STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
South Carolina Department of Probation, Parole and Pardon Services
S. Phillip Lenski, Administrative Law Judge
Appellate Case No. 2019-000934

Bernard Bagley, #175851 — Appellant

v.

South Carolina Department of Probation,
Parole and Pardon Services — Respondent

RECORD ON APPEAL

Bernard Bagley
#175851/HD133/Ker.CI
4848 Goldmine Hwy.
Kershaw, SC 29067

pro se

Tommy Evans, Jr.
P.O. Box 50666
Columbia, SC 29250
Attorney for Respondent

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Bernard Bagley, #175851, Appellant, v. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No. 18-ALJ-15-0037-AP **ORDER OF DISMISSAL**

This case is before the Administrative Law Court (ALC or court) pursuant to the appeal of Barnard Bagley (Appellant), an individual who is incarcerated with the South Carolina Department of Corrections. The Appellant was convicted of murder and on April 12, 1991, the Appellant was sentenced to a term of incarceration for the rest of his natural life. At the time the Appellant committed the offense of murder, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty (20) years. The Appellant made initial appearance before the Parole Board on September 8, 2010 and was denied parole. Since his initial denial, the Appellant has appeared before the Parole Board three additional times, each resulting in a denial of parole.

After the most recent denial of parole, the Appellant contact the Department of Probation, Parole, and Pardon Services (Department) requesting clemency or a pardon. On November 7, 2018, the Department informed the Appellant that because he was parole eligible, he cannot be considered for a pardon and that statutorily the Parole Board can only offer a recommendation to the Governor to commute a sentence of death to life and because the Appellant is currently serving a sentence that will not result in the death penalty, his sentence cannot be commuted. On December 6, 2018, the Appellant filed a Notice of Appeal with the court alleging that the Department's decision to permanently deny him consideration for a pardon is arbitrary and capricious and deprives him of a protected liberty interest. After review of the parties' briefs, the court can find no basis upon which to assert jurisdiction in this case and therefore concludes that dismissal is appropriate.[1]

[1] The court notes that its dismissal is based upon a procedural deficiency in the appeal and that the court makes no

STANDARD OF REVIEW

The court's jurisdiction to review this matter is derived from the South Carolina Supreme Court decisions in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) (establishing an administrative review process for inmate appeals), *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003) (incorporating final decisions of the Department into that review process), and ALC Rules 51 and 59(C).

Rule 51, ALC Rules, entitled "Applicability" provides:

> The Rules in this section shall apply exclusively in matters heard on appeal from final decisions pursuant to *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000).

The Notice of Appeal does not contain a copy of any final decision from the Department which is the subject of the appeal as required by ALC Rule 59(C). By failing to obtain a final decision from the Department, the Appellant has not exhausted his administrative remedies and has thus, failed to meet the requirements of the Administrative Procedures Act for review by this court: "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." S.C. Code Ann. § 1-23-380 (Supp. 2017). In sum, this court has no jurisdiction to hear the underlying merits of the case.

This matter is not properly before this court and therefore,

IT HEREBY ORDERED that this appeal is **DISMISSED.**

AND IT IS SO ORDERED.

S. Phillip Lenski
Administrative Law Judge

April 30, 2019
Columbia, South Carolina

finding on the issue of its subject matter jurisdiction over this type of case.

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States Mail, postage paid, or in the inter-agency Mail Service addressed to the parties or their attorney(s).

This 30th day of April 2019

By: _____
Judicial Law Clerk

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State of South Carolina

Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor

JERRY B. ADGER
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.dppps.sc.gov

November 7, 2018

Mr. Bernard Bagley SCDC#175851
Kershaw Correctional Institution
4848 Goldmine Hwy.
Kershaw, South Carolina 29067

RE: Pardon

Dear Mr. Bagley:

This correspondence is in response to your October 5 letter regarding a request for clemency. Within this letter you raise a Court decision that stated malice can no longer be inferred due to the use of a deadly weapon. It is your position that this should be considered an extraordinary circumstance that could allow you an opportunity to receive a pardon. Unfortunately, due to the fact you are currently eligible for parole you are cannot be considered for a pardon.

You are currently serving a life sentence for the offense of murder, with parole eligibility upon the service of twenty years. You initially became eligible for parole on June 28, 2010. Since this initial hearing you have been before the Parole Board an additional four times each resulting in a denial of parole. You are again scheduled to appear before the Board on March 15, 2019.

Pursuant to South Carolina law, "An inmate must be considered for pardon before a parole eligibility date only when he can produce evidence comprising the most extraordinary circumstances." S.C. Code Ann. §24-21-950(A)(4)(1981). So pursuant to this statute an inmate who is currently eligible for parole cannot receive a pardon.

As for commuting a sentence, in South Carolina the Parole Board is only able to grant a pardon. The Board can offer a recommendation to the Governor to commute a sentence of death to life. You are currently serving a sentence that will not result in the death penalty. Therefore, your sentence cannot be commuted.

I hope this has answered all of the questions you may have regarding this matter. Good luck in all of your future endeavors. With kind regards I remain,

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:te

Cc: Nettie Jacobs, Board Support Services Supervisor

State of South Carolina

Department of Probation, Parole and Pardon Services

HENRY McMASTER
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Facsimile: (803) 734-9440
www.dppps.sc.gov

January 8, 2019

Mr. Bernard Bagley SCDC# 175851
Kershaw Correctional Institution
4848 Goldmine Hwy.
Kershaw, South Carolina 29067

RE: Pardon

Dear Mr. Bagley:

This is in response to your November 30 letter relating to your previous request for a pardon. As stated in my earlier letter, since you are currently eligible for parole you cannot be considered for a pardon while incarcerated.

