petitioner with sufficient legal information to participate intelligently and effectively in decisions concerning the objectives and the means by which they were to be pursued, to the extent Petitioner is willing and able to do so. The guiding principle is that trial counsel failed to fulfill reasonable client expectations for information i.e., the elements and nature of (ABWIK), (ABHAN), self-defense, defense of another, malice, malice aforethought, criminal intent, etc. consistent with Mr. Boggs duty to act in Petitioner's best interest and the overall requirement as to the character of representation.

IV. The Appellate Court erred in finding that trial counsel was not ineffective for negotiating with the trial Judge at the beginning of the criminal proceeding, outside the presence of the Petitioner, during an in-chambers meeting, not to present nor argue any meaningful self-defense case on Petitioner's behalf.

Petitioner contends that he was denied and deprived of Due Process and Equal Protection of law under the 5th, 6th and 14th Amendments of the United States Constitution by way and through ineffective assistance of counsel. Behind trial counsel knowingly and intelligently engaging in conduct involving dishonesty, deceit and misrepresentation in violation of South Carolina Rules of Court, Rule 407 Professional Conduct Rules 8.4 Misconduct.

Particularly, at the beginning of the Petitioner's Jury Trial an in-chambers conference was held including only the trial Judge, trial counsel and the prosecutor. Petitioner was not informed of any decisions reached, facts or evidence discussed or, any contents mentioned immediately following that in-chambers meeting. It

became evident at the very end of Petitioner's Jury Trial that trial counsel never intended to present nor argue a self-defense case on Petitioner's behalf. See Trial Tr. Pp. 142 Lines 3-5; Mr. Bogg:

"Judge, you made a comment (during the in-chamber meeting) that he (Petitioner) can argue that 'there is no self-defense' and that you were going to make a charge along that line."

Trial Tr. Pp. 142 Lines 6-12

The Court: "Oh, I'm not making a charge. No. I said I thought he, I assume that he, would argue the fact that 'this was not a self-defense case and that I WOULD NOT BE INSTRUCTING THEM ON SELF-DEFENSE.'"
"AND I'M NOT." "WE HAD THIS DISCUSSION IN CHAMBERS."

Trial Tr. Pp. 132 Lines 17

Mr. Boggs: "Judge, we're NOT REQUESTING SELF-DEFENSE."

Excluding the Petitioner from the in-chambers

meeting as well as concealing the decisions and agreements made between the trial judge, trial counsel and prosecutor were not mere missteps. Trial counsel now had the advantage to create an illusion for the Petitioner that self-defense would be our defense. But in essence, trial counsel would present material facts and evidence to support a charge on the law of self-defense but rather, argue inappropriately and ineffectively the defense of defense of another. Consequently, the trial judge could simultaneously denied the Self-defense Charge where no meaningful case was presented nor argued; and at the same time, deny any request for a defense of another charge where the evidence and facts establishes self-defense instead of defense of another.

In the instant case, the Petitioner did not deliberately ignorance himself about the fact that the trial judge predetermined not to instruct the jury on self-defense or that trial counsel informed the trial judge that he would not effectively nor meaningfully present or argue self-defense on Petitioner's behalf. Rather, the trial judge, prosecutor and trial counsel withheld and concealed such critical informa-

tion From the Petitioner until such time that it was useless or would have no bearing on Petitioner's legal case and Self-defense defense; (at the conclusion of Petitioner's as well as the State's case). Or, immediately before the trial Judge gave the Jury the case for their deliberations.

On the contrary, had Petitioner been informed of the trial Judge's Ruling; trial counsel's intention to defect and any other critical issues discussed and decided upon during the secret in-chambers meeting, at the conclusion of their conference or in a reasonable or sufficient time manner, Petitioner would have immediately Motioned the trial Judge to recuse himself because of prejudice and bias. To wit, infringe upon the province and rights of the trial Jury to determine the weight of the facts and evidence of the case in relation to legal Justification, provocation and Self-defense.

(2) Petitioner would have fired trial counsel and retained other counsel who would not hide vital issues and information about the status of any in-chambers meeting, the goals and trial strategy to reach such goals or any crucial information necessary for Petitioner to

acknowledge if or when a Federal or state constitution right to a defense of self-defense is being denied and deprived. And most important, inform the Petitioner of relevant and pertinent advantages and disadvantages of the jury trial so that he can effectively and intelligently assist trial counsel to act in his best interest.

V The Appellate Court erred in finding that trial counsel was not ineffective for failing to explain to the Petitioner the practical implications, its obligations, the advantages of testifying on his own behalf after the trial Judge affirmed the final of all requests for a self-defense charge, and extended to the trial counsel an opportunity to explain to the Petitioner the detriment it would have on Petitioner's case, to determine whether or not it would change the Petitioner's mind about testifying.

Petitioner asserts that he was denied and deprive Due Process and Equal Protection of Law through and by way of ineffective assistance of

counsel pursuant to the 5th, 6th and 14th Amendments of the United States Constitution as well as Article 1 Section 3 South Carolina Constitution.

Behind Mr. Boggs failed to adhere to the Rules of Professional Conduct, Rule 407 A Lawyer's Responsibility [2] to perform the function of providing Petitioner with an informed understanding of his right to testify being reinstated and the benefits thereof pursuant to Statute Section 19-11-50 South Carolina Code of Law (1976).

During Petitioner's trial, the trial Judge notified him: Trial Tr. Pp. 100 Lines 11-14

"....if you want to testify or you want to provide this Jury with any information that might be important in their decision, 'now is the only opportunity that you will have to do so.'"

Trial Tr. Pp. 100 Lines 17-19

"If you want to testify, if you want to provide this Jury any information, 'you have to do so now during the opportu-

ity that you have to present evidence."⁹⁹⁹

Nevertheless, because trial counsel told the Petitioner that, if he (Petitioner) testified, the prosecutor would use his previous conviction of voluntary manslaughter to persuade the jury to draw bias and prejudice conclusions that, by nature, the Petitioner is violent and have no respect for human life, nor South Carolina Law.

As such, the trial transcript demonstrates:

Pp. 101 Lines 19, 20

The Court: And what is your decision?

The Defendant: I don't want to testify.

However, at the conclusion of trial counsel's defense, Petitioner's case took a critical turn for the worst. Simply stated, the trial Judge stated

"I want to give you an opportunity to talk with your client about, again about, whether or not he will testify."

"Because upon what I've heard, I'm not inclined to instruct the Jury on

Self-defense or defense of another. But if that changes your strategy about whether or not, or it changes Mr. Alexander's mind about whether or not, he will testify in this case, I want you to have that opportunity to discuss it with him."

See Trial Tr. Pp. 131 Lines 17-25 and Pp. 132 Lines 1-4.

On the contrary, rather trial counsel proceeded with his Closing Arguments instead of taking that opportunity to explain to the Petitioner that it was absolutely necessary for the Petitioner to testify in order for the trial Judge to instruct the Jury on self-defense, legal justification, legal provocation or offer evidence to mitigate, reduce, abate his culpability from (ABWIK) to (ABHAN). The verdict very well could have been self-defense or assault and battery of high and aggravated nature had trial counsel taken a few minutes to inform the Petitioner that, at that critical stage in the trial; Petitioner had nothing to lose and everything to gain by testifying. That we had, as evidence, a Voluntary

Statement from April (a witness) which would corroborate evidence and facts of Mr. Freeman's threatening Petitioner in words and actions (which trial counsel failed to present to the jury and trial court) which brought on the difficulty.

Initially, petitioner was willing and wanted to testify. It was only after trial counsel convinced Petitioner of its harmfulness did the Petitioner-waive or forfeit his right to testify. However, once the trial Judge required Petitioner to prove self-defense beyond all doubt and by a preponderance of the evidence to the trial court before being inclined to issue any self defense charge to the jury did trial counsel become obligated pursuant to Rule 407, Communication With Client [3] Paragraph (a)(3) to inform the Petitioner about the status of the significant development affecting the timing and substance of the trial. But when trial counsel failed to explain to Petitioner that his only chance of attaining a self-defense charge hinged on his decision to testify, trial counsel's performance fell below the professional standards and conduct set out in Strickland v. Washington,

466 U.S. 668 (1984); Butler v. State, 334 S.E. 2d 813 (1985) cert. denied, 474 U.S. 1094 (1986); and Cherry v. State, 386 S.E. 2d 624 (1989)

XI.

The Appellate Court erred in finding that trial counsel was not ineffective for failing to object to the excluding and absenting Petitioner from a very critical stage of his Jury Trial i.e., during the beginning of the criminal proceeding in an in-chambers meeting where the trial Judge decided there would be no self-defense charge given at the conclusion of the State's case and Petitioner's defense. In addition, to trial counsel placing the trial Judge on Notice that no profound effort would be executed to obtain a self-defense charge.

Petitioner contends that he was denied and deprived of nonwaivable Federal and State constitutional guaranteed rights to be present during a critical stage of his Jury Trial pursuant to the 5th, 6th and 14th Amendments of the United States Constitution. As well as Article I Section 3 S.C. Constitution. By way and through trial

counsel ineffective assistance of counsel.

Relying on Stewart v. State, 300 S.E.2d 331 (1983) The rule is well established that on trial "Petitioner must be present when the Court takes any action materially affecting his case." Leaning on Rogers v. United States, 422 U.S. 35, 95 S.Ct. 2091 (1975); and Tillman v. United State, 406 F.2d 930 (5th Cir. 1969) "The right is guaranteed to the accused by the Fundamental Fairness Law, in order that Petitioner may see to it that he have a fair and impartial trial and that nothing is done that would in any wise tend to his prejudice." And unless the character of the communication clearly shows that it was not prejudicial to the accused, "the presumption of law would be that it was prejudicial." See Miller v. State, 79 S.E.232 (1913); Wilson v. State, 90 S.E.2d 557 (1955); also Pierce v. State, 171 S.E. 731 (1933).

Trial counsel allow Petitioner to be denied and deprived of due process and equal protection of law by failing to object to violation of constitutional irregularities and improprieties of the trial Judge excluding Petitioner, without his consent, waiving his right to be present

or, absenting himself of the in-chambers meeting held at the beginning of his trial. Plus, immediately following the in-chambers meeting, neither trial Judge, prosecutor nor trial counsel inform the Petitioner of any statements made, the evidence presented and/or discussed, agreements made or rulings reached. Such as, the trial Judge's decision not to grant any self-defense instruction at the end of the trial. Or that trial counsel would not be arguing self-defense on the Petitioner's behalf.

Further, the PCR Court found; "trial counsel testified that the sister did not testify as she had indicated during previous conversations and he had to shift strategy for closing and focus on lack of intent." Maybe the PCR Judge's finding was meant for another case.

Because in the present case, the trial transcript demonstrates:

Trial Tr. Pp. 142 Line 3, 4

Mr. Boggs: "Judge, you made a comment that

he (the Petitioner) can argue that 'there is no self-defense'

Trial Tr. Pp. 142 Lines 7-10

The Court:

"I assume that he (Petitioner) would argue the fact that this was not a self-defense case and that I would not be instructing them on self-defense."

"And I'm not."

Trial counsel did not inform Petitioner, prior to trial, of any other defense other than self-defense as the trial strategy. Neither did trial counsel inform Petitioner of the above mentioned agreement and rulings made between the trial Judge, prosecution or trial counsel himself during their in-chambers meeting.

In essence, the in-chambers conference held in secret, off the record and in Petitioner's absence clearly was a step during his trial where Petitioner suffered substantial Prejudice. The in-chambers meeting constituted a

critical stage during Petitioner trial where the Federal and subsequent State constitution guarantee him the right to "appear and defend in person."

Otherwise, as in the present case, Petitioner's trial was literally being held in his absence although he was present, willing, and able to defend himself.

Consequently, conducting the in-chambers meeting in the Petitioner's absence denied and deprived him the right; (1) to participate in the preservation of his Due Process and Equal Protection of Law; (2) to observe that trial counsel was not advocating for Petitioner zealously or professionally; (3) to observe the demeanor of the trial Judge and solicitor; (4) to hear trial counsel's, trial Judge's and prosecutor's statements, arguments, if any, and the ruling denying the request for a self-defense instruction; (5) to provide and pursue additional evidence, information or testimony bearing on the issues and arguments being discussed; (6) to hear the trial Judge's logic for determining why he believed that Petitioner's evidence and facts were insu-

efficient to lay a foundation (and warrant) a self-defense instruction. Based on Petitioner's observation, he would have ascertained grounds to fire trial counsel or pursue ineffective assistance of counsel claims.

The prejudice suffered is most obvious. The Petitioner was lured into the criminal trial by trial counsel and abandoned to the lions. Trial counsel withheld from Petitioner the trial Judge's intention not to instruct self-defense. Trial counsel withheld his intention not to argue meaningful for a self-defense instruction from the trial judge. And trial counsel failed pursuant to Article I Section 18 of the South Carolina Constitution to guarantee Petitioner "the right to be confronted with any witnesses, any testimony, any evidence against him personally during the in-chambers meeting." See 6th Amendment.

Contrarily, trial counsel's presence and participation in the in-chambers meeting did not constitutionally waive nor forfeit Petitioner's right to appear and defend himself during such a critical stage of his trial. See State v. Matt, Mont, No. Da 06-0134, 12/30/08.

There to, the South Carolina Supreme Court addressed the issue and held: "In a prosecution for a felony, Petitioner has a right to be present at every part of the trial proper unless he absent himself." See State v. James, 107 S.E. 907, 116 S.C. 243.

Incidentally, "it was reversible error for the trial court to conduct an in-chambers meeting with the attorney but without the Petitioner." See State v. Brogden, 407 S.E. 2d 158, 163 (1991); State v. Exum, 470 S.E. 2d 333 (1996); also see State v. Moss, 418 S.E. 2d 213 (1992). Waiver of constitutional or statutory right requires showing on the record that Petitioner made waiver knowingly and intelligently. See State v. Arthor, 374 S.E. 2d 291, 296 S.C. 495. Petitioner neither waived nor forfeited his right to attend and participate in the in-chambers meeting.

This Due Process right especially applies if the Petitioner's presence has a reasonable substantial relation to his ability to mount a self-defense case. See Kentucky v. Stincer, 482 U.S. 730 (1987). This constitutional right is guaranteed under the Due Process Clause where the Petitioner was being confronted by

evidence, statements, testimony and/or witnesses used against him during his Jury Trial. See United States v. Gagnon, 470 U.S. 522 (1985). Wherefore, PreJudice attached when the Petitioner's fundamental fairness rights to be present and participate in the in-chambers meeting were never pursued nor secured by trial counsel. Citing State v. Reed, 210 P. 756 (1922).

VII.

The Appellate Court erred in finding that trial counsel was not ineffective for failing to request a State v. Fennell Jury Charge of presence of malice does not preclude a finding on Assault and Battery Of High And Aggravated Nature.

The Petitioner assert that trial counsel allowed him to be denied and deprived of Due Process and Equal Protection of Law under the 6th and 14th Amendments of the United States Constitution as well as Article 1 Section 3 of the South Carolina Constitution. Particularly, during Petitioner's Jury Trial the prosecution's key objective was to convince the Jury that the Petitioner acted with malice. That malice is an element of Assault and Battery With Intent To Kill. And

that if they were convinced that the Petitioner acted with malice; "they must Convict the Petitioner of assault and battery with intent to kill (ABWIK)." See Trial Tr. Pp. 159 Lines 22-25 and Pp. 100 Lines 1,2

Ms. Jordan: "I'll tell you that in our state we qualify assault and battery with intent to kill as a crime of violence. The lesser included charge...is not considered a crime of violence in our state."

Trial Tr. Pp. 156 Lines 6,7

Ms. Jordan: "A violent injury is what we are required to show for assault and battery with intent to kill."

And immediately following Solicitor Jordan's above mentioned statements during her Closing Arguments; the trial Judge instructed the Jury:

"And again, before you could find the defendant guilty of the lesser included offense of assault and battery of a high and aggravated nature the state must also establish criminal intent as I have previously defined that term for you."

As such, both assault and battery with intent to kill and assault and battery of a high and aggravated nature are equivalent in all elements only with the one distinguishing element that must constitute the greater offense (ABWIK) from the lesser included offense (ABHAN). Malice or the absence thereof.

Pursuant to State v. Peterson, 287 S.C. 244, 335 S.E.2d 800, 802 (1985) "a malice charge which used such term "9 times—were erroneous and prejudicial." Nonetheless, trial counsel failed to object when the prosecutor gave the Jury fourteen (14) definitions, inferences and/or personal opinions (some of which were not current nor correct) of malice or malice aforethought during Closing Arguments. Thereto, trial counsel failed to object where the trial Judge subsequently issued the Jury twenty-eight additional inferences definitions and/or personal opinions (most of which were not applicable; and one of which has since been determined unlawful pursuant to Belcher v. State) of malice and/or malice aforethought.

Overly burdened with forty-two (42) inferences of malice and/or malice aforethought

unobjected to nor challenged by trial counsel, the petitioner's conviction of assault and battery with intent to kill was imminent. First, because every one of the definitions, inferences and/or personal opinions of malice were directed solely towards (ABWIK). Second, the prosecutor's statements on the law of malice supported by the trial Judge Jury Charge on Malice mislead the Jury as well as had the effect of requiring "the absence of malice and violence as an element of assault and battery of high and aggravated nature."

But most crucial and prejudicial was where trial counsel failed to request that the trial Judge include in his Malice Charge that; "the absence of malice is not a required element of (ABHAN), and the fact that a defendant acts with malice does not preclude a finding of assault and battery of high and aggravated nature." See Pilgram v. State, 465 S.E.2d 108 (S.C. App. 1995) Also, pursuant State v. Fennell, 531 S.E.2d 512 (S.C. 2000) "A defendant may be convicted of (ABHAN) regardless of whether malice is present."

The Petitioner contends that there was no overwhelming evidence of malice proved by the

prosecution. Otherwise, there would not have been the need to excessively broaden the chances of the Petitioner's actions constituting malice with (42) inferences.

Ultimately, trial counsel was ineffective under the 6th Amendment when he failed to object or request that the trial Judge's Malice Charge sufficiently enlighten the Jury of their right to find the Petitioner guilty of (ABHAM) if malice was applicable to the evidence and facts of the case. Pursuant to United States v. Perez, C.A. 9 (Guam) 1995, 67 F.3d 1371 trial counsel allowed the Petitioner to be deprived and denied Due Process to a fair trial behind his failing to object to "the trial Judge neglecting, refusing or failing to instruct the Jury on an essential element of the crime (ABHAM) of which Petitioner was being put to trial for." Especially an element that made "all the difference between the Petitioner being sentence to fifteen (15) years for (ABHAM) or Life Without Parole for (ABWIK)."

Under Sandstrom v. Montana, 99 S.Ct. 2450 "A bias or partial jury instruction on any element of the crime 'can never constitute harmless error.'"

Also, under Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975) ⁶⁶ "The 14th Amendment prohibit a state from shifting to Petitioner the burden of disproving malice not only for (ABWIK) the greater charge but, also for (ABHAN) the lesser offense which the absence of malice is not a required element." Because, in such vain, Petitioner was left with no element to distinguish between the greater or lesser offense.

Thus, where (ABHAN) was issued as a lesser included offense of (ABWIK), it was anomalous in the extreme to require the Petitioner to disprove malice for the lesser included offense and relieved the prosecutor of the burden of proving reasonable doubt when in fact there was some between the greater offense. See Fifth (5th) Amendment. The Due Process Clause of the Fourteenth Amendment safeguards against the trial Judge issuing a Jury an instruction which a reasonable Juror could construe or interpret it to require a finding of guilt based on a degree of disproof greater than that required by the due process clause.

In sum, where the trial counsel failed under Rule 20(b) S.C.R. Crim. Procedures to object

to the trial Judge's bias, prejudice and inadequate Malice Charge, the Petitioner suffered the prejudice of an impartial and unfair trial where the Jury was directed and forced to convicted the Petitioner of (ABWIK) because trial counsel failed to request that the trial Judge instruct the Jury that "malice did not bar a finding for (ABHAN) and absence of malice is not a required element of assault and battery of high and aggravated nature." See Fennell supra.

VIII.

The Appellate Court erred in finding that trial counsel was not ineffective for failing to object to the prosecution, during Closing Arguments, proclaimed to the Jury, "South Carolina does not consider assault and battery of a high and aggravated nature as a crime of violence;" Contrary to Statute Section 16-3-620 S.C. Code Ann. (1976).

During her Closing Arguments, Solicitor Jordan stated to the Jury:

"The lesser included offense... is not considered a crime of violence

in our state."

See Trial tr. Pp. 159 Lines 24, 25 and Pp. 160 Lines 1 and 2. Second, immediately after the prosecutions Closing Arguments, the trial Judge charged the Jury in the Jury Charge:

"Keep in mind, as I have instructed you, you may not Find the defendant guilty of count two) unless you have found him guilty of count one."
"You may find him guilty of the lesser included offense of assault and battery of a high and aggravated nature." "In that event he must be found not guilty of count two because count two requires that proof of a violent crime be proven, and assault and battery of a high and aggravated nature is not classified as a violent crime."

Ultimately, under neither the prosecutor's nor the trial Judge's explanation on the elements of assault and battery of a high and aggravated nature could the Jury find the Petitioner guilty of (ABHAN). First, because under Statute Section 16-3-620 South Caro-

lina Code Ann. (1976), at the time of Petitioner's trial, assault and battery of a high aggravated nature is defined as a crime with circumstances of aggravation which would include the use of a deadly weapon and/or the infliction of serious bodily harm or injury [a crime of violence]. But not classified as a violent crime.

Evenmoreso, the trial Judge's Jury charge designated and place a responsibility upon the trial Jury to decide upon the law whether to Convict the Petitioner of a violent or non violent crime in a single count of the indictment. Under the trial Judge's Jury charge, if the Jury found the Petitioner guilty of assault and battery of a high and aggravated nature of count one of the indictment; they would have also found Petitioner guilty of count two of the indictment because they were instructed: "you may not find him guilty of count two unless you find him guilty of count one." On the other hand, if the Jury found the Petitioner guilty of assault and battery of a high and aggravated nature under count one of the indictment, the trial Judge instructed the Jury: "In that event he must be found

not guilty of count two because count two requires that proof of a violent crime be proven, and assault and battery of a high and aggravated nature is not classified as a crime of violence."

Under the most reasonable interpretation of the prosecution's statements and trial Judge's Jury Instructions on the law of elements of assault and battery of a high and aggravated nature; the law barred them from a finding of (ABHAN) under count one of the indictment. Because there was no separate count or indictment for (ABHAN); a finding of guilt for (ABHAN) on count one would force the Jury to convict the Petitioner of possessing of a firearm during the commission of a violent crime Count-Two where the use of a deadly weapon only constituted circumstance of aggravation.

In the instant case, the Jury was made to determine whether the Petitioner's use of the deadly weapon constituted a violent or non violent offence. Since both (ABHAN- Non Violent and ABWIK-Violent) were included in the count one of the indictment; a conviction on either crime (count one) required Petitioner

to disprove proof of a violent crime because the Jury could not convict Petitioner of Count - Two, possession of a firearm during the commission of a violent crime, unless the Jury convict him of Count - One (ABWIK or ABHAN). Particularly, assault and battery of a high and aggravated nature was not classified as a violent crime but was allowed and instructed as count one for the purpose and stipulation of being guilty of count two.

Pursuant to Drake v. Kemp, 762 F.2d 1449, 1459-60 (11th Cir. 1985), "a prosecutor must refrain from stating his personal opinions during arguments and misleading the Jury about the law. Violations of this type, if in the slightest, contributed to the conviction or sentence, the conviction or sentence must be set aside absent a show of prejudice. The record gives no reason to assume that the Jury could not or should not have believed the prosecutor when she told them; "assault and battery of a high and aggravated nature is not considered a crime of violence in our state." Specifically because trial counsel failed to object or request a current, correct or curative instruction from the trial Judge.

Also, pursuant to State v. Torrence, 406 S.E. 2d 315 (S.C. 1991) "When a solicitor's person opinion is explicitly injected into the Jury's determination as though it were in itself evidence or law Justifying a conviction or sentence.... the resulting conviction or sentence is not free from the influence of arbitrary factor as required by the Due Process Clause."

Unmistakingly, assault and battery of a high and aggravated nature is an unlawful act of violent injury to another person accompanied by circumstances of aggravation. See Knox v. State, 340 S.C. 81, 530 S.E. 2d 887 (S.C. 2000). Therefore, trial counsel was ineffective for failing to object to the prosecution's shifting the burden upon the Petitioner to disprove violence or a violent injury (the very elements of (ABHAN) as unlawful as well as lawfull elements of (ABHAN) before the Jury would be permitted to find the Petitioner guilty of such lesser included offense.

Likewise, trial counsel was ineffective where he failed to object to the trial Judge placing the unreasonable burden upon the Petitioner of proving that his actions only constituted the

lesser included offense of assault and battery of a high and aggravated nature (ABHAN) under (Count 1) of the indictment does not permit the Jury to find him guilty of (Count 2) of the indictment for possession of a firearm during the Commission of a violent crime because (ABHAN) is not classified as a violent crime.

All the while, fulfilling an unattainable burden of persuading the Jury to disregard the trial Judge's Jury Charge:

"You may not find the defendant guilty of possession of a firearm during the commission of a violent crime under (Count two) unless you have him guilty of assault and battery of a high and aggravated nature (Count one) a non-violent crime."

In the instant case, the prosecution only had the responsibility to prove the elements of the lesser included offense of (ABHAN) to constitute a conviction of (ABWIK) for the purpose of (Count 1), which would unlawfully permit a non-violent offense to overcome the statutory requirement that the Petitioner be found guilty of a violent crime before being convicted of possess-

ion of a Firearm during the commission of a violent crime under (Count two).

The most obvious reasons why trial counsel's performance fell below the 6th Amendment requirements is found in Sandstrom v. Montana, 99 S.Ct. 2450 (1979) which held: "It has long been the case and settled that, when a case is submitted to the Jury on alternative theories, (guilty of a non-violent or violent crime under a single count of an indictment (count one) precluding as well as permitting a conviction under (count two) of the indictment which require proof of a violent crime), the unconstitutionality of any of the theories requires that the conviction be set aside." Especially, because "an unconstitutional Jury instruction on the elements of count one for (ABWIK-Violent vs. ABHAN-Non Violent) can never constitute a harmless error." See Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L. Ed. 117 (1931); Leary v. United States, 395 U.S. at 31-32, 89 S.Ct. at 1545 - 1546; Carpenters v. United States, 67 S.Ct. at 782; also see Bollenbach v. United States, 66 S.Ct. at 405, 406.

And pursuant to State v. Torrence, Id. at 534,

172 S.E. 2d at 112, "We adopted the prevailing view that a Jury charged with the responsibility of assessing the penalty (15 years for ABHAN vs. Life Without Parole for ABWIK - Count One-) to be suffered by an accused should not be invited, by instruction or argument." The rationale for this view was expressed as follows:

"The Jury perform their task completely when they decide the matter assigned to them upon the evidence before them."

[Quoting State v. White, 27 N.J. 158, 177-78, 142 A. 2d 65, 76 (1958): "the Jury must only be instructed to base their decision solely upon the evidence adduced at trial." 278 S.C. at 585, 300 S.E. 2d at 71. Even if the trial Judge had decided, in the end, to enlighten the Jury of the current and accurate law, merely superimposing correct instructions over erroneous ones serves only to foster prejudice and confusion. See State v. Adams, 277 S.C. 115, 283 S.E. 2d 582 (1981); Copeland, Supra

Under minimum prevailing norms trial counsel was required to object to and challenge the prosecutor's unlawful statements during Closing Arguments as well as the trial Judge's unreason-

able and unattainable burden shifting Jury Charge on the law and elements of assault and battery of a high and aggravated nature. There is a reasonable probability that but for trial Counsel's deficient and unprofessional performance, the Petitioner's Jury trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); 6th Amend.

IX. The Appellate Court erred in finding that trial counsel was not ineffective for failing to object to the prosecution's voluntary and knowingly giving a false impression to the trial Judge and Jury by using perjured statements that involved a corruption of the truth seeking process of the criminal trial proceeding.

On July 21, 2006, three hours after the incident, Petitioner's sister (April) gave a Voluntary Statement to detectives stating:

"I went to the kitchen and Orenthiell said you stupid fat bitch, what you get him for, you'll fucking with the wrong person." He told my brother aint shit you

can do. I'll take your head off; it appeared that they would start to fight, and I walked towards them."

Again, on July 21, 2006 on a Search Warrant Affidavit, W. Lindsey, Affiant states:

"Deputies also spoke with April Alexander who told them that ("She and Freeman had been arguing about bills and such but it had not gotten severe"). She told them that ("She was in the kitchen when she heard a shot come from the living room where John and her boyfriend were. She entered the living room to see that Freeman was next to the door and had been shot. She did not see this occur")."

During the Petitioner's Jury Trial neither the trial Judge nor the Jury heard either of the above mentioned versions of the incident given to detectives by the Petitioner's sister (April). Consequently, had trial counsel investigated, utilized and presented to the trial Judge and Jury one or both (April's) Voluntary Statement to Deputy K. Kent and Investigator T. Davis or the Affidavit of Deputy W. Lindsey, the Petitioner's culpability

would have been reduced, mitigated or diminished to self-defense or assault and battery of a high and aggravated nature. The United States Supreme Court has already decided: "Errors of these kind justify collateral relief.... even though they may not have been preserved properly in the original trial." See Mooney v. Halohan, 294 U.S. 103 (1935); Strickland v. Washington, 466 U.S. 668 (1984); and 6th Amendment.

On the contrary, because trial counsel failed to object to or confront Petitioner's trial witness' trial testimony which differed from her Voluntary Statements given to Deputy K. Kent or the Affidavit of Investigator W. Lindsey, the Petitioner's conviction and sentence resulted from perjured trial testimony solicited by the prosecutor, who deliberately suppressed such material evidence favorable to the Petitioner. Or as the result of the prosecution's shameful silence in light of their duty to protect the truth. In either event, the Petitioner's right to the Due Process to a fair trial and effective assistance of counsel was deprived and denied as guaranteed under the 5th, 6th and 14th Amendments of the United States Constitution. See United States v. White, 970 F.2d 328 (7th Cir. 1992); and COM. OF

Northern Mariana, Island v. Bowle, 236 F.3d 1083
(9th Cir. 2001).

In the case sub Judice, (April's) trial testimony were not mere mistatements or contradictions, but instead, false attestation, rather than as a result of confusion, mistake or faulty memory. Pursuant to United States v. Murry, 65 F.3d 1161 (1995) April "Obstructed Justice either by giving false statements in her Voluntary Statement to Deputy K. Kent or in the investigative Affidavit taken by Investigator W. Lindsey or during her trial testimony on the witness stand. In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed 1217 (1959) "the same result obtains when the prosecutor, although not soliciting false evidence, allows it to go uncorrected when it appeared." Id., at 269, 79 S.Ct., at 1177. Corroberating Brady v. Maryland, 373 U.S., at 87, 83 S.Ct. at 1197 "Suppression of material evidence Justifies a new trial irrespective of the good faith or bad faith of the prosecutor. See American Bar Association, Project On Standards for Criminal Justice, Prosecution Function and the Defense Function Section 3.11 (a).

Herein, the prosecution deliberately mislead or deceived the Jury by eliciting false evidence

incompatible with rudimentary demands of Justice. Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L. Ed. 214 (1942). Under Statute Section 16-9-10 (A)(2) S.C. Code Ann. (1976) "if the information given to Deputy K. Kent in (April's) Voluntary Statement or the information given to Investigator W. Lindsey in the Affidavit were false, (April) was guilty of perjury. But if the information was true, (April) perjured herself on the witness stand under subsection (A)(1). See State v. Stanley, 365 S.C. 211, 615 S.E.2d 445 (2005).

Pursuant to Ex parte Carmona, 185 S.W. 3d 492 (2006) "Petitioner has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment." "Although the present case involve unknowing rather than knowing, use of perjured testimony, we see no reason for subjecting the two types of errors to different standards of harm;" opinion by Judge Paul Womack. Additionally, the unknown use of perjured testimony "the lower Federal Courts have decided, deprives the Petitioner of Due Process. United States v. Mitrone, 357 F.3d 712, 74 CrL 337 (7th Cir. 2004).

In essence, the prosecution's unwitting use of perjured testimony used to convict the Petitioner

ner must be held to the same harmless error standard the knowing use of perjured testimony. See (Ex parte Chabot, Tex. Crim. App., No. AP-75, 940, 12/9/09). Whether the prosecution chose to intentionally suppress or conceal the exculpatory material evidence or, the trial counsel failed to discover, utilize and present the exculpatory statements which undisputably would exonerate, reduce or mitigate the Petitioner's culpability, if believe by the Jury, not only was the Jury denied and deprive of their truth seeking process, but more critical, the Petitioner was denied and deprived of Due Process and Equal Protection of Law. See 5th, 6th and 14th Amend.; Article I Section 3 of the S.C. Constitution; Strickland v. Washington *Supra*.

In 1976, the High Court was called yet again to visit this recurring issue, noting that "it has consistently held that a conviction obtained by the knowing or unknowing use of perjured testimony is fundamentally unfair and must be set aside" if there is any reasonable likelihood that the false testimony could have affected the Judgment of the Jury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L Ed. 2d 342 (1976).

The Court observed that the Mooney line of cases applied this strict standard not just because they involved prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the jury trial process.

X.

The Appellate Court erred in finding that trial counsel was not ineffective for failing to object to the prosecution's three (3) false, misleading and deceitful statements to the trial judge and jury during closing arguments that Mr. Freeman sustained life threatening injuries to his stomach, but all medical, surgical and examination reports, along with all trial evidence, facts and testimony demonstrate that Mr. Freeman's (Victim) received non-life threatening injuries to the pelvis.

During Closing Arguments, prosecutor Ms. Jordan misled, deceived and manipulated the jury into believing:

(1) "I think the last two things that go together, pointed and shot an unarmed man, 'shot him'

in the stomach."

(2) "They want to make you believe Just because 'he shot him in the stomach' that it's, you know, just a little, a little nothing."

(3) "He shot the man in the stomach right here."

See Trial Tr. Pp. 161 Lines 23-25 and Pp. 162 Lines 1-3. The Petitioner was unduly prejudiced by trial counsel's deficient performance in failing to investigate and introduce into evidence Mr. Freeman's (victim's) Operation Report, Radiology Report, Discharge Summary and Final Exam, which raise sufficient doubt as to the questions to undermine confidence in the verdict. See Hart v. Gomez, 174 F. 3d 1067 (9th Cir. 1999). 6th Amend.

Exactly what the Operation Report dated 7/21/06, dictated by Dr. Patel; M.D. Surgeon Dr. Kramer and Dr. Yukley Physician discloses is:

Blood Replaced: None.

Drains: None.

Complication: None.

Condition at the completion of the procedure:
None.

On July 21, 2006 Dr. Ari Kramer noted in his Secondary Survey:

Condition of pelvis: "Stable"

The Radiology Report Found:

"No Stomach Injuries"

"Injury to the left lower quadrant (Pelvis)"

The Discharge Summary Authenticated by Devonne D. Barrineau, MD, on 8/10/06 reveals:

"Mr. Freeman entered the Emergence Unit stable and conscience."

"Very minor complications during the nine day hospital observation."

And the Final Exams demonstrates:

"Remarkable recovery."

"Outpatient therapy recommended."

Emphatically, the prosecution conscientiously sought out to maliciously prosecute the Petitioner by injecting counterfeit and false medical facts and material evidence into the jurors truth seeking process. "Absolutely nowhere in Mr. Freeman's medical reports / files do any of the

Surgeons or Doctors who treated Mr. Freeman even insinuate that he received injury to his stomach." Completely False. The only evidence of Mr. Freeman's life being in Jeopardy comes from trial testimony of Dr. Patel:

Dr. Patel: "But 'if' you do an exmed or so 'they may die.'"

Solicitor Jordan:

"Would you classify his injuries as life threatening at the time he came into your facility?"

Dr. Patel:

"Absolutely."

However, prior to Petitioner's trial, all Dr. Patel's, Dr. Kramer, Dr. Yukley's, etc. Medical Reports, findings, facts and/or opinions denounce even the slightest suggestion that Mr. Freeman, upon entry throughout the discharge, was in danger of losing a vital organ or his life.

Reasonable competent and effective trial Counsel, in the least, would have investigated the medical reports and file of Mr. Freeman. Interviewed Dr. Patel who was listed as an potential State's Witness. And thereafter sought to depose of Dr. Patel by way of a suppression hearing. Based on the ground that, although Dr. Patel's testimony may be relevant; such evidence must be excluded because its probative value outweigh the danger of unfair prejudice. See Gill v. State, MO, No. S.C. 89831, 12/1/09; State v. Cheeseboro, 552 S.E.2d 300 (S.C. 2000); and Rule 106 as well as Rule 403 South Carolina Rules of Evidence.

Overmore, tracking the path of the bullet is a standard procedure whether Mr. Freeman was injured as an result of an accidental shooting, an intentional shooting in self-defense, or an intentional malicious act. However, the "exmed" Dr. Patel alluded to is a more extensive examination of the path of the injury "was not warranted nor performed on Mr. Freeman. Consequently, there was zero chances of Mr. Freeman dying of a result of a procedure never performed on him. Trial counsel was deficient and below professional norms where he failed

to object to Dr. Patel's deliberately injecting highly prejudicial irrelevant sentiments into the intellect of the Jurors bent on bolstering a distorted belief and certitude of Mr. Freeman's injury to be more severe than medically factual. See State v. Alexander, 303 S.C. 377, 401 S.E. 2d 146 (1991); State v. Wilson, 345 S.C. 1, 545 S.E. 2d 827 (2001) "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis."

The meat of this issue is that, Solicitor Jordan's highly prejudicial and bias statements to the Jury are manifest as such: The stomach is one of the vital organs located within the abdomen. The sort of injury sustained to a stomach or its disruptive affect can easily be assumed to be life threatening. The pelvis, on the other hand, is the bony structure that supports the lower abdomen. Two big, symmetric hipbones forms the pelvis. Each hipbone in an adult (such as Mr. Freeman) appears to be one bone. Mr. Freeman's entire medical file described his injury to be, through the left lower abdomen, into the ilium (the broad, flat bone you feel when you rest your hands on the hip). An adult would have to sustain a severe fracture

to his ilium, ischium, or pubis (one of the three bones that unites as the body matures to form the pelvis) requiring replacements or significant repairs before being considered or classified as life threatening. Mr. Freeman's injury to the pelvis did not cross that threshold pursuant to his surgeon's, physician's and doctor's medical data.

Trial counsel allowed the Petitioner to be denied and deprived of Due Process and Equal Protection of Law behind his failing to investigate, utilize and present exculpatory material evidence i.e. Mr. Freeman's Operation Report, Secondary Survey, Radiology Report, Discharge Summary and Final Exam, which raised sufficient doubt as to the questions to undermine confidence in the verdict. Additionally, trial counsel's trial performance fell below minimum standards of representation by failing to object to the prosecution's malicious prosecution that so affected the Jury's ability to consider the totality of the true and accurate evidence fairly that it tainted the verdict as well as denied and deprived the Petitioner a fair and impartial Jury trial. See United States v. Giese, 597 F.2d

1170, 1199, 100 S.Ct. 1979); United States v. Smith, 962 F.2d 923 (1992); see also 6th Amend; United States v. Young, 470 U.S. 1, 12-13, 105 S.Ct. 1038, 1044-45, 84 L.Ed. 2d 1 (1985).

XI. The Appellate Court erred in finding that trial counsel was not ineffective for failing to pursue a Brady violation where the prosecutor failed to disclose and unlawfully suppressed a 911 Emergency Tape. Or in the alternative, where trial counsel failed to obtain, utilize or present as mitigating evidence the 911 Emergency Tape.

The Petitioner contends that he remains indigent. And due to the limited amount of legal paper the McCormick Correctional Institution has restricted him to, as well as various institutional lockdowns restraining his access to legal books/cases; Petitioner is unable, at present, to brief and argue the above issue.

XII. The Appellate Court erred in finding that trial counsel was not ineffective for failing to pursue a Missouri v. Seibert, violation

where the investigating detectives executed unconstitutional Federal and State police tactics of inserting Miranda warning in the midst of coordinating and continuing interrogations that was designed to mislead and deprive Petitioner of truthful knowledge essential to the ability to understand the nature of his right to remain silent or the consequences of abandoning them.

The Petitioner contends that he remains indigent. And due to the limited amount of legal paper the McCormick Correctional Institution has restricted him to, as well as various institutional lock-downs restraining his access to legal books/cases; Petitioner is unable, at present, to brief and argue the above issue.

XIII. The Appellate Court erred in finding that trial counsel was not ineffective for failing to object or request a curative instruction on the trial Judge's General Intent Charge which created a Federal and State unconstitutional shifting the burden of proof upon the Petitioner on the element of intent.

Upon a Motion made by the prosecution; the trial Judge instructed the Jury:

"There must however be proven beyond a reasonable doubt that the defendant maintained at least a general criminal intent in order for the offense of assault and battery with intent to kill to be established."

See Trial Tr. Pp. 175 Lines 5-8. Trial counsel was ineffective for failing to object to the trial Judge's General Intent Charge where the evidence, facts nor any circumstances of Petitioner's Jury trial met any of the lawful elements justifying such instruction. Petitioner rely on two cases in support of this issue.

First, pursuant to State v. Foust, 479 S.E. 2d at 56 (S.C. App. 2000) "At trial, the State introduced a letter written by Foust in which he claimed he never meant to hurt the victim. The Supreme Court found that despite Foust's denial of intent to kill the victim, a general intent to kill was sufficient to support an assault and battery with intent to kill charge."

"His use of a deadly weapon while burg-
arizing victims home, and the fact that
victim sustained serious (injuries), were
held to be adequate evidence of such
general intent."

Paralleling State v. Coleman, 536 S.E. 2d 387 (S.C. App.
2006):

"I just can't see.... somebody standing
there with both hands on a pistol, directly
in front of somebody pulling the trigger and
shooting him in the head; how that could
possibly be assault and battery of a high
and aggravated nature. 'I mean, it's eith-
er assault and battery with intent to
kill or nothing.'"⁹⁹⁹

"We agree with the trial Judge's reasoning.
Coleman's manner in using the weapon -
pointing the gun at victim and the delibe-
rately raising the gun to aim at victim's
head just before he fired could have only
been reasonably calculated to kill or cause
great bodily harm to victim."

"Moreover, the resulting wound was near fatal. Coleman offers no excuse or justification for his act, except that he panicked. This assertion alone cannot mitigate his general intent to kill, as evidence by his voluntary shooting victim in the head."

See Foust supra; 41 C.J.S. Homicide Section 179 (intent may be inferred when it is demonstrated that the accused voluntarily and wilfully commits an act, 'the natural tendency of which is to destroy another's life')."

The greatest irregularities and material discrepancies in the present case and that of Coleman or Foust is articulated in Coleman as such:

"An assault and battery of high and aggravated nature charge is appropriate only when the evidence demonstrates the defendant lacked the requisite intent to kill."

See also State v. Hilton, 284 S.C. 245, 249, 325 S.E. 2d 575, 577 (Ct. App. 1985). Herein, trial counsel allowed the trial Judge to place an unreasonable burden upon the Petitioner to disprove a General Intent to kill where the trial Judge agreed that Petitioner lacked the requisite intent to kill. As well as found

that the evidence and facts of the case mitigated any general intent to kill when the trial Judge instructed the lesser included offense of (ABHAM).

Even worse, under no sense of the 6th Amend. could trial counsel's trial performance be deemed effective where he allowed the trial Judge to instruct the General Intent instruction without informing the Jury of any of the elements nor defining general intent. It would be unreasonable for trial counsel or the trial Judge to assume that the Jurors, untrained in the law, was aware that pursuant to Holloway v McElroy, 632 F.2d 605 (1980)

"By general intent we mean intent in the sense that a person intends the consequence of his voluntary physical actions e.g. an intentional shooting in self-defense. The contrasting term is specific criminal intent, which refers to a state of mind that is thought culpable - e.g., premeditation as part of murder."

"General Intent is the intent to perform an act even though the actor does not desire the consequences that result. This is the state of mind required for the commission of certain common-law crimes not requiring a specific intent or

not imposing "Strict Liability." General Intent usually takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence).

The heart of the prejudicial affect of the General Intent Charge is that, it reduced the element of malice for assault and battery with intent to kill to the circumstances of aggravation the trial Judge gave for assault and battery of a high and aggravated nature. As such, the prosecution's only burden of proof and reasonable doubt requirement for (ABWIK) was to prove the circumstances of aggravation for (ABHAN) e.g., recklessness or negligence. See United States v. Spillone, 879 F.2d 514, 525 (9th Cir. 1989); Cage v. Louisiana, 111 S.Ct. 328, 112 L.Ed. 339 (1990).

Thus, but for trial counsel's failure to object to the trial Judge's erroneous and prejudicial instruction on the critical element of general intent, the outcome of the Petitioner's jury trial would have been different. See Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991); Taylor v. State, 439 S.E.2d 820 (S.C. 1993). A tho rough review of the record demonstrate

that the benchmark in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); and Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) has been contravened. That when differential judicial scrutiny is applied, the conduct of trial counsel fell below the wide range of reasonable professional assistance of counsel.

XIV. The Appellate Court erred in finding that trial Counsel was not ineffective for failing to object where the prosecution failed in accordance with Statute Section 17-25-45 S.C. Code of Law (1976) to serve the Petitioner with a timely Notice to seek Life Without Parole at least ten days prior to his criminal trial.

The Petitioner contends that he remains indigent. And due to the limited amount of legal paper the McCormick Correctional Institution has restricted him to, as well as various institution lock-downs restraining his access to legal books / cases; Petitioner is unable, at present, to brief and argue the above issue.

XV. The Appellate Court erred in finding that trial counsel was not ineffective for failing to discover, utilize or present to the trial Court and Jury critical exculpatory material evidence i.e., a Voluntary Statement of Petitioner's defense Witness, that profoundly supports and establish the elements of self-defense.

The Petitioner contends that he remains indigent. And due to the limited amount of legal paper the

McCormick Correctional Institution has restricted him to, as well as various institutional lock-downs restraining his access to legal books / cases; Petitioner is unable, at present, to brief and argue the above issue.

XVI. The Appellate Court erred in finding that trial counsel was not ineffective for failing to object to the prosecution's invading on the province of the Jury by opining on an ultimate issue i.e. malice and criminal intent, of the law which infected the trial with unfairness by arousing the passion and prejudice of the Jurors to wit, injecting an arbitrary factor into the Jury's deliberation and being bent on misleading, deceiving and seducing the Jury to reach an improper and wrongful verdict by unlawfully alluding to an unrelated and irrelevant guilty defendant who committed a separate statutory offense of armed robbery. And thereafter pleading with the Jury to use such illustration as an rationale in the instant case.

The Petitioner contends that he remains indigent. And due to the limited amount of legal paper the

McCormick Correctional Institution has restricted him to, as well as various institutional lock-downs restraining his access to legal books / cases ; Petitioner is unable, at present, to brief and argue the above issue.

XVII. The Appellate Court erred in finding that trial counsel was not ineffective for failing to object to the trial Judge's repeatedly injecting his personal opinion i.e. (1) "I can only assume that you (prosecution) intend to address that in your Closing Argument, that I'll (the trial Judge) will not be instructing them (the Jurors) on self-defense. They cannot consider that or legal justification. And so I assume you'll be able to handle that through some persuasive Closing Argument."

(2) "So that's why I'm saying (the trial Judge); if I were the prosecutor I'd argue that this is not a self-defense case. And I won't be instructing them on the law of self-defense. And there is nothing wrong in my view. I'm talking about that's Argument."

XVII.

That the Petitioner was denied and deprived of Due Process and Equal Protection of law under the 5th, 6th and 14th Amendment of the United States Constitution as well as Article 1 Section 3 and Article 5 Section 17 of the South Carolina Constitution.

Behind Mr. Boggs failed to object or request a mistrial when the trial Judge repeatedly injected its unsolicited highly prejudicial and bias comments favorable to the prosecution which, clearly amounted to a direct attack upon Petitioner's defense and Jury trial. Mr. Boggs trial performance also fell below professional standards and norms where he fell to object where the trial Court expressed and implicated its bias and prejudicial opinion as to the weight and effect of the evidence, of self-defense, to be determined by the Jury.

Under State v. Norris, 243 S.E.2d 440 (1978) all questions of the evidence and facts of self defense are to be decided exclusively by the

Jury, uninfluenced by any expression of opinion by the Judge", particularly, where the facts stated in a charge are in dispute. Also under State v. Kennedy, 250 S.E.2d 338 (1978) "in the course of a criminal trial, trial Judge must refrain from all comments which tends to indicate his opinion as to weight or sufficiency of evidence, credibility of witnesses, guilt of accused or as to the controverted facts. S.C. Constitution Article 5, Section 17.

In the present case, the trial Judge addressed the solicitors as such:

"I can only assume that you intend to address that in your closing argument, is that this is not the case of self-defense and that I'll not be instructing them on self-defense and that that's not applicable under the facts of this case. And so I assume you'll be able to handle that through some persuasive closing argument."

"I assume if Mr. Boggs had requested a self defense instruction y'all would have objected on the ground that there's not sufficient evidence to establish it. They just weren't able to get "ENOUGH

testimony from the only other witness that was present."

"The Jury might be confused about that issue, about whether or not they were acting properly in self-defense."

"Self-defense isn't going to be charged because there's not sufficient evidence to support it."

"So that's why I'm saying if I were the prosecutor I'd be, I'd argue the fact that this is not a self defense case. And there is nothing wrong in my view because of the potential for confusing him telling the Jury, and I won't instruct them, the Court will not be instructing them, on the law of self-defense. That's why they can't consider that. I'm not going to tell them that. I'M TALKING ABOUT THAT'S ARGUMENT."

It would be an unreasonable application of natural thinking for the Appellate Court to conclude that the trial Court's above comments to the solicitor were not bias,

prejudicial, impartial and fair to the Petitioner. Or that the trial Court refrained from making statements indicating its personal opinion of the weight and sufficiency of evidence, credibility and force of Petitioner's trial witness testimony, Petitioner's guilt and the highly contravened facts of the case.

Emphatically self-defense, lawfulness and legal justification were at the heart of Petitioner's legal defense. And the sole contravened facts in dispute. In essence, Petitioner was denied his due process and equal protection to a jury trial. Especially where the trial Court deprived Petitioner the right to a fair and impartial jury^{to} decide all questions of guilt or innocence, weight and sufficiency of evidence, credibility and force of Petitioner's witness testimony, and the contravened facts by the trial jury, uninfluenced by expression and personal assumptions of the trial judge.

Pursuant to United States v. Goetz, 746 F.2d 705 (1984) [3] "This rule is firmly established that the trial judge cannot direct a verdict in favor of the State for all or even one element of the crime." The former 5th Circuit emphatically

stated this principle: "No fact, not even an undisputed fact, may be determined by the trial judge."

Basic to this concept, the trial Court denied and deprived Petitioner fundamental fairness to a fair and impartial trial by failing to adhere to the requirements of neutrality and neglected its imperative duty to exercise a high degree of restraint, caution and circumspection in making remarks bent on shaping a guilty verdict in the minds of the Jury. In the instant case, the trial Court's statements were neither slight nor innocent, for they intimated the Judges professional opinion on the manner to secure a conviction. Which was totally incompatible with Petitioner Federal and State rights to a fair and impartial Jury trial and are irreconcilable with proper image of a neutral Judge. See State v. Campbell, 374 S.E.2d 668 (1988); State v. Cook, 368 S.E.2d 907 (SC. 1988), and State v. Kennedy 250 S.E.2d 338, 339 (1978).

The trial Judge aware that vested as the Judge with superior authority, and possessing experience not available to the ordinarily layman, Jurors as a rule, are anxious to

catch his view, upon which to found their conclusions. Moreover, a slight remark, apparently innocent in its language, may, when uttered by the Court, have a decided weight in shaping the opinion of one or more Jurors. See State v. Pruitt, 196 S.E. 2d 371, 372 (1938); Sosebee v. Leeke, 293 S.E. 534, 535, 362 S.E. 2d 22, 24 (1987); State v. Simmons, 41 S.E. 2d 217 (1941).

Finally. Mr. Boggs' trial performance is not considered within the wide range of professional assistance established under Strickland v. Washington where he failed to object or request a mistrial where the trial Court withdrew from the Jury all factual disputes, questions and considerations of the evidence and facts pertaining to self-defense lawfulness and legal justification.

XVIII. The Appellate Court erred in finding that trial counsel was not ineffective. Petitioner contends that through and by way of ineffective assistance of counsel Petitioner was denied and deprived Due Process and Equal Protection of Law under the 5th, 6th, and 14th Amendment of the United States Constitution as well as Article 1 Section 3 of the South Carolina Constitution. Particularly, in violation of a clearly mandated rule which guarantee that Petitioner be present at every stage of the trial in accordance with Federal Rules of Criminal Procedure Rule 43, 18 U.S.C.A.

Petitioner assert that his trial counsel's representation was deficient because he omitted to object where the trial Court failed to adhere to the rules of orderly conduct of a Jury trial entitling Petitioner, during his jury trial, to be present from the time the jury was impaneled, until its discharge after rendering the verdict.

Specificly, at the close of Petitioner's defense and the State's case; the Court gave to the Jury its Jury Charge and sent them to their Jury Room for deliberations. Petitioner was escorted to a holding cell. Where after being held for five minutes, a bailiff escorted Petitioner back into the courtroom. However, between the above mentioned transition, Mr. Boggs informed Petitioner that no verdict had been reached by the Jury but rather, they had a question for the Court concerning its Malice Charge. The trial Court issued the Jury a Supplementary Malice Charge through the bailiff.

Therefore, Petitioner contends that trial counsel's representation fell well below professional norms behind his failure to object to (1) procedural error; (2) the trial Court's answering query through the bailiff (without informing Petitioner) and (3) the substantive content of the Supplementary Malice Charge was coercive and insufficient to respond to the Jury's inquiry.

Pursuant to United States v. Rounder, 639 F.2d 931 (2nd Cir. 1981) the high Court set forth the requirements and held the proper practice should include these steps: (1) "The Jury's inquiry should be submitted in writing." This is the surest way of affording the court and counsel an appropriate opportunity to

confer about any response; (2) "Before the Jury is recalled, the note should be marked as a court exhibit and be 'read into the record in the presence of counsel and the defendant,' This avoid any later claim by the defendant that "he remained unaware of the notes's content", despite his counsel's knowledge of it." (3) "Counsel should be afforded an opportunity to suggest appropriate responses." During this colloquy, it is also helpful for the Judge to inform counsel of the substance of his proposed response, or even to furnish a written text of it, if available." C.f. Federal Rules of Criminal Procedure Rule 30, "requiring the trial Judge to inform counsel of proposed requests to charge prior to Summations." (4) "After the Jury is recalled, the trial Judge should 'precede his response by reading into the record in their presence the content of any note concerning substantive inquiries.'" This assures that all Jurors appreciate the question to which the response is directed, in the event the note was not discussed among all Jurors. It also provides an opportunity to correct any failure by the foreperson to convey accurately the inquiry of one or more of the Jurors, in the event the Foreman has undertaken to author all substantive notes."

Furthermore, under South Carolina Digest Criminal Law Key 636 (7) Private Communications

between Judge and Jury during Jury's deliberations, whereby Jury asked and Judge answered a question in the absence of defendant and without notice to him, "violated mandate rule which requires that defendant be present at every stage of the trial." Rule 43 Federal Rules of Criminal Procedure 18 U.S.C. A. Likewise, pursuant to United States v. Glick, 463 F.2d 491 (1972) "it was reversible error for trial Judge to answer Jury's question during its deliberations in absence of defendant and without notice to him." See U.S. v. Bascaro, 742 F.2d 1335, 1355 (11th Cir. 1984); U.S. v. McDuffie, 542 F.2d 236 -41 (5th Cir. 1976).

In the instant case, where the presence of malice and criminal intent or the absence thereof, were the very issues in dispute, and the Jury raised a question about malice; the Montana high Court held: "the corresponding Federal and State constitutional rights gives Petitioner the legal right to be present at all times during the proceeding of the trial and, when anything is done which in any manner affect Petitioner's right." State v. Montana Matt, No DA 06-0134, 12/30/08; State v. Reed, 210 P. 752 (1922)

In short, the communication between the trial Court and the Jury clearly constituted a Supplementary Malice Charge which the trial Judge denied and deprived Petitioner the right to hear, object to or, challenge. Here, the trial Court

Created a gap in Petitioner's Jury trial that it may provide the jury with unconstitutional Jury Instructions on an element of assault and battery with intent to kill which in no wise can ever constitute a harmless error. See Carpenters v. United States, supra, 330 U.S., at 408-409, 67 S.Ct., at 782; Bollenbach v. United States, supra, 326 U.S., at 617-615, 66 S.Ct., at 405-406; See also United States v. Polowichak, 783 F.2d 410 (4th Cir. 1986). A reasonable competent attorney would have objected to and preserved for appellate review, the unconstitutionality of the above mentioned denial and deprivation of Petitioner's Fundamental fairness to the due process and equal protection right to have notice of the Jury's question, have an opportunity to suggest a propose Supplementary Malice Charge, and be present to hear, object to and challenge the additional malice instruction, if necessary.

In conclusion, the Honorable Court Found among other things that, "Counsel's testimony is credible." As well as "Counsel is an experienced trial attorney who has prepared and presented many criminal cases which focused on self-defense and he is well-aware of the elements that must be met for a Jury charge of self-defense to be considered."

Petitioner contends that Mr. Boggs was disbarred

from practicing criminal law as a result of his effective dishonesty and deceit. State v. Boggs, 324 S.C.243, 478 S.E.2d 838 (1996). That Mr. Boggs fail to inform Petitioner of his disbarment as well as his habit of continue to be deceitful and dishonest, prior to Petitioner hiring him to represent him during trial. For example, Mr. Boggs testified during Petitioner's post conviction relief hearing that; "It would have been two weeks before Petitioner's trial that the solicitor served Petitioner with the Life without parole Notice." However, in a letter to the Petitioner during May 4, 2009, Mr. Boggs stated; "as to the particular mechanics" (of the Notice being served) "I cannot remember." See attachments.

Also, Mr. Boggs stated during the post conviction relief hearing that; "after the sister changed her previous testimony during trial that I lost confidence in the self-defense defense." However, during Petitioner's trial, Mr. Boggs stated prior to Petitioner's sister taking the stand; during an in-chambers meeting with the trial Judge; "Judge, you made a comment that he (Petitioner) can argue that there is no self-defense and that you were going to make a charge along that line." See Tr. pp. 142

XXI.

That Petitioner was denied and deprived the Fundamental Fairness to a fair and impartial trial through and by way of ineffective assistance of counsel. Behind Mr. Boggs failed to protect Petitioner's due process and equal protection of law under the 5th, 6th, 8th and 14th Amendments of the United States Constitution.

Particularly, Mr. Boggs failed to file a Motion To Quash The Indictment, based on the ground that: "the indictment was not framed to appraise Petitioner with reasonable certainty the nature of the accusational or specific "act of malice" he was being held to answer for." Or that the State intended to prove at trial. Pursuant to Russell v. United States, 82 S.Ct. 1038 (1962) the indictment for assault and battery with intent to kill was fatally defected because it lacked the necessary second prong of sufficiency to adequately notify Petitioner of the concised act of malice required to meet at trial. See also United States v. Simmons, 96 U.S. 360, 362, 24 L. Ed 819 held, "In an indictment upon statute, it is not sufficient to set forth the offense in the word of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the

elements necessary intended to be punished."

However, in the instant case, the Jury was permitted to consider a General Intent to Kill as well as Malice May Be Inferred from The Use Of A Deadly Weapon. Two separate elements illegally allowed to be constructively amended or had the same affect on the indictment which, the Grand Jury never heard nor True Billed indicted Petitioner for.

In violation of the Fundamental Fairness Rule as well as the Due Process Clause, Petitioner was put to trial and convicted upon an indictment which did not purport to inform him of either one or more of the trial Court and solicitor's forty-two (42) definitions, inferences, circumstance or nature of malice and /or malice aforethought. Rule 7 (c) Federal Rules of Criminal Procedure 18 U.S.C.A. have uniformly held: "an indictment must do more than simply repeat the language of the Criminal Statute where Petitioner's guilt depended so crucially upon such a specific identification of element/s" of malice."

The indictment left the prosecution free to roam at large to shift its theory of

criminality in forty-two (42) angles so as to take advantage of each passing vicissitude of the trial and appeal. The cryptic form of indictment require Petitioner to go to trial with the chief issue, i.e. alleged act or acts of malice undefined. Enabling Petitioner's Conviction to rest on one point and, the affirmance of my conviction to rest on another.

As such, it gave the solicitor free hand at trial and, on appeal, to fill in the gaps of proof by surmise or conjecture. The high Court has had occasion before now to condemn just such a practice. See Cole v. Arkansas, 333 U.S. 196, 201-202, 68 S.Ct. 514. 517, 92 L.Ed. 644. The real prejudice, bias and egregiousness which characteristically infected Petitioner's Jury trial based on the indictment for assault and battery with intent to kill that failed to specify at least one of the 42 definitions, inferences or alleged acts of malice charge to the trial Jury, allowed Petitioner to be convicted on the basis of elements not known to, not found by, or presented to the Grand Jury which True Billed the indictment. In connection with United States v. Cruikshank, 92 U.S. 542, 550. 23 L.Ed. 588 "It is an elementary principle

of criminal proceeding that, where definition of an offense, whether it be at common law or by Statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state species - it must descend to particulars."

Ultimately, the vice of the indictment rather is that it failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, i.e. failed to appraise Petitioner of a specific definition, inference, act or acts of malice upon which he was being put to trial.

Concretely, the omission denied and deprived Petitioner of one of the significant protections which the guaranty of a Grand Jury indictment was intended to confer, 14th Amend.

Consequently, where Mr. Boggs failed to Motion to quash the indictment prior to the trial due to the above mentioned defects; the prosecution was allowed to unconstitutionally shift the burden upon me to disprove an uncertain and undefined inference or act of malice Petitioner was being held

accountable for by a trial, and also the hardship of defending himself against 42 permissive inferences, definitions and personal opinions of malice.

Objectively, had Mr. Baggs motioned to quash the indictment; there would not have been subject matter Jurisdiction of the cause. In the alternative, the solicitor would have been compelled, by way of a motion for more definite statement, to specify in a new indictment the act of malice the State intend to prove at trial. Thus, all other inference definitions, etc. by objection would not be issued to the Jury for non-applicable consideration of malice.

XVIII. The Appellate Court erred in finding that trial counsel was not ineffective. Petitioner contends that Petitioner was denied and deprived of Due Process and Equal Protection of Law under the 5th, 6th, 8th and 14th Amendment of the United States Constitution as well as Article 1 Section 3 of the South Carolina Constitution.

Behind Mr. Boggs failed to object where the trial Court gave a Jury instruction which constituted a highly prejudicial and egregious error, that was bent on misleading, confusing and was susceptible to an erroneous interpretation of their duty to determine Petitioner's innocence. Additionally, that Mr. Boggs failed to protect Petitioner's due process and equal protection of law by failing to request a curative and/or additional instruction to prevent the trial Court from coercing, manipulating and forcing the Jury to convict the Petitioner.

Specificly, the trial Court instructed the Jury: "you are instructed that 'the verdict must be unanimous. All 12 of you must be in agreement before any decision may be reached.'"

Under the Federal and State Constitution, such insufficient and inaccurate Jury charge deprived Petitioner of the Fundamental Fairness and basic Due Process and Equal Protection of Law to have the State prove the elements of assault and battery with intent to kill, beyond a reasonable doubt. Agreeing to State v. Parker, 224 S.E. 2d 280 (1976).

"The instruction is unconstitutional, misleading, and confusing. It is true that the Jury was properly instructed that before they return a verdict, it must be unanimous. There can be no doubt but that no person can be finally convicted of a crime except by the unanimous consent of a Jury of 12 persons properly impanelled." "However, the instruction before us is susceptible of the interpretation that, when a vote is taken and there is a majority - either for conviction or acquittal - the minority must then cast their vote with the majority and make the verdict unanimous, before returning the verdict in open Court. This, of course, is not true and must never be the case."

When reviewed individually, in isolation or as a whole, the trial Court's above mentioned Jury charge so clearly and unequivocally constitutes a fatal error that no Federal or South Carolina laws, as of record, supports it. On the contrary, The Honorable Haynsworth writing in U.S. v. Roger, addressed this issue and held:

"Here what was given was not the Allen charge, but only a paraphrase of that portion of it which directs the attention

of the Jurors to their duty to agree, without any mentioning of their duty to dissent if dissent is founded upon reasoned conclusions reasonably arrived at and reasonably held. Without reference to both sides of the coin, a strong statement of the duty of agreement may readily be construed by those Jurors in the minority as requiring a differential surrender to the views, however unreasoned they may be, of the majority."

See State v Elmore, 308 S.E.2d 781 (1983). Hence in State v. Hensley, 462 S.E.2d 550 (1995) Trial Judge must be carefully in what they say and do because the Jury looks to the Court for guidance and picks up slightest intimation of an opinion; it does not matter whether opinion of trial Judge is conveyed to Jury directly or indirectly as every defendant in criminal cases are entitled to trial before an impartial Judge and unbiased Jury.

In the present case, the trial Court charged the Jury unequivocally, it was unlawful to maintain an honest held position, if to do so would hinder or prevent the Jury from reaching an unanimous verdict. That any vote, other than unanimous, was not acceptable nor

permitted to the principles underlying the legal system. Thereto, the effect of the trial Court's Jury Charge gave the Jury the false impression that a hung Jury or mistrial was no option. See Lowenfield v. Phelps, 484 U.S. 231 (1988); (Hooks v. Workman, 10th Cir., No. 07-6152, 5/25/10) In that vain, any one or more Juror whom developed and maintained a reasonable doubt throughout Petitioner's trial were compelled, not based on the evidence and facts aduced at trial, to find guilt, but rather because the majority were in favor of a guilty verdict. And because they were deprived of their duty and right to retain any Conscience-ntiously held independent view.

At a minimum, the Due Process and Equal Protection Claus obligated Mr. Boggs to request and the trial Court to issue under Anderson v. Leeke, 248 S.E.2d 120 (1978) "A Jury may refuse to convict if only one Juror has a reasonable doubt. Corroberating State v. Parker, 224 S.E.2d 288 (1976) "If there is any doubt, even the slightest doubt whatsoever, in the mind of one of you, then your verdict must be not guilty." "For a guilty verdict, there must not be any doubt or question in the mind of a single Juror." See State v. Torrence, 406 S.E.2d 315 (S.C. 1991).

XX. In the instant case, the trial Judge instructed the Jury that they were permitted to infer an element of assault and battery with intent to kill which the Grand Jury had not heard nor true billed. The right to have the grand Jury make the charge on its own Judgment is a substantial right which cannot be taken away with or without court amendment or instruction. 5th Amendment.

Consequently, the trial Judge's Malice Charge permitting the Jury to infer malice from the use of a deadly weapon clearly broaden the basis for a conviction beyond those presented to the grand Jury. See Floresca, 38 F.3d 706, 710 (4th Cir. 1994). Under United States v. Milestone, 626 F.2d 264 cert. denied 101 S.Ct. 319 (1980)

"Amendments or, instructions that transform indictment from one that does not state offense into one that does or that tends to increase defendant's burden at trial are prohibited."

Under Article I Section 11 of the South Carolina Constitution; the Petitioner should have been protected against answering for additional elements not on a presentment or indictment

of a grand Jury. Assault and battery with intent to kill is a felony. And the 5th Amendment require that prosecution be begun by indictment. See Stirone v. United States, 80 S.Ct. 270 (1960). Every since Ex parte Bain was decided in 1887, it has been the rule that after an indictment has been returned, its charges, e.g. elements may not be broadened through amendment except by the grand Jury itself.

In the present case, the trial Judge did not permit a formal amendment. But the effect of its Malice Charge was the same i.e. adding an additional element of malice Petitioner had to disprove. The additional element was neither trivial, harmless nor innocuous. Compare Ford v. United States, 273 U.S. 593, 602, 47 S.Ct. 531, 71 L.Ed. 793; Goto v. Lane, 265 U.S. 393, 402, 44 S.Ct. 525, 527, 68 L.Ed. 1070. The basic protection the grand Jury was designed to afford was defeated by a device or method which subjected the Petitioner to prosecution for allegations for which the grand Jury did not charge. Pursuant to Ex parte Bain, 121 U.S. 1, 75 S.Ct. 781, 30 L.Ed. 849 which has never been disapproved, and stands for the rule that a court cannot permit a defendant to be tried on elements that are not made

In the indictment against Petitioner. Corroborating United States v. Norris, 281 U.S. 619, 622, 50 S. Ct. 424, 425, 74 L. Ed. 1076; see also CF. Clyatt v. United States, 197 U.S. 207, 219, 220, 25 S. Ct. 429, 432, 49 L. Ed. 726.

Ultimately, it is well settled law that, an unconstitutional jury instruction on any element of assault and battery with intent to kill can never constitute harmless error. See Carpenters v. United States, 330 U.S. at 408-409, 67 S. Ct. 782; Bollenbach v. United States, supra, 326, at 614, 615, 66 S. Ct. 9, at 405-406. Particularly because, under United States v. Lemier, 720 F.2d 1344 (D.C. Cir. 1983) Cert. denied 467 U.S. 1226, 104 S. Ct. 2678 (1984) Two dangers arise from a substantial deviation of instructions from an indictment:

First, a defendant is required to answer to a charge that was not brought by a grand jury;

Second, a defendant is denied sufficient notice to present and prepare an adequate defense to the crime charged.

Even more so, the instruction the trial Judge

added to the Petitioner's culpability was held unconstitutional while Petitioner's criminal proceeding was on direct appeal. But was address more recently in State v. Moose, 313 S.E. 2d 507 (1984) as such:

The trial court erred in its instruction to the Jury that malice and unlawfulness are implied by the law from the intentional shooting with a deadly weapon contrary to law, constitutes an unconstitutional conclusive presumption on an element of (ABWIK) and places the burden on the defendant to disprove an element of the offense, impermissibly and unconstitutionally relieve the State of the burden of proving all elements of the offense, and is unconstitutional, thereby depriving the defendant of his right to a trial by Jury, his right to have the State prove every element beyond a reasonable doubt.

Also, pursuant to State v. Belcher, 685 S.E. 2d 802 (2009) the Supreme Court expressly rejected the Jury instruction that malice may be infer-

red by the use of a deadly weapon thusly:

We hold that the use of a deadly weapon implied malice instruction has no place in a murder (or ABWIK) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the ABWIK).

But most applicable to the instant case is the reasoning found in, Mr. Justice Miller, Speaking for the Court:

If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand Jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand Jury, as an prerequisite to a prisoner's trial for a crime, and without which the constitution says, 'no person shall be held to answer; may be frittered away until its value is almost destroyed.'

121 U.S. 1, 10, 75 S.Ct. 781. The Bain Court further held: "After the element and indictment was changed, it was no longer ~~the~~ indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney." 121 U.S. 1, 13, 75 S.Ct. 781, 787.

Finally, pursuant to 23 A C.J.S. Criminal Law Section 1311 (1961) "As a general rule, the instructions should be confined to the issues made by the pleading, and should not be broader or narrower than the indictment or information, and an instruction which is not based on, and in conformity with, the issue properly raised by the pleading is erroneous. It has been held that the instruction must not submit to the jury an allegation or element not included in the indictment and information." Under Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252 (1960) "The logical reason for this rule is that a defendant in a criminal case is entitled to be tried only upon the charges in the indictment against him, State v. Tabor, 202 S.E. 2d 852 (1974).

Where the 5th and 14th Amendment Due Process And Equal Protection of Law rights of the Petitioner to a fair and impartial trial are so obvious to trial counsel, the failure to object to the trial Judge's Malice Charge constitutes a violation of the 6th Amendment standard of effective assistance of counsel.

ARGUMENT

COMES THE ABOVE NAMED PETITIONER, John D. Alexander, before this South Carolina Supreme Court in a timely manner.

Contending that under the Federal and State Constitution, Rules, Statutes and case citings, the below allegations are factual and true.

XIIII The Appellate Court erred in finding that trial counsel was not ineffective for failing to object where the prosecution failed in accordance with Statute Section 17-25-45 S.C. Code of Law (1976) to serve Petitioner with a timely Notice To Seek Life Without Parole ten days prior to his criminal trial.

By way of prosecutorial misconduct and ineffective assistance of counsel the Petitioner was denied and deprived of Due Process and Equal Protection of law under the 6th and 14th Amendments of the United States Constitution. As well as Article 1 Section 3 South Carolina Constitution.

Trial counsel never explained nor acquainted the Petitioner with Statute Section 17-25-45 (H) Section 7. Notice prior to his criminal trial.

As such, during the sentencing phase of the

Petitioner's Jury Trial, initially he responded to the trial Judge's inquiry about the Notice; "I do not remember the exact date." But by the Petitioner being overwhelmed by the guilty verdict, as well as, his lacking any understanding or discernment of the true nature or material significance of the Life Without Parole Notice, the Petitioner later succumbed to the prosecution's second alleged dated proffered to the trial Judge. Which consequently, placed the prosecution within the requirement of Statute Section 17-25-45 (H) if it had been true. See Trial Tr. Pp. 185 and 186.

On the contrary, material evidence exist that proves and substantiates the actual date of June 7, 2007 rather than May 31, 2007, as the prosecution suggested during the Jury trial. Consequently, any application of Section 17-25-45 constitutionally deprive the Petitioner of his due process and equal protection of the law to be timely informed of a punishment mandated by law as a result of a guilty verdict for assault and battery with intent to kill. And subsequently, for assault and battery of a high and aggravated nature, if the jurors accepted accurately the trial Judge's Jury Charge that "in order for the Jury to find the defendant guilty of Count Two of the indictment

they must find the defendant guilty of Count One of the indictment." Thusly, a finding of guilt for assault and battery of a high and aggravated nature (non-violent offence) under Count One of the indictment could permissibly be used as evidence of guilt which would constitute an unstutory element to be considered for a finding of guilt contrary to a requirement of conviction of a (violent crime) before any conviction could be held for possession and use of a deadly weapon of a violent crime under Count Two of the indictment.

Additionally, by way of a Motion For Discovery, as well as, a Subpoena, Petitioner sought the production of the original Notice Of Life Without Parole (to no avail) the prosecution served the Petitioner: dated and signed, prior to his PCR hearing. Also, Petitioner sought any and all documented notes, contracts, etc. evidence from his trial counsel's file which would confirm the true date the prosecutor served the Notice. Unfortunately, one year and five months after Petitioner's Jury trial, trial counsel asserted "I have tried to reconstruct the dates you have inquired about but as to the particular mechanics, I can not remember."

T.A.M. BOGGS
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Post Office Box 1539
Clemson, S.C. 29633-1539

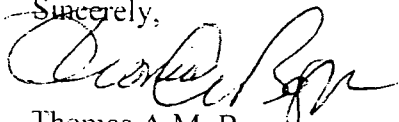
May 4, 2009

John Alexander 194748
McCormick Correctional Institute
386 Redemption Way
McCormick, S.C. 29899

Dear John:

I have tried to reconstruct the dates you have inquired about, but have had no luck. I do remember being put on notice that the State was going to serve the notice to seek life without parole, but as to the particular mechanics, I can not remember.

Sincerely,



Thomas A.M. Boggs

Phone: 864-654-6042 Fax: 864-653-3305 e-mail: tamboggsattorney@yahoo.com

However, five years after Petitioner's trial and conviction, trial counsel miraculously could remember and testify during Petitioner's PCR Hearing that; "It would have been two weeks before trial." Petitioner finally sought to obtain a copy of the signed and dated Notice from the Solicitor's Office, prior to his PCR hearing, by way of a Pro se Writ Of Mandamus. Again, the Petitioner was refused and denied production of such critical evidence.

Wherefore, because Petitioner asserts that he suffers the identical prejudicial harm under the Due Process Clause under the 14th Amend. found in State v. Johnson, (S.C. App. 2001) 347 S.C. 67, 552 S.E. 2d 339; also Ricky Jamerson v. State, — S.E. 2d — (2009), this Supreme Court of South Carolina can and should resolve this claim by compelling the Spartanburg County Solicitor's Office to produce the signed Notice To Seek Life Without Parole documents in order to justify granting Petitioner a new trial.

XVI. The Appellate Court erred in finding that trial counsel was not ineffective for failing to object to the prosecution's invading on the province of the jury by opining on an ultimate issue i.e. malice and criminal intent, on the law which

infected the trial with unfairness by arousing the passion and prejudice of the Jurors to wit, injecting an arbitrary factor into the Jury's deliberation and being bent on misleading, deceiving and seducing the Jury to reach an improper and wrongful verdict by unlawfully alluding to an unrelated and irrelevant guilty defendant who committed a separate Statutory offense of armed robbery. And thereafter, pleading with the Jury to use such illustration as a rationale in the instant case.

The meat of the above claim is that trial counsel's performance fell below effective assistance under the 6th Amendment where he fail to object when Solicitor Jordan stated to the Jury during her Closing Arguments:

"Its kind of like if I were to go into a bank, rob the bank..... My actions afterwards do not negate what I did when I walked into the bank and took the money, Just like in this case it doesn't negate that he shot Mr. Freeman Just because afterwards he decided to help."

Pursuant to Berger v. U.S., 295 U.S. 78, 88 (1935), The prosecutor's duty in a criminal prosecution is to seek justice. Although the prosecutor should prosecute with earnestness and vigor, he or she may not use improper methods calculated to produce a wrongful conviction. The use of such methods is grounds for mistrial or reversal of a conviction because it results in an unfair trial violating the Due Process Clause."

In the present case, a guilty bank robber has no place, relevance or probative value. But rather was mentioned with malicious intent to prejudice the Petitioner and was calculated to generate a wrongful conviction. The Petitioner, accuse of assault and battery with intent to kill, was entitled to have his guilt or innocence determined solely on the basis of the evidence and facts introduced at trial. See Patterson v. COM, 429 S.E. 2d 899 (1993); and Winston v. Commonwealth, 404 S.E. 414, 415 (1991). Federal and State constitutions prohibit the introduction of unrelated or unconnected criminal offenses into Petitioner's Jury Trial. 5th, 8th and 14th Amendments.

Furthermore, trial counsel, as well as, the prosecution urged but, the trial Judge instructed the

Jury to "use their common sense." Additionally, the trial Judge instructed the Jury; "what the attorneys tell you is not evidence but, you should listen to what they have to say because those statements do serve a purpose."

Solicitor Jordan was clear and direct about her intentions for making the statements to the Jurors about robbing a bank (a crime I was never accused of nor, being held to answer for). To incite and inflame the Juror's natural bias and prejudice; to divert the Juror's attention away from the actual evidence and facts of the case infecting the trial with fundamental unfairness; or to contaminate the Jury trial with an arbitrary factor. In either case, the Petitioner was denied and deprived of Due Process and Equal Protection of law under the 5th, 6th, 8th and 14th Amendments; Boyd v. French, 147 F.3d 319 (4th Cir. 1998); State v. Hawkins, 292 S.C. 418, 421, 357 S.E. 2d 10, 12 (1987); U.S. v. Garcia - Guizar, 160 F.3d 511 (1998); and Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985); also see Statute Section 16-3-20 S.C. Code of Law (1976).

Lastly, the prosecutor, as the representative of the people, must guard against any violation of Petitioner's rights. And, if or when the prosecutor

inject into the trial criminal behavior and crimes other than the offense which the accused is being held to answer for, for the sole intent to persuade the Jury to wrongfully convict the accused; trial counsel is not constitutionally effective in any sense of the 6th Amendment where no objection is made. As such, this Supreme Court can and should grant the Petitioner a new trial. Hutchins v. Commonwealth, 149 S.E. 414, 415 (1929).

XXII. The Appellate Court erred in finding that trial counsel was not ineffective for failing to move the Court for psychiatric examination and expert witness to assist in preparation, utilization and presentation of the evidence demonstrating that, at the time of the incident, Petitioner's twenty-six (26) years of mental health inpatient/outpatient mental health treatments and defects yields mitigating evidence which relates directly to the elements of assault and battery with intent to kill and assault and battery of a high and aggravated nature.

The Petitioner submitted, as a court exhibit, a partial copy of his mental health history dating from 1980 upwards until 2011, during his PCR

hearing. The documents/exhibits From the Spartanburg Area Mental Health Center ultimately demonstrate that, during 1980 and again in 1983 the Petitioner was committed to the Mental Health Department in Columbia, South Carolina for inpatient psychiatric evaluation and/or treatment. The Mental Health Reports additionally substantiates that the Petitioner has had some outpatient involvement, off and on, during the following twenty-three (23) years following 1983 with a psychology or psychiatric mental health agency.

Therefore, the PCR Court simply overlooked, ignored or disregarded the above mentioned mitigating facts and evidence. The PCR Court's decision that the Petitioner was not prejudiced by trial counsel's failure to discover, utilize and present his mental health disorders and defects as mitigating evidence was unreasonable application of the 6th Amendment of the United States Constitution. As well as Article 1 Section 3 of the South Carolina Constitution. See Porter v. McCollum, U.S., No. 08-10537, 11/30/09.

In the instant case, trial counsel did not even take the first step of requesting the records yielding mitigating factors of Petitioner's mental

impairment after Petitioner informed trial counsel of its existence. During Petitioner's Jury Trial, the trial Judge and the prosecutors emphasized the fact that malice and criminal intent, general and or specific intent is a mental state of mind. And once the trial Judge and solicitor made the Petitioner's mental state of mind relevant to his criminal culpability and punishment he might suffer, the assistance of a psychiatrist was crucial to Petitioner's ability to marshal his defense. See Ake v. Oklahoma, 105 S.Ct. 1087, 1094-1097 (1985).

Essentially, a psychiatrist expert witness could have enabled the Jurors to make its most accurate determination of the truth on the law of malice, malice aforethought and criminal intent. Without psychiatrist assistance, the Petitioner did not offer a well informed expert opposing view thereby lost a significant opportunity to raise in the Jurors mind reasonable doubt and/or reasonable questions about the alleged proof of malice. Unlike lay witnesses or "prosecutors, who merely describe symptoms they believe might be relevant to the Petitioner's state of mind," psychiatrist can identify the elusive and often deceptive symptoms of insanity. See Sollesbee v. Balkcom, 339 U.S. 9, 12, 70 S.Ct. 457, 458 (1950).

Psychiatrist can translate a medical diagnosis of:

- (1) Suicidal Ideation
- (2) Destructive Behavior
- (3) Anxiety and Depressed Mood Swings
- (4) Amphetamine Dependence
- (5) Intermittent Explosive Disorder; and
- (6) Personality Disorder

at which; at one time or another Petitioner has been diagnosed as having (See PCR exhibits) into language that will assist the trier of fact, and thereafter offer evidence in a form that has meaning for the task at hand. Through this process investigation, psychiatrist ideally assist lay Jurors, who have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the Petitioner "at the time of the incident." See State v. Lemacks, 98 S.C. 498, 82 S.E. 879 (1914).

Traditionally, the rule is that the trial Judge, had trial counsel requested, instruct on the issue of mental health conditions where the record contains material evidence and facts which supports the Petitioner's theory that, although he may realize that the offending act may be illegal, because of mental disease or

defects the Petitioner possessed a false belief that the act was morally justified. See U.S. v. Sullivan, supra, 544 F.2d at 1056; U.S. v. Noah, 475 F.2d 688, 697 (9th Cir. 1973); Charron v. U.S., 412 F.2d 627, 660 (9th Cir. 1969); Perkins v. U.S., 315 F.2d 120, 124 (9th Cir. 1963); and U.S. v. Segna, 555 F.2d 226 (1977). "The quality of representation at trial falls below what is required for prevailing professional norms and is valueless to the Petitioner where the defense requires the assistance of a psychiatrist and trial counsel failed to make such service available." ABA Standards For Criminal Justice 5-1.4, Commentary, P. 5-20 (2d ed. 1980); United State v. Flynt, 756 F.2d 1352 (1985).

Finally, was ineffective under the 6th Amend and allowed the Petitioner's Due Process to be denied and deprived where he failed to request the trial Judge to instruct; Petitioner is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform Petitioner's conduct to the requirement of Law." Wade v. United States, 426 F.2d 64, 71-72 (9th

Cir. 1978). Or in the alternative, trial counsel was deficient in his representation for failing to request trial counsel to instruct; if the Jury find that the Petitioner, because of a mental defect or disease, lacked substantial capacity to appreciate the moral wrongfulness of his conduct even if he knows his conduct to be criminal but so commits it because of a delusion that he is morally justified, then your verdict must be not guilty.

The Supreme Court of South Carolina can and should find that, even if the issues included in Petitioner's Petition For Writ of Certiorary submitted on his behalf by Mr. Robert M. Pachak, the Pro se Petition For Writ of Certiorary individually may not amount to reversible error; reviewing the case as a whole, it qualifies under the Cumulative Error Doctrine. Particularly because, the Petitioner has, in relation to the entire case, demonstrated and/or established that the cumulative errors adversely affected his right to a fair trial. See Tennant v. Martin Health Care Foundation, 194 W. Va. 97, 459 S.E. 2d 374 (1995); State v. Peterson, 287 S.C. 244, 335 S.E. 2d 800 (1985); and State v. Freeman, 319 S.C. 110, 459

The Petitioner submitted to the Post-Conviction Relief Court, the Court of Appeals and now to this Supreme Court that, the Cumulative Error Doctrine provides relief where the numerous error during the Petitioner's Jury Trial are subject to automatic reversal even though they may not violate constitutional rights. See Gomez v. United States, 490 U.S. 858, 874, 76, 109 S.Ct. 2237, 2248 (1989). And where the combination of errors individually had the affect of denying, depriving and preventing the Petitioner from recieving an impartial and fair trial. See State v. Johnson, 512 S.E. 2d 795 (S.C. 1999); State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E. 2d 642, 647-48 (1998); see also Delaware v. Van Arsdall, 475 U.S. 676, 106 S.Ct. 1431 (1986). Thusly, a new trial is appropriate, Justified and warranted.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Dated 6/18/15.

Respectfully Submitted,
John Alexander

Sworn and Subscribed
this ^{18th} day of June, 2015
Perry G. Merton
Notary Public For South Carolina
My Commission Expires Feb 28, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari To The Court of Appeals

Appeal From The South Carolina Court of Appeals

Hon. _____

John D. Alexander,

Petitioner,

v.

The State,

Respondent.

Opinion No. 2012 - 211390

AFFIDAVIT

PROOF OF SERVICE

I, John Alexander, certify that I have served the within Petition for Writ of Certiorari and Appendix by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Ms. Susanne H. White, Ass. Attorney General
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Post Office Box 11549
Columbia, South Carolina 29211

Mr. Robert M. Pachak, Appellate Defender

SCCID

Division of Appellate Defense

Post Office Box 11589

Columbia, South Carolina 29211

I Further certify that all parties required by Rule
to be served have been served. This 18 day of June
2015.

Respectfully Submitted,
John Alexander

Sworn and Subscribed

this 18th day of June, 20 15

Penny Q. Morton

Notary Public For South Carolina

My Commission Expires Feb 28, 2018