Joseph Walker
SCDC# 285497
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

S.C.Supreme Court
Daniel Shearouse, Clerk
P.O. Box 11330
Columbia, SC. 29211

RE: Pro-Se Johnson petition
C/A No.2017-000059

Dear Mr. Shearhouse,

Enclosed for filing in the above captioned please find my pro-se Johnson petition for writ of certiorari.

However, the South Carolina Department of Corrections does not allow us to make copies of our legal briefs unless they have been "clocked stamped" by the Courts. Therefore at this time I respectfully ask that you please send me a "clock stamped" copy back of my pro-se petition so that I may properly serve the Respondents in this matter.

I thank you very much for your time and consideration in this matter.

Kindest Regards,

/s/ Joseph Walker
Joseph Walker

Petitioner, pro-se

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Hon. John C. Hayes, Presiding

Joseph Walker -- Petitioner,

-vs-

State of South Carolina -- Respondent,

Appellate Case NO.2017-000059

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed pro-se Johnson petition on the parties whose names and addresses appear below. This being done by placing the aforesaid in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this ___ day of August 2017.

Those Served:

S.C. Supreme Court
Daniel Shearouse, Clerk
P.O. Box 11330
Columbia, SC. 29211

Assistant Attorney General
DeShawn Mitchell
P.O. Box 11549
Columbia, SC. 29211

Respectfully Submitted,

/s/ Joseph Walker

Joseph Walker, pro-se

Sworn to and Subscribed Before Me

this 23rd day of August, 2017

Nancy C Murdaugh

NOTARY PUBLIC

My Comm. Expires 1-23-2023

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Hon. John C. Hayes, Presiding

Joseph Walker -- Petitioner,

-vs-

State of South Carolina -- Respondent,

Appellate Case NO.2017-000059

PETITIONER'S PRO-SE JOHNSON

PETITION FOR WRIT OF CERTIORARI

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Petitioner, pro-se

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QUESTIONS PRESENTED

ISSUE (A)

WAS COUNSEL CONSTITUTIONALLY EFFECTIVE FOR IMPROPERLY "VOUCHING" FOR THE STATE'S STAR WITNESS AND VICTIM THAT DENIED PETITIONER HIS RIGHT TO A FAIR TRIAL AND DIRECTED A VERDICT FOR THE STATE?

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WAS COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER CLOSING SUMMATION THAT APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY?

ISSUE (C)

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WAS COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S ERRONEOUS AND CONFUSING INSTRUCTIONS ON IMPLIED MALICE THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF DUE PROCESS AND SUBSTANTIALLY LESSENED THE STATE'S BURDEN OF PROOF?

PROCEDURAL HISTORY

Petitioner was indicted December 20, 2011 by the Greenville County Grand Jury for one count of attempted murder, App.395-396. The case was called for trial on April 1, 2013 before the Honorable C. Victor Pyle, Jr. and a jury. The State was represented by Assistant Solicitor L. Mark Moyer, and Petitioner was represented by Christopher Lance Sheek. On April 2, 2013 the jury convicted Petitioner as indicted, App.244, 1.16-18. Judge Pyle sentenced Petitioner to life without parole pursuant to the LWOP statute, S.C. Code Ann. §17-25-45, App.247, 1.9-11.

A timely notice of appeal was filed. On appeal Petitioner was represented by Robert Dudek of the South Carolina Office of Indigent Defense. Dudek filed a no merit Anders brief. The Court of Appeals dismissed the appeal, State v. Walker, Op.No.2015-UP-230 (SC.Ct.App.filed May 6, 2015). The Remmittur was handed down May 26, 2015.

Petitioner filed a pro-se application for post conviction relief (2015-CP-23-4239) on July 1, 2015. An evidentiary hearing was conducted December 9, 2016. Petitioner was present and was represent by state statutory (Rule 71.1(d), SCRCP) appointed PCR Counsel Mills Arial, Jr. The State was represented by Patrick Schmeckpeper. Thereafter on December 20, 2016 Judge John C. Hayes, III issued a written order denying PCR relief. A timely notice of appeal filed. Petitioner was appointed Lara M. Caudy Esquire of the South Carolina Office of Indigent Defense. PCR appellate counsel filed a Johnson petition. Petitioner's pro-se Johnson petition is as follows:

STATEMENT OF THE CASE

The State's theory was that Petitioner fired a pistol at Tyler Mattress, who was dating the mother of Petitioner's children (Amanda Ray). App.21, l.7-17. Mattress had an extensive criminal record and has been convicted of at least ten burglaries, armed robbery, five counts of grand larceny, malicious injury to property, and attempted burglary. App.31, l.18-p.32, l.4; App.69, l.9-23.

Apparently Mattress had started dating Ray in July 2011. Ray testified that Petitioner was not jealous of Mattress, but he did not care for Mattress being around his children. App.91, l.20-p.92, l.11.

Mattress was at Ray's apartment on the day in question and Ray and Mattress had spent the day "laying in bed". App.36, l.6-21. According to Mattress Petitioner continuously called Ray throughout the day, but Ray did not answer the phone. Later in the evening, Petitioner had called Ray from her sister's phone and Ray answered. Mattress claimed he overheard Petitioner allegedly threatening Ray, so he grabbed the phone from her at which time Mattress admittedly told Petitioner "since you want to fight a girl, come fight me." App.36, l.16-p.37, l.8. Mattress claimed that Petitioner responded by saying, "Don't worry about it, I'll be over there in a minute, I'm going to do something to you." Thereafter, Petitioner hung up the phone, and Mattress walked outside. App.39, l.6-16.

Mattress went to a friends (Bobby Golden)'s apartment and retrieved a knife from him. App.40, l.2-10. Mattress admitted [he] took a knife with him "to fight [Petitioner]." App.54,

1.13-24. Mattress testified that when Petitioner arrived, he (Mattress) got off the sidewalk, and walked up to Petitioner - towards him. Mattress testified that as he came around the trunk area of the car he allegedly seen a gun in Petitioner's hand. Mattress said by this time Petitioner was [getting ready] to raise the gun, at which time Mattress took off running up the apartment complex and around the building. App.41, 1.13-22. Mattress claims that he didn't pull out the knife as he walked towards Petitioner. App.41, 1.12-p.42, 1.7.

Mattress admitt[ed] when Petitioner arrived Mattress "taunted Petitioner: "You want to fight a girl, fight me." Mattress claimed that after he saw Petitioner allegedly come around the trunk of the car with the gun, Petitioner allegedly fired one shot in Mattress direction and as he was running he said he heard Petitioner say, "shit real." App.42, 1.14-19.

Amanda Ray testified that she was talking with Petitioner on the phone the day in question and apparently Petitioner said "he was going to crack her skull." However, Ray testified this was normal because her and Petitioner argued on regular basis. In fact she said "[W]e do this all the time. It's just somebody else was involved this time." App.96, 1.23-p.97, 1.18.

Ray testified that while she was on the phone talking to Petitioner that day, Mattress "just took the phone out of her hand." She then said Mattress and Petitioner began exchanging words on the phone. App.103, 1.1-10. Ray steadfast maintained that [both] Petitioner and Mattress were upset, but she has <u>never</u> seen either of them with a weapon". (emphasis original and supplied). App.108, 1.10-p.109, 1.9.

Law enforcement did little to nothing to investigate the case beyond speaking with Mattress. Officer Jonathan Rackley testified that he received a "shots fired call from dispatch on the day in question, App.116, l.7-24. Rackley said he was a first responder and when he arrived he located Mattress, "the victim" and spoke with him." App.117, l.2-6.

Rackley admitted that he did not show Mattress a photographic line-up, instead he just took Mattress' word that Petitioner was the alleged shooter. App.123, l.18-p.124, l.23. Rackley admitted that, based solely on Mattress' statement alone, he reported to a local judge and warrants were issued for Petitioner's arrest." App.125, l.13-p.126, l.1. According to Rackley he considered the case "cut and dry" from the moment he spoke with Mattress. App.130, l.2-11.

ISSUE (A)

WAS COUNSEL CONSTITUTIONALLY EFFECTIVE FOR IMPROPERLY "VOUCHING" FOR THE STATE'S STAR WITNESS AND VICTIM THAT DENIED PETITIONER HIS RIGHT TO A FAIR TRIAL AND DIRECTED A VERDICT FOR THE STATE?

FACTS

The State's entire case hinged on and around State's witness Tyler Mattress, App.30, l.22-p.77, l.18. The essence of Mattress' testimony was "as Petitioner arrived he stepped out of the car and as he came around the trunk area of the car Petitioner was to have had a gun in his hand and raised it and shot it numerous times at Mattress. Id

During closing summation to the jury trial counsel made the following comments as was recorded:

> Well, the case the State has brought to you stands and falls on Tyler Mattress. Right? That's what the State told you. That's what the officer who investigated the case told you. I came in and I talked to Tyler Mattress. Once he said it was Joe Walker, I was done. [App.201, l.17-21].

> You know I submit to you, yeah, there was a problem between Tyler Mattress and Joe Walker. "I think Tyler's telling the truth." [App.215, l.18-20].

As is clearly seen in the above cited portions of trial counsel's closing argument it is undisputed that counsel intentionally "vouched" for the credibility of the State's witness and victim. Petitioner submits this statement being made

to the jury during closing argument was extremely prejudicial because the statement in essence told the jury "Petitioner is no doubt guilty, and you the jury can believe Tyler Mattress because "he's telling the truth." The PCR Court's denial of relief on this issue was error as a matter of law.

DISCUSSION

It is well established law that a solicitor cannot "vouch" for the credibility of a witness, State v, Shuler, 344 S.C. 604, 545 S.E.2d 805, cert. denied ___U.S.___, 122 S.Ct. 404 (2001), the Court explained that a solicitor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." Id; accord State v. Kelly, 343 S.C. 350, 369, 540 S.E.2d 851, 861 (2001)(rev'd on other grounds, 543 U.S. 246, 122 S.Ct. 726 (2002); Gilchrist v. State, 565 S.E.2d 281, 285 (SC.2002)(same).

Therefore, it is equally also error for trial counsel to "vouch" for the credibility of a witness.(emphasis added). It was extremely egregious in the instant matter as counsel abandoned Petitioner at a critical stage of the trial and "vouched" for the credibility of the State's star witness and alleged victim Tyler Mattress, that caused a breakdown in the adversarial system and denied Petitioner his right to the effective assistance of counsel and his right to a fair trial.

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate" Anders v. California, 386 U.S. 738, 743 [89 S.Ct. 1396, 1399][(1967)]. The right to the effective assistance of counsel

is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

Here counsel's conduct of "vouching" for the credibility of the State's witness and victim at a critical stage of the trial caused a breakdown in the adversarial system that denied Petitioner his right to a fair trial that compels an application of the Cronic exception to the Strickland, 466 U.S. 668 (1984) requirement of showing that the outcome of the trial would have been different without counsel's errors or omissions, See Cronic v. U.S., 466 U.S. at 659-60, 104 S.Ct. at 2047. Counsel's concession to the jury during closing argument that there was no reasonable doubt that Tyler Mattress was telling the truth was an abandonment of the defense of his client during a critical stage of the trial.

When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred. But, if it loses it's character as a confrontation between adversaries, the constitutional guarantee is gone. Cronic v. U.S., 466 U.S. at 656-57, 104 S.Ct. at 2045-46 (footnotes omitted).

A criminal defendant is also protected from unfairness in the criminal process by due process that his guilt be proved beyond a reasonable doubt. When a defense attorney as here "vouches" for the credibility of the State's star witness and victim there is no reasonable doubt concerning the only factual issue in dispute, the State has not been held to it's burden of persuading the jury that the defendant is guilty.

The Supreme Court recognized in Cronic that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their affect in a particular case is unjustified. Cronic, 466 U.S. 658, 104 S.Ct. at 2046. The Court identified the complete denial of counsel or the deprivation of effective representation at [a] critical stage of an accused's trial as justifying a presumption of prejudice. Id at 659, 104 S.Ct. at 2047.

The Court further stated that "circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one could provide effective assistance is [so] small that a presumption of prejudice [is] appropriate without inquiry into the actual conduct of the trial. Id at 659-60, 104 S.Ct. at 2047.

In the instant matter the evidence was "not overwhelming", and in fact the only direct evidence pointing at Petitioner in the case was the testimony of Tyler Mattress. Counsel's concession to the jury that Tyler Mattress was telling the truth unduly prejudiced Petitioner and denied him a fair trial. Petitioner is entitled to a new trial on this issue where the credibility of Tyler Mattress can be weighed by the jury and not defense counsel.

ISSUE (B)

WAS COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER CLOSING SUMMATION THAT APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY?

FACTS

During closing argument the solicitor violated established law in several instances without objection from counsel as was recorded:

> If it were not for some good fortune Mr. Mattress could have been killed that day. **If it were not for some fortune, a child could have been hit.** There's no telling where these bullets could have gone when they were flying around this parking lot. [App.235, l.2-6].

> The State, **the people of Greenville County** have an interest that people who commit crimes like this one are brought to justice. As I stated a minute ago, Tyler Mattress is not the only person who was put in danger that day, **but there was a whole apartment complex full of people who were put in danger as well.** [App.235, l.24-p.236, l.4].

The solicitor in this case gave a closing argument that violated established law in several respects, yet trial counsel did not object. Trial counsel's failure to object to several egregious remarks by the solicitor prejudiced Petitioner and requires reversal of his conviction, Strickland v. Washington, 466 U.S. 668 (1984).

As is seen in the above the solicitor appealed to the passions and prejudices of the jury by appealing to the jury that

"if it were not for some good fortune a child could have been hit." The solicitor then went on to turn the jury into partisans with the turn phrase "[the people] of Greenville County have an interest that people who commit crimes like this one are brought to justice." The solicitor then argued "there was a whole apartment complex full of people who were put in danger as well." and counsel sat mute. The PCR Court's denial on this issue are errors law.

DISCUSSION

A solicitor's closing argument is bound by the rules of fairness and may not be calculated to arouse the juror's passions and prejudices, State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). A solicitor cannot inject material outside of the evidence or the judge's charge, but must confine him/herself to the record in the case presented to the jury. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004)(The States closing argument must be confined to the evidence), State v. Copeland, 321 S.C. 318, 486 S.E.2d 620 (1996); State v. McAlister, 133 S.C. 99, 130 S.C. 511 (1925)(holding it is improper in closing argument for the State to refer to and comment about facts of other cases to indicate or suggest the same results).

Coupled with the other errors complained of when considering the highly prejudicial statements by the Solicitor "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donelly v. DeChrisoforo, 416 U.S. 637, 643 (1974). This determination requires the Court to look to "the nature of the comments, the quantum of evidence before the jury,

the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Bennett v. Angelone, 92 F.3d 1336, 1345-46 (4th Cir.1996)(internal quotation marks omitted).

The State had last argument. These statements by the solicitor were the last things the jury heard from the attorneys. The solicitor did not make an isolated remark, but deliberately violated established rules regarding closing arguments. Trial counsel could not have had an reasonable strategy for failing to object to these comments and given the trial court a chance to cure the error. Here the State's closing contained three egregiously improper arguments which taken as a whole satisfies the Donnelly standard. Petitioner is entitled to a new trial on this issue.

ISSUE (C)

WAS COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS THAT FAILED TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF "CRIMINAL INTENT", WHICH SUBSTANTIALLY LESSENED THE STATE'S BURDEN OF PROOF IN VIOLATION OF THE DUE PROCESS CLAUSE AND RESULTED IN A STRUCTURAL ERROR?

FACTS

During Petitioner's trial the trial court charged the jury as follows:

> **The Court:** Now, Madame Foreman, ladies and gentlemen of the jury, as you know, this defendant is charged with and has been indicted for attempted murder. This is a statutory offense. And section 16-3-29 of our code of laws reads in part as follows:, a person who **with the intent to kill** attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder.
>
> Now in order for you to understand this charge it is first necessary for me me to define murder for you. And murder is also a statutory offense. And section 16-3-10 of our code reads murder is the killing of any person with malice aforethought, either express or implied. Of course, I don't need to define for you the killing of another.
>
> So the **second** element of murder is that it be done with malice aforethought, express or implied. Malice aforethought, ladies and gentlemen, is a legal -- malice is a legal term of art which implies wickedness and excludes a just cause or excuse. It means a condition of the mind or heart which prompts one to take the life of another without just cause or excuse. Now our Supreme Court has defined malice by saying it springs from a heart devoid of social duty or obligation and is one fatally and deliberately bent on mischief.
>
> Now, to prove malice it is not necessary for the State to prove the

Defendant had a feeling of hatred or ill-will toward the person killed. The statute says that malice must be aforethought. Aforethought simply means deliberate or planned.

In other words, a forethought means that malice must be in the mind a sufficient length of time to have produced the act that caused the death. Now, no long period of time must have existed. If it was there long enough to bring on the act that caused the death, it would be sufficient in point of time.

The statute, as I read it to you, says that malice may be express or it may be implied. Express malice means there is some direct proof of malice as, for example, where a person by word of mouth states his hatred or ill-will for another or where there is evidence of previous threats of lying in wait or making plans to take human life. That is express malice.

Implied malice, on the other hand may be shown from the facts and circumstances surrounding an event. **Implied malice exists where there no actual intent to kill** any person, but the death is caused by conduct which the law regards as showing such abandoned **state of mind** as to be equivalent to **an actual intent to kill.**

Stated somewhat differently, ladies and gentlemen, murder is the malicious taking of human life. It is nothing more or less than evil, wicked **intent** to take a human life. It may be expressed by evil expression of the human lips indicating **the intent** on the part of the human human heart or it may be implied where the killing takes place under such circumstances as indicate that it first had been prompted by a wicked, evil, depraved heart devoid of social duty fatally bent of mischief. That, ladies and gentlemen, is murder.

Now the Defendant in this case is charged with attempted murder, Ladies and gentlemen, attempt in criminal law is an endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution or completion of the ultimate design. In other words, **an attempt includes an intent** to do a particular criminal thing combined with an act falling short of the thing intended.

> Now, an attempt has two elements. First of all, it must have been a specific intent to commit a particular crime, in this case murder. And secondly, -- and, secondly, a direct ineffectual act towards it's completion. That, ladies and gentlemen, is the law with respect to attempted murder. [236, 1.11-p239, 1.6].

As is seen in the above instructions the Court has failed to instruct the jury on the "essential element of criminal intent" that has resulted in structural error and therefore requires reversal of the conviction.

The departure point for the constitutional jaunt, which lies a head is In re Winship, 396 U.S. 358, 364, 90 S.Ct. 1068 (1970), where the U.S. Supreme Court laid down the constitutional axiom that due process requires a State to prove beyond a reasonable doubt "each and every element" necessary to constitute the crime for which a defendant is charged. Id.

Petitioner here was charged with attempted murder 16-3-29 and therefore it is of importance to consider 16-3-10 in conjunction, which was directly addressed by the trial court during instructions, App.236, 1.11-24. Petitioner submits the statutory definition has not altered in anyway the ingredients which common law deemed essential, 16-3-10 in no wise affected the essential elements which are necessary to constitute murder or attempted murder 16-3-29 but leaves them exactly and in every particular as they stood at common law, State v. Judge, 208 S.C. 497, 505, 38 S.E.2d 715, 719 (1946).

Consequently the "element of criminal intent" though not alluded to in 16-3-10 is still in South Carolina an "essential

element" of the crime of murder and in this case 16-3-29 attempted murder. State v. Thrailkill, 73 S.C. 314, 314, 53 SE 482 (1906)("criminal intent"... is an essential element in every common law crime), Cf. State v. American Chemical Co. 118 S.C. 333, 337, 110 SE 800, 802 (1920).

The leading book on criminal jury charges defines criminal intent as:

> Now, Criminal intent is a necessary element of any crime, and it has to be proven by the state beyond a reasonable doubt.
>
> Criminal intent is always a matter that has to be decided from circumstances that are surrounding the situation because there's no way that we can cut into a man's brain and look down in there and see what he had in mind at the time.
>
> And so the law says that criminal intent may be inferred from the circumstances which were shown to have exists at the time, and that's how you make a determination as to whether or not criminal intent was present.
>
> And criminal intent is a state of mind, and it operates jointly with an act in the commission of a crime. It is a mental state, it's a conscious wrong doing, and it's up to you as a jury to determine what the defendant intended to do based on the circumstances which are shown to have existed.
>
> The State has to prove criminal intent beyond a reasonable doubt just as it has to prove every other element of the crime charged.

Ralph King Anderson, Jr. South Carolina Requests to Charge -- Criminal (2012).

The PCR Court's denial of relief on this issue was wrong as a matter of law, and further when counsel was questioned regarding

the trial court's failure to instruct the jury on criminal intent, counsel simply stated: "I did not raise any issues regarding that, no" App.349, l.3-5. (emphasis original and added) and therefore cannot be considered trial strategy by any means of the word.

Petitioner submits counsel rendered ineffective assistance of counsel in failing to lodge and objection and preserve the meritorious issue for appeal or at least recognize such an error and ask the trial to instruct the jury on criminal intent and cure the error it's self. Strickland v. Washington, 466 U.S. 668 (1984).

DISCUSSION

In reviewing jury charges for error, the Court must consider the court's charge as a whole in light of the evidence presented and issues present at trial. State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Id at 318, 577 S.E.2d at 464.

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004).

Petitioner submits the charge given here even considered as a whole omits any reference to the "essential element of criminal intent" that has resulted in structural error that requires reversal of the conviction.

In conducting harmless error analysis of constitutional violations, the U.S. Supreme Court repeatedly has reaffirmed that "[s]ome constitutional violations... by their very nature cast so much doubt on the fairness of the trial process that as a matter of law, they can never be considered harmless. See Satterwhite v. Texas, 483 U.S. 249, 256 (1988) Accord Neder v. United States, 527 U.S. 1, 7 (1999)("[W]e have recognized a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards." ... Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. "affect the substantial rights') without regards to their affect on the outcome").

In Arizona v. Fuliminante, 499 U.S. 279 (1991), a five-Justice majority of the Court, Id at 306-312, elucidated this rule of per se prejudice (sometimes called the "rule of automatic reversal"), Id at 294, see also Satterwhite v. Texas, supra, 486 U.S. at 257, by distinguishing between the concept of "structural" and "trial" errors: "structural defects in the constitution of the trial mechanism, Fulminante, supra, 499 U.S. at 309, see also Neder v. United States, supra, 527 U.S. at 7; Johnson v. United States, 520 U.S. 461, 468 (1997), Fulminante, supra, 499 U.S. at 310 ('structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself'), are per se prejudicial; while trial errors occurring "during the presentation of the case to the jury", Fulminante, supra at 307 are subject to harmless error analysis, Fulminante, supra, 499 U.S. at 308-310.

Structural errors however, must be corrected regardless of their affect on the trial because they violated basic protections without which a criminal trial can reliably serve it's function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. Fulminante, supra, 499 U.S. at 310.

The prejudice incurred is easily seen as coming directly after the Court erroneous implied malice charge that failed to instruct the jury regarding a essential element the Court told the jury "the burden is on the State in this case to prove this Defendant guilty and to [prove each and "every element"] of the offense with which he is charged beyond a reasonable doubt." App.240, 1.19-22. The omission of the essential element from the charge substantially lessened the State's burden of proof. The error complained of is structural and requires reversal of the conviction.

Petitioner is entitled to a new trial on this issue.

ISSUE (D)

WAS COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S COURT'S ERRONEOUS AND CONFUSING INSTRUCTIONS ON IMPLIED MALICE THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF DUE PROCESS AND SUBSTANTIALLY LESSENED THE STATE'S BURDEN OF PROOF?

FACTS

During the trial court's instructions to the jury on implied malice the following was recorded:

> Implied malice, on the other hand, may be shown from the facts and circumstances surrounding an event. Implied malice exists where there is no actual intent to kill any person, but death is caused by conduct which the law regards as showing such an abandoned state of mind as to be equivalent to an actual intent to kill. [App.238, l.3-8].
>
> Now, an attempt has two elements. First of all, it must have been a specific intent to commit a particular crime, in this case murder. And secondly, -- and secondly, a direct ineffectual act towards it's completion. That ladies and gentlement is the law with respect to attempted murder. [App.239, l.1-6].

As is clearly seen in the above cited portions the Court told the jury "implied malice exists where there is no actual intent to kill, but death is caused by conduct which the law regards as showing a statement mind equivalent to an actual intent to kill." The Court then immediately tells the jury "it must have been a specific intent to commit a particular crime, and in this case murder. The Court then instructed "secondly, a direct ineffectual act towards it's completion.

Petitioner submits the implied malice instruction here were, erroneous, confusing and only shifted the burden of proof, thus substantially lessening the State's burden of proof beyond a reasonable doubt, in light of the fact the Court never instructed the jury regarding the essential element of "criminal intent", supra Issue (C).

DISCUSSION

In State v. King, 155 S.E.2d 409 (1930) our Supreme Court held that... the State must never be given the benefit of any reasonable doubt.

In a long line of cases, culminating Yates v. Evatt, 500 U.S. 391 (1991), the U.S. Supreme Court recognized that the prosecution must prove [**each and every element**] of the crime charged beyond a reasonable doubt, citing In re Winship, 397 U.S. 158 (1970). The burden of proof on any element cannot be shifted to the defense, because in so doing it decreases the State's burden of proving the crime beyond a reasonable doubt.

As early as 1975 the Supreme Court considered a Maine Rule which required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden of proof on any element of the crime to the defendant, finding the risk describe to be intolerable, reversing the conviction. Mullaney v. Wilbur, 421 U.S. 684, 701 (1975).

The Court overturned another conviction in Sandstrom v. Montana, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when the person

"purposely or knowingly" caused the death of another and, at Sandstrom's trial , the trial judge instructed the jury that, "The law presumes that a person intends the ordinary consequences of his voluntary acts. Id at 512. After considering Sandstrom's argument, the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense. The Court reiterated that a State must prove [every element] beyond a reasonable doubt and the defendant cannot be required to prove any elements of his defense or disprove any element of his crime, holding "a reasonable juror might have interpreted the instructions either as a conclusive presumption or as a burden shifting presumption, but either interpretation, the Court rendered the instruction unconstitutional."

In Francis v. Franklin, 472 U.S. 307 (1985), the Court found that the use of a "rebuttable" presumption was also unconstitutional for the same reasons set forth in Sandstrom, supra.

Following Sandstrom v. Montana, Mullaney v. Wilbur and Francis v. Franklin, the case of Yates v. Evatt, 310 S.E.2d 805 (1982), 474 U.S. 896 (1985)(Yates v. Aiken), and 500 U.S. 391 (1991), wound it's way through the judicial system on identical issues. This matter is thus solid stare decisis in South Carolina.

Based upon case law as presented, there is no doubt that the implied malice instructions given in Petitioner's trial were unconstitutional and burden shifting.

Petitioner is entitled to a new trial on this issue.

CONCLUSION

Based on the foregoing Petitioner respectfully prays certiorari will issue to review the judgment below, or in the alternative that this Court will grant the relief deemed just and appropriate in the instant matter.

Respectfully Submitted,

/s/ Joseph Walker

Joseph Walker, pro-se