In your letter you stated that your position is that you believe that since the statute does not specifically state the words "currently" or "initially," it may not be the intent of the legislature that it means "currently" or "initially" eligible for parole. However, the statue does state, "an inmate must be considered for pardon before a parole eligibility date." Once your parole eligibility date has passed you are at that time eligible for parole. So you are currently eligible for parole as evidenced by appearing before the Board four times. Since you are currently eligible for parole you cannot be considered for a pardon.

You have referred to a changing of the law regarding the inference of malice when a deadly weapon is used. That is irrelevant due to the fact you continue to serve a life sentence for murder. At the time you were convicted South Carolina allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years. You became eligible for parole on September 8, 2010, so you cannot be considered for a pardon.

Since you are currently eligible for parole you cannot be considered for a pardon pursuant to South Carolina law. Therefore, I cannot assist you in your request. I would no longer be answering any more correspondence regarding this matter.

Good luck in all of your future endeavors. With kind regards I remain,

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:te

2:30 I'LL BRING YOU OUT HERE AND I WILL THEN INSTRUCT YOU AND TELL YOU WHAT THE LAW IS AND WHAT YOUR DUTIES AND RESPONSIBILITIES ARE IN YOUR DELIBERATIONS. HAVE A NICE LUNCH AND I'LL SEE YOU BACK HERE AT 2:30. THANK YOU. I WANT EVERYONE ELSE TO REMAIN SEATED WHILE THE JURY LEAVES THE COURTROOM.

(THE JURY LEAVES THE JURY BOX AT 12:43 P.M.)

THE COURT: COURT WILL BE ADJOURNED UNTIL 2:30. WE'VE GOT A PLEA.

(LUNCHEON RECESS)

(COURT RESUMES AT 2:36 P.M.)

THE COURT: WOULD YOU BRING THE JURY IN, PLEASE?

(THE JURY RETURNS TO THE JURY BOX AT 2:37 P.M.)

THE COURT: ALL RIGHT. LADIES AND GENTLEMEN OF THE JURY, THE STATE OF SOUTH CAROLINA IN THIS CASE HAS ACCUSED BERNARD BAGLEY OF THE CHARGE OF MURDER AND OF BURGLARY IN THE FIRST DEGREE. NOW, I TELL YOU, LADIES AND GENTLEMEN OF THE JURY, THAT IT'S A BASIC RULE OF LAW IN OUR COUNTRY THAT EVERYONE WHO IS ACCUSED OF A CRIME REGARDLESS OF WHAT THAT CRIME MIGHT BE IS PRESUMED TO BE INNOCENT UNTIL FOUND GUILTY. NO ONE WHO IS ACCUSED OF A CRIME IN OUR COUNTRY IS REQUIRED TO COME FORWARD AND PROVE THEIR INNOCENCE. OUR LAW SAYS THAT A PERSON IS PRESUMED TO BE INNOCENT UNTIL YOU MEMBERS OF THE JURY ARE CONVINCED BEYOND A REASONABLE DOUBT THAT HE IS GUILTY. THE STATE OF SOUTH CAROLINA HAVING BROUGHT THESE

CHARGES AGAINST THIS DEFENDANT HAS THE BURDEN OF PROOF. I MEAN BY THAT THE STATE OF SOUTH CAROLINA THROUGH YOUR SOLICITOR'S OFFICE IS REQUIRED TO PROVE TO YOU BY EVIDENCE AND TESTIMONY CONVINCING YOU THAT HE IS GUILTY AND THEY MUST PROVE THAT TO YOU BEYOND A REASONABLE DOUBT. SO, THEREFORE, AFTER HEARING THE TESTIMONY AND THE EVIDENCE THAT YOU HAVE HEARD IF YOU HAVE A REASONABLE DOUBT IN YOUR MIND AS TO WHETHER OR NOT A DEFENDANT IS GUILTY OR NOT GUILTY, YOU HAVE TO RESOLVE THAT DOUBT IN HIS FAVOR AND FIND HIM NOT GUILTY. ON THE OTHER HAND, IF YOU DO NOT HAVE A REASONABLE DOUBT IN YOUR MIND AS TO WHETHER OR NOT HE'S GUILTY OR NOT, YOU HAVE TO FIND HIM GUILTY.

NOW, YOU MEMBERS OF THE JURY ARE THE SOLE JUDGES OF THE FACTS. I MEAN BY THAT IT'S YOUR DUTY AND RESPONSIBILITY TO TAKE THE EVIDENCE AND THE TESTIMONY THAT YOU HAVE HEARD AND FROM THAT EVIDENCE AND TESTIMONY OR FROM THE LACK OF CERTAIN TESTIMONY DETERMINE WHAT THE TRUE FACTS ARE. I'VE HEARD JURORS BEFORE TELL ME IN THE PAST I JUST CAN'T BE A JUROR, I JUST CAN'T DO THIS. THIS IS NOTHING UNUSUAL FOR YOU TO DO. THIS IS WHAT YOU DO EVERYDAY IN YOUR LIFE. YOU LISTEN TO PEOPLE TALK TO YOU AND TELL YOU THINGS THEY'VE SEEN OR HEARD AND YOU DECIDE WHAT YOU BELIEVE AND WHAT YOU DON'T BELIEVE. YOU JUST USE YOUR GOOD JUDGMENT AND COMMON SENSE.

NOW, SINCE YOU HAVE TO DETERMINE WHAT THE FACTS ARE, THEN BY NECESSITