

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

John Alexander — PETITIONER
(Your Name)

vs.

Leroy Cartledge, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals, Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John Alexander
(Your Name)

386 Redemption Way
(Address)

McCormick, South Carolina 29899
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel when trial counsel neglected and failed to object where the trial court denied and deprived Petitioner's Four Requests for a charge on the law of self-defense where such a charge was supported by facts and evidence? 14th Amend.
2. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel when trial counsel failed and neglected to object but rather, conceded the self-defense issue without presenting any evidence and arguments for a lesser included offense? See United States v. Chronic; 14 Amend.
3. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel when trial counsel failed and neglected to explain the true nature and elements of self-defense, defense of another, assault and battery with intent to kill or assault and battery of a high and aggravated nature (Petitioner's only defense and charges put to trial for) so that the Petitioner may intelligently, understandably and voluntarily assist trial counsel with the self-defense defense and /or presenting material facts and evidence of the lesser included offense?

4. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel where trial counsel failed and neglected to inform the Petitioner that the trial Judge informed the solicitors and himself during a secret In Chambers meeting (absent the petitioner), before any Opening Statement's; that the Court would not give the Jury a self-defense instruction on the law at the conclusion the evidentiary phase of the Jury Trial?
5. Did the Petitioner be denied and deprived due process, equal protection of law and ~~Sixth~~^{Sixth} Amendment effective assistance of counsel where trial counsel neglected and failed to utilize a court suggested opportunity to explain to the Petitioner that, without his trial testimony, the Court would not issue any instruction on the law of self-defense?
6. Did the Petitioner be denied due process, equal protection of law and Sixth Amendment effective assistance of counsel where trial counsel failed and neglected to object when the trial court gave the Jury Twenty-Eight (28) implied malice inferences to consider in the Malice Jury Charge immediately following the solicitor giving the Jury Sixteen (16) implied malice inferences during Closing Arguments?
7. Did the Petitioner be denied and deprived due process, equal

protection of law and Sixth Amendment effective assistance of counsel where trial counsel neglected and failed to Request a State v. Fennell, Jury Charge that: "The presence of malice would not bar a finding on the lesser included offense assault and battery of a high and aggravated nature"?

8. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel where trial counsel neglected and failed to object when the solicitor during, Closing Arguments, erroneously mislead the Jury on an element of lesser included offense assault and battery of a high an aggravated nature by telling the Jury: "South Carolina does not consider ("ABHAN") as a "crime of violence."?
9. Did the Petitioner be denied and deprive due process, equal protection of law and Sixth Amendment effective assistance of counsel when trial counsel, without objection, allowed the prosecutor to tell the Jury three (3) separate times that "Mr. Freeman was shot in the stomach" (to bolster the severity of the injury), contrary to Mr. Freeman's Medical, Examination and Surgical Reports, Which demonstrates all injuries were to the "pelvis"?
10. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance

of counsel where trial counsel neglected and failed to object when the trial court gave a General Intent to kill Jury Charge to the Jury absent a legally recognized definition; where such an element was not included within the indictment for assault and battery with the intent to kill, and where the Petitioner had not been given an opportunity to defend against such an element?

11. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel where trial counsel, without objection, allowed the prosecutor during Closing Argument to give an illustration of a guilty bank robber who is armed and commits a crime of armed robbery and thereafter, requests the Jury to find the Petitioner guilty based on the rationale and principle of the armed bank robber instead of the material facts and evidence presented during the Jury trial?
12. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel where trial counsel failed and neglected to object where the trial Judge repeatedly told the prosecutor what to include in their Closing Arguments and what he (the Judge) would argue if he "were the prosecutor" to persuade the Jury to convict the Petitioner?
13. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of

counsel where trial counsel failed and neglected to object when the trial court sent the Jury a Supplemental Malice Charge through a bailiff, off the record, and without trial counsel or the Petitioner knowing its contents or an opportunity to object?

14. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel where trial counsel failed and neglected to object when the trial court instructed the Jury: "You are permitted to infer malice from use of a deadly weapon," where the Petitioner presented evidence that reduced, mitigated, excused or justified the assault and battery with intent to kill caused by the use of a deadly weapon? See State v. Moose, 313 S.E. 2d 507 (1984); also State v. Belcher, 685 S.E. 2d 802 (S.C. 2009).
15. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel where trial counsel (prior to trial) failed and neglected to Request a Motion for more definite statement on the act or acts of malice the indictment had been true billed for putting the Petitioner on trial?
16. Did the Petitioner be denied and deprived due process, equal protection of law and Sixth Amendment effective assistance of counsel where trial counsel failed and neglected to obtain and utilize the Petitioner's Twenty-Seven (27) years inpatient and outpatient Mental Health Records for mitigating purposes during the trial.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix H(1) to the petition and is

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

The opinion of the United States district court appears at Appendix Z to the petition and is

☒ reported at 6:16-cv-00600-HMH; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix N/A to the petition and is

☒ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

☒ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 17, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 12, 2017, and a copy of the order denying rehearing appears at Appendix J(1).

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was N/A.
A copy of that decision appears at Appendix N/A.

☒ A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

Sixth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

STATEMENT OF THE CASE

The Petitioner was indicted during the November term of 2006 for Assault and battery with intent to kill. And allegedly subsequently directly indicted some time later for possession of a weapon during a violent crime. Petitioner was represented by T.A.M. Boggs.

The Petitioner proceeded to trial on July 13-14, 2007, convicted by a Jury, and sentenced to Life and 5 years by the Honorable J. Derham Cole. A time Direct Review was submitted. Ms. Celia Robinson of the Appellate Defense Office represented the Petitioner. The South Carolina Court of Appeal Affirmed the Direct Review on April 29, 2010. The Remittitur was issued May 17, 2010.

A timely Post-Conviction Relief Application was submitted on May 6, 2010. The Honorable Roger L. Couch issued an Order For Production of Grand Jury Impanelment Documents be produced to the Petitioner November 21, 2011. The Petitioner never received any of the above mentioned documents. Rather, a PCR hearing was held on December 8, 2011. Later, on March 16, 2012 the Honorable J. Mark Hayes, II Dismissed the PCR application. The Petitioner filed a time prose Motion to Alter or Amend the PCR Court's March 16, 2012 Order. However, the Motion was Dismissed on May 3, 2012 by Judge Hayes pursuant to Rule 11, SCRPC.

The Petitioner timely Appealed the PCR Court's Order of Dismissal of his application as well as Motion to Alter or Amend Judgment. On May 29, 2012 the Supreme Court of South Carolina decided no action would

taken on the Petitioner's Appeal of his Motion to Alter or Amend Judgment. Thereafter, on July 19, 2012 the Petitioner submitted a prose Petition for Writ of Certiorari before the Supreme Court of South Carolina. And a Supplemental Pleading on November 16, 2012. Plus, on January 1, 2013 Petitioner filed a prose Motion for Remand to Reconstruct all the inaccuracies within the PCR Transcript of Record.

On February 13, 2013 the Supreme Court Denied Petitioner's Motion to Remand and Motion to Hold Petitioner's Writ of Certiorari in Abeyance. Also, on March 4, 2013 the Supreme Court Denied the Petitioner's timely prose Petition for Rehearing of its February 13, 2013 Order. In time, the Petitioner by Motion sought to Relieve Counsel and have New Counsel Appointed. But, on April 3, 2013 Denied the Motion. Also, on July 29, 2013 the Supreme Court transferred Petitioner's post-conviction relief case to the South Carolina Court of Appeals. Whom Denied the Petition for Writ of Certiorari May 21, 2015.

The Petitioner on June 4, 2015 File a timely Petition for Rehearing. However, on June 8, 2015 the South Carolina Court of Appeals issued a Remittitur. Next, on June 12, 2015 the Court of Appeals denied the Petition for Rehearing alleging untimely. So, on June 13, 2015 the Petitioner filed a timely prose Petition for Writ of Certiorari to the Supreme Court. Incidentally, on June 25, 2015 the Court of Appeals acknowledged the Petition for Rehearing as timely and Granted Petitioner's prose Motion to Recall the Remittitur. The next day, June 26, 2015, the Supreme Court Denied Petitioner's prose Petition for Writ of Certiorari. During August 20, 2015 the Court of Appeals Denied the Petition for Rehearing. In light of

the Court of Appeals Order dated August 20, 2015 recalling the Remittitur and Ruling on the Petition for Rehearing, the Petitioner Filed a timely New Petition for Writ of Certiorari to the Supreme Court. Nevertheless, September 21, 2015 the Supreme Court Denied the pro se Writ of Certiorari. And on October 19, 2015 a Remittitur issued by the Court of Appeals.

Afterwards, the Petitioner Filed a timely Petition for Habeas Corpus Relief and Motion for Appointment of Counsel on February 22, 2016. A Report of Magistrate Judge was submitted January 13, 2017. The Petitioner File a timely Objection to the Report of Magistrate Judge. On February 1, 2017 the United States District Court Denied Petitioner's Habeas Petition. Following, the Petitioner filed a timely Motion to Alter or Amend Judgment proving the Objection to Report of Magistrate Judge was timely. The United States District Court Denied the Motion on February 8, 2017. Again, the Petitioner demonstrated in a 2nd Motion to Alter or Amend Judgment the Objection was timely. So on February 14, 2017 the United States District Court Granted the Motion to Alter or Amend Judgment.

Essentially, on February 28, 2017 the U.S. District Court again Dismissed the Habeas Petition. Likewise, the Petitioner again timely Motioned to Alter or Amend the 2/28/2017 Order. On April 3, 2017 the U.S. District Court Denied Petitioner's Motion. Therefore, the Petitioner submitted a 2nd Motion to Alter or Amend Judgment seeking a ruling on all grounds. But on May 3, 2017 the U.S. District Court Denied that Motion.

Finally, the Petitioner timely Appealed to the United States Court of Appeals. Then on October 17, 2017 the U.S. Court of Appeals, Fourth

Circuit Denied a Certificate of Appealability and Dismissed the Appeal. The Petitioner submitted a timely Petition For Rehearing and Petition For Rehearing En Banc. Later, on November 3, 2017 the U.S. Court of Appeals issued a Stay of Mandate under FED. R. App. P. 41 (d)(1). Plus, on December 12, 2017 the U.S. Court of Appeals Denied the Petitioner's Petitions. And Filed the Mandate on December, 20, 2017.

REASONS FOR GRANTING THE PETITION

The Petitioner contends that there are compelling reasons why this Honorable Court can and should exercise its discretionary Jurisdiction and /or call for an exercise of its supervisory power. Particularly, where during the Petitioner's Jury trial, trial counsel employed the defense of self-defense, presented evidence of self-defense and made four (4) separate Requests and argued for a charge on the law of self-defense. Nevertheless, the United States Court of Appeals, Fourth Circuit condoned the trial court's imposing an impermissible, unconstitutional and unreasonable burden of persuasion on self-defense upon the Petitioner. See Griffin v. McElroy, 785 F.2d 1172 (4th Cir. 1986); State v. Judge, 38 S.E. 2d 715, 720 (1946); and State v. Bolton, 266 S.E. 444, 449 (1976).

Specifically, four times the trial court denied and deprived the Petitioner a charge on the law of self-defense based on its opinion that "there was not enough or 'insufficient' evidence of self-defense." Pursuant to Holloway v. McElroy, 632 F.2d 605 (1980) "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.'" See Patterson v. New-York, 432 U.S. 215, 97 S.Ct. at 2329; also Engle v. Isaac, 102 S.Ct. 1558 (1982). Herein, the trial court erroneously was concerned with the weight rather than the existence or non existence of evidence of self-defense.

Consequently, when the Petitioner produced evidence of self-defense, he was entitled to a charge on the law of self-defense. State v. Burkhardt, 350 S.C. 252, 565 S.E. 2d 298 (2002); Tyler v. Nelson, 163 F.3d 1222 (1999); and State v. Kelly, 131 Kan. 357, 291 Pac. 945 (1930). Nearly all State

Courts agrees with the Petitioner's position. See State v. Wiggins, 500 S.E. 2d 498 (1998); Williams v. State, 538 S.E. 2d 544 (2000); Miller v. State, 720 N.E. 2d 696 (Ind. 1999); State v. Osborne, 775 So. 607 (La. App. 4th Cir. 2000); Commonwealth v. Beaucamp, 49 Mass. App. Ct. 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 598 (2000); State v. Garcia, 18 P. 3d 1123 (Utah App. 2001); State v. Walden, 131 Wash. 2d 469 (1997).

As such, to preclude any future opportunity for a clear miscarriage of Justice or trial court potential bias or prejudice in favor of the prosecution, the Petitioner respectfully requests that this Honorable Court determine whether or not the due process and equal protection clause entitle a defendant / Petitioner a charge on the law on self-defense where he employs self-defense, produces evidence of self-defense, argue and requests a self-defense Jury Charge in "all United States State Courts." Especially in South Carolina in State v. Campbell, --- S.E. 2d --- the trial court emphatically stated and ruled that such law is accurate and clear. See Appendix L (1) and M (1)

Additionally, after the trial court denied the Petitioner's fourth request for a charge on the law of self-defense, trial counsel conceded along with the trial Judge that there was "not enough" and / or "insufficient" of self-defense to prove self-defense. Fortunately, The United States Constitution, The South Carolina Constitution, and all other state Court Constitution guarantees protection from paid attorney's withdrawing from Petitioner's sole defense of self-defense, failing and neglecting to discover, present and utilize other favorable, mitigating, available

material evidence to the trial court and Jury. **2046-657. Such type of trial strategy and performance constitutes an abandonment or breakdown in the adversarial process implicating the Sixth Amendment is not limited to counsel's performance as a whole — "specific errors and omissions may be the focus of a claim of ineffective assistance of counsel as well. Strickland v. Washington, 466 U.S. 668, 693-696, 104 S.Ct. 2052.

Significantly, pursuant to Belcher v. State, 685 S.E.2d 802 (S.C.2000) South Carolina joined all other state courts in acknowledging that a Jury charge of "malice may be inferred by the use of a deadly weapon is confusing and prejudicial where there is evidence of self-defense or that would reduce, mitigate, excuse, or justify the ("ABWIK") presented." In the instant case, "evidence of self-defense was present" thereby highlighting the prejudice resulting from the charge. Farris v. Commonwealth, 77 Ky.362 (Ky. 1878); Glen v. State, 68 Md. App.379, 511 A.2d 1110-1126 (1986); Erwin v. State, 29 Ohio St.186, 191 (Ohio 1876); State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244, 252 (1994); see also Bruce A. Antkowiak, The Art of Malice, 60 Rutgers L. Rev. 435 (2008).

Wherefore, the Petitioner respectfully requests that this High Court grant Certiorari to determine whether the United States Court of Appeals, South Carolina State Courts possess discretion to adhere to the Belcher, ruling retroactively to all cases (i.e. the Petitioner's case), which was pending on direct review, or can the above Courts be compelled by the new ruling to apply the Belcher, standard of law indiscriminately, Harris v. State, 273 Ga. 608, 543 S.E.2d 716-718 (2001).

Next, the most universal recognized of Due Process and Equal Protection of Law is that (1) Petitioner be advised and informed of real Notice of the True Nature and Elements of the Petitioner's sole defense of self-defense; (2) the True Nature and Elements of assault and battery with intent to kill; and the True Nature and Elements of assault and battery of a high and aggravated nature. The offenses put to trial for. Sixth and Fourteenth Amendment; South Carolina Constitution, Art. 1 Sec. 14; also see Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed. 2d 108 (1976). Trial counsel conceded along with the Petitioner during the state post-conviction relief proceeding, "I don't use legal definitions all that much," and "I don't know that I would have sat down and given him a legal definition," "I try to do it in layman's terms."

The Petitioner asserts where any trial counsel fails and neglects to put a defendant on real notice of the elements of self-defense (defendant's sole defense) or of the true nature and elements of the crimes for which he is being held accountable for; the prejudicial affect is three fold. First, a defendant is unaware of any meaningful material evidence that must be presented to the jury to establish the defense of self-defense; Second, the defendant is deliberately ignoranced of the 'legal elements' the state must prove beyond a reasonable doubt before any conviction may be made on the allegations contained in the indictment; and third, the defendant is inadequate to effectively or meaningfully assist trial counsel in the legal defense and trial strategy.

Wherefore, the Petitioner respectfully requests that this Honorable Court so exercise its discretionary jurisdiction to grant certiorari to determine

for certain whether the due process clause and equal protection of law guarantee a defendant / Petitioner such protection of (prior to trial) having trial counsel take a few minutes to explain the true nature and elements of the crime/s charged in a jury trial? Sixth and Fourteenth Amendment. Pursuant to Malik v. United States, 457 F.2d 790 (7th Cir. 1972); and United States v. Cody, 438 F.2d - (8th Cir. 1971) "reading the indictment can never constitute an adequate determination of Petitioner's understanding of the elements or true nature of the charge against him.

Further, the Petitioner's Trial Transcript demonstrates at the beginning of his Jury Trial, prior to Opening Statements, a secret in chambers meeting was held including the trial judge, both solicitors and trial counsel. Judge Cole notified the solicitors and trial counsel that he, the court would not be giving a Self-Defense Charge because he did not feel that trial counsel could produce enough evidence to warrant a charge on the law. Unfortunately, no one informed the Petitioner of Judge Cole's pre-Opening Statements findings on the facts and evidence or, decision not to grant Petitioner's request for a self-defense instruction during the in chambers meeting.

The Petitioner claims that all defendants (he) have a federal and subsequent state right "to be present at every stage of the trial proper unless he absence himself." State v. James, 107 S.E. 907, 116 S.C. 243; a guaranteed right to be confronted with any witness, testimony or evidence against him, as well as the right to be fully heard in my defense "personally." State v. Matt. Mont, No. Da 06-0134, 12/20/08; State v. Myers, 2016 WL 821234; State v. Reed, 210 P. 756 (1922); or, in the alternative, the Petitioner

has the right to be timely advised and given real notice of any material or critical ruling/s made in the in chambers meeting that would significantly damage or impair the Petitioner's perspective defense. See Rogers v. United States, 422 U.S. 35, 95 S.Ct. 2091 (1975); Tillman v. United States, 406 F.2d 930 (5th Cir. 1969); U.S. v. Gagnon, 470 U.S. 522 (1985); Kentucky v. Stincer, 482 U.S. 730 (1987). The character of the communications clearly shows that it was prejudicial and warrants new trial. Pierce v. State, 171 S.E. 731 (1933); also Wilson v. State, 905 S.E. 2d 557 (1955).

Wherefore, the Petitioner respectfully requests that this Highest Court so exercise its discretionary Jurisdiction to grant certiorari to resolve ultimately for all state courts the issue of whether or not a defendant has a guarantee under the United States Constitution to be present, "in person," during a secret in chambers meeting that he never knew existed, who called the meeting, the reason/s for which the meeting was called for or, the results of such meeting and/or the right to be timely advised of the above in a reasonable manner so as to provide the defendant an opportunity to offer additional material and meaningful evidence of self-defense to satisfy the court's high bar? 6th and 14th Amendments.

There to, to reduce or eliminate the chances of the Petitioner of a finding on the lesser included offense of assault and battery of a high and aggravated nature, the prosecutor gave the Jury a false impression and element on the law of assault and battery of a high and aggravated nature (ABHAN). Specifically, during Closing Arguments, the prosecutor to the Jury, "In South Carolina, ("ABHAN") is not considered a crime of violence." While

(ABHAN) was not classified a "violent crime" during the Petitioner's trial, it was considered a "crime of violence."

Overmore, the sheer nature and elements of (ABHAN) constitutes it a crime of violence. For example, the use of a deadly weapon, inflicting serious bodily injury upon the person of another or, malice and criminal intent. See U.S. v. Johnson, 2011 WL 322364; U.S. v. Hampton, 2012 WL 368-085; and U.S. v. Bethea, 603 F.3d 256 (2010). Nevertheless, the Petitioner was allowed to be put on trial on an element not within the state statute for (ABHAN) nor included within Petitioner's indictment. As such, the Petitioner's constitutional guarantee to a fair trial, right to be put to trial only upon the elements and allegation in the indictment or, the right to effective assistance of counsel was violated. See 5th, 6th and 14th Amendment. Consequently, the Petitioner's conviction and sentence was obtained and rests upon unlawful methods calculate to deny and deprive him of due process and equal protection of law. S.C. Const. Art I Section 3; U.S. v. White, 2007 WL 2963710

Wherefore, the Petitioner respectfully requests that this Highest Court so exercise its discretionary Jurisdiction to decide whether or not a defendant in any state court may receive a fair trial: where the jury is given and allowed to consider an element of an offense not in the indictment or state statute.

Additionally, the Petitioner's right to have the Jury deliberate the facts and evidence unpolluted by bias, prejudice and false comments from the solicitor was violated. In particular, during Closing Arguments, the solicitor told the

Jury three (3) separate times that the victim was shot in the "stomach." To the contrary, all Mr. Freeman's Medical, Surgical and Examination Reports clearly demonstrates that the injury was to the "pelvis," and non life-threatening

In all federal and state courts, the rule of law is clear. A solicitor is prohibited from introducing false, misleading or erroneous comments on the facts and evidence into a defendant's trial. Herein, the solicitor willfully, knowingly and intentionally made untruthful statements to the Jury calculated to bolster the severity of Mr. Freeman's injury for the sole purpose of persuading the Jury to find the Petitioner guilty of the greater rather than lesser offense. Certainly, the probative value of the solicitor's erroneous and false comments was not substantially outweighed by the danger of unfair prejudice. Rule 403. SCRE Such unfair prejudice of denying and depriving the Petitioner a right to confront and dispute the false proposed evidence. Or denying and depriving a defendant / Petitioner the opportunity to suppress the false evidence from entering into the trial.

Also, during the Petitioner's Jury Trial the prosecutor was allowed to make unconstitutional comments to the Jury which infected the trial with unfairness so as to make the conviction and sentence a denial and deprivation of due process and equal protection of law. Specifically, during Closing Arguments the solicitor manufactured an illustration about a defendant who goes into a bank armed with a gun and robbed the bank. Afterwards, the solicitor tells the Jury to draw undue conclusions and inferences from the illustration and apply those exact principles to the Petitioner's case in order to convict him.

Such methods have long ago been determined unconstitutional because

it strips a defendant of his right to have the Jury decide his innocence or guilt based solely on the facts and evidence adduced at trial. See Patterson v. COM, 429 S.E. 2d 899 (1993); Winston v. COM, 404 S.E. 2d 414-415 (1991); Boyd v. French, 147 F.3d 319 (4th Cir. 1998); and United States v. Garcia - Guizar, 160 F.3d 511 (1998). The sole nature and purpose the solicitor gave the Jury the illustration was to divert their attention away from the insufficient facts and evidence of (ABWIK), the Petitioner's character, his background, and the nature of the crime charged. Thereto, the solicitor's comments to the Jury was bent on appealing to the passion and prejudice of the guilty bank robber and subsequent the Petitioner. Which is affirmatively condemned in most states. See Dial v. Niggel Assoc., Inc., 509 S.E. 2d 269, 271 (1998); South Carolina State Highway Dept. v. Nasim, 255 S.C. 406 (1971); Toyota of Florence, Inc. v. Lynch, 442 S.E. 2d 611, 615 (1994); State v. Bennett, 632 S.E. 2d 281 (2006); Von Dohlen v. State, 360 S.C. 602 (2004); Norman v. State, 2015 WL 6986237; Callahan v. State, 347 S.E. 2d 269 (1986); Fann v. State, 331 S.E. 2d 547 (1985); and Smith v. State, 68 S.Ct. 86 (1947).

Another significant and relevant legal matter of constitutional issue in this case that Justify this Honorable Court exercising its discretionary Jurisdiction is stated in State v. Peterson, 287 S.C. 244, 335 S.E. 2d 800, 802 (1985) where the Court held: "A malice charge which used such term nine (9) times were erroneous and prejudicial." Certainly then, in the present case when the Judge used the term and gave the Jury twenty-eight (28) inferences of malice during the Malice Charge, and gave an additional Supplemental Malice Instruction at the Jury's request, the Petitioner was unduly prejudiced by the inapplicable and/or erroneous inferences of malice.

Prejudice is presumed first where Belcher v. State, 685 S.E. 2d 802 (2009)

condemned use of the language: "Malice may be inferred from the use of a deadly weapon where evidence is presented of self-defense, Justification, excuse, etc. to mitigate the (ABWIK)." Second, most of the inferences of malice charged to the Jury were not in the states Standard Malice Charge, or in the Petitioner's indictment.

Ultimately, the twenty-eight inferences of malice the trial Judge gave the Jury had the affect of lessening and reducing the solicitor's burden of proof beyond a reasonable doubt on the element of malice. Consequently, an unreasonable and unconstitutional burden of persuassion of absence of malice was placed upon the petitioner on the greater and lesser included offense. See Fifth, Sixth and Fourteenth Amendment.

The Petitioner respectfully requests that this Highest Court exercise its discretionary Jurisdiction to grant certiorari review to resolve whether or not a defendant / Petitioner received due process and equal protection of law where the trial court neglected and failed to instruct the only other inference of malice recognized in South Carolina i.e., "Absence of malice does not bar a Finding of 'ABHAN.'" Fennell v. State, 531 S.E. 2d 512 (2000).

Importantly, the state's Closing Arguments were tailored to preclude the Jury from a Finding on "ABHAN" in the event the presence of malice were inferred. Likewise, the trial court's malice charge conveyed to the Jury that the presence of malice barred a finding on the lesser included offense of "ABHAN." Clearly, after being giving twenty-eight (28) unfavorable inferences of malice, the Jury should have been advised of their right to find the Petitioner guilty of the lesser included offense whether

or not the presence of malice was found by them. State v. Pilgram, 482 S.E. 2d 568 (1997). This is the surest way to ensure that a defendant / Petitioner receives a fair and impartial Jury Trial. Fifth, Sixth and Fourteenth Amendment.

Next, the Petitioner claims that he was denied and deprived equal protection of law and due process behind trial counsel failing and neglecting to seek a statement of particulars and/or Motion for a More definite statement of the act or acts of malice the state intended to put the Petitioner on trial for, Fifth, 6th and Fourteenth Amendment; also Fed. R. Civ. P. 12 (e). Prejudice attached when, during Closing Arguments, the solicitor gave the Jury fourteen (14) inferences/definitions to choose from. Immediately afterwards, the trial court issued the Jury a Malice Charge consisting of twenty-nine (29) permissive inference of malice.

Under United States v. Simmons, 96 U.S. 360, 362, 24 L. Ed. 819 (1977) ("In an indictment upon statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any ambiguity, set forth all the acts necessary intended to be punished.") See Rule 7 Federal Rules of Criminal Procedure 18 U.S.C.A. ("an indictment must do more than simply repeat the language of the criminal statute where a defendant's guilt depends so crucially upon such a specific identification of act/s of malice.")

Wherefore, the Petitioner prays that this Honorable Court exercise its discretionary Jurisdiction to grant certiorari to determine whether or not a defendant / Petitioner can receive a fair or impartial Jury Trial where an indictment for (ABWIK) omit a specific or particular act of malice

intended to be punished. And during the trial, the Judges instructed twenty-nine (29) inference of malice from which a conviction can be reached?

Further, the Petitioner suffered fundamental unfairness and a due process violation when the solicitor tried and argued Petitioner's case on the theory on a specific intent to kill yet the trial court instructed the Jury on General Intent To Kill. See United States v. San Juan, 545 F.2d 314 (1976). Particularly, because the trial court failed and neglected to give the Jury the elements or define legal General Intent To Kill. Even worse, General Intent was not included in the Petitioner's indictment for ABWIK

As such, the Petitioner's guarantee to be "tried only upon the offense /elements true billed by a grand Jury was annihilated." Fifth and Fourteenth Amendment. United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811 (1985); also Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781 ("Nothing can be added to an indictment without the concurrence of the grand Jury by which the bill was found.")

Ultimately, the trial court's General Intent To Kill Charge constructively amended Petitioner's indictment, added an additional element to the offense of ABWIK and, unconstitutionally broaden the basis for a conviction beyond those submitted to the grand Jury. United States v. Floresca, 38 F.3d 706, 710 (4th Cir. 1994) So much so that, the Petitioner was put to trial, convicted and sentenced on an element

other than those cited in the indictment. United States v. Randall, 171 F.3d 195, 203 (4th Cir. 1999).

Wherefore, the Petitioner respectfully requests that this Highest Court exercise its discretionary Jurisdiction to grant certiorari to decide whether or not the Due Process Clause preclude state courts from charging Juries on elements not within a defendant's indictment not included within the state's statute for ABWIK nor, where a defendant was ever provided the opportunity to prepare for and defend against such element?

Incidentally, prior to the Petitioner's Jury Trial, trial counsel advised the Petitioner not to testify because the solicitor would use his prior conviction against him. However, after trial counsel rested his defense, the trial Judge declined to grant Petitioner's fourth and final request on the law for self-defense charge, but advised trial counsel if that changed his trial strategy about putting the Petitioner on the witness stand, he "wanted to give trial counsel an opportunity to talk to the Petitioner, again, about whether or not he wanted to change his mind about testifying."

To the contrary, trial counsel rashly withdrew Petitioner's requests for a self-defense charge and simply conceded along with the court that there was not enough evidence to make out a self-defense case, without consulting with the Petitioner to determine whether or not he wanted to testify. The Petitioner informed counsel from the onset that he wanted to take the stand. And, had trial taken a few minutes to explain to the Petitioner that he no longer had anything to lose, but

rather everything to gain by testifying at the court's discretion to re-open the evidentiary phase to allow additional evidence of self-defense to be introduced into the trial; certainly the Petitioner would have done so. See State v. Wright, 785 S.E. 2d 479 (2016).

Wherefore, the Petitioner prays that this Highest Court utilize its discretionary Jurisdiction to grant certiorari to decide whether or not a defendant's / Petitioner's due process was denied and deprived where trial counsel fails to consult with him to explain, during a critical stage of a Jury trial, that if he does not change his mind about testifying; the Judge will not reconsider giving a self-defense charge. Certainly, then, a conviction would be forthcoming absent the Petitioner's testimony?

In the instant case, Just before the Closing Arguments, the Judge told the prosecution:

"So that's why I'm saying 'if I were the prosecutor I'd argue the fact that this is not a self-defense case.' 'The court will not be instructing them on self-defense.' 'That's why they can't consider that.' 'I'm talking about that's Argument.'"

"Now in this case, as Mr. Boggs has conceded, the testimony of the witness did not measure up to provide sufficient evidence upon which self-defense may be made out." 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 I'll not be instructing

them on self-defense and that that's not applicable under the facts of this case;"

"I assume if Mr. Boggs had requested a self-defense instruction 'y'all would have objected to it' on the ground that there's not sufficient evidence to establish it;"

"And I assume you'll be able to handle that through some persuasive closing argument."

Clearly, the trial Judge demonstrated bias and prejudice in favor of the prosecution. Likewise, the trial Judge's words and deeds manifested its repeated inability to remain neutral, fair or impartial. Literally, the trial Judge provided the solicitors with unsolicited favorable legal advice on trial strategy in the form of "assumptions." And, for what it's worth; the solicitor never objected to any of the Petitioner's four requests for a self-defense instruction.

Hence, the trial court transcended its discretion, authority and jurisdiction when it coached the solicitors on the contents to include in their closing argument. Prejudice is presumed where, in contrast, the trial Judge failed and neglecting to share with defense counsel what he would do if he were defense counsel. Or, in the alternative, give defense counsel favorable assumptions on any contents to include in the closing argument. 5th, 14th Amendments

Wherefore, the Petitioner prays that this Highest Court exercise its

discretionary Jurisdiction to grant certiorari review to decide whether or not any trial court possess discretion or authority to give a solicitor advise on what to include in their closing arguments? And, if not, is a defendant / Petitioner fatally prejudiced if a trial Judge does so?

Finally, the Petitioner has undergone inpatient /out patient mental health treatment from the Spartanburg Regional Mental Health Center and various other institutions for over twenty - five (25) years. Trial counsel failed and neglected to obtain, research and discover that the Petitioner's mental health records contained mitigating evidence. The prejudicial affect of trial counsel's deficient performance in neglecting to discover and utilize the Petitioner's mental health records denied and deprived the Petitioner the right to have the Jury deliberate his mental health defects (at the time of the incident). See Sixth Amend.

Significantly, during the Petitioner's post-conviction relief proceeding trial counsel testified that, prior to trial, Petitioner notified him of the existence of the mental health records and requested that they be retrieved and examined. Second, trial counsel testified in his professional opinion; "a reasonable minded person would have considered doing what the Petitioner did." Nevertheless, the trial Judge rejected counsel's professional opinion and denied Petitioner's four requests for a self-defense instruction.

At that critical stage of the Petitioner's Jury Trial, if utilized properly, the Petitioner's mental health defects would have reduced, mitigated or excused his actions. Or, in the least, successfully refuted and

defeated the prosecution's claim that the Petitioner possessed the state of mind constituting malice and criminal intent at "the time of the incident."

Wherefore, the Petitioner prays that this Highest Court utilize its discretionary Jurisdiction to grant certiorari to decide whether or not a defendant/Petitioner is provided Sixth Amendment effective counsel where counsel intentionally disregard and overlook crucial mitigating material evidence that would have annihilated criminal intent and malice "aforethought.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John Alexander

Date: March 8, 2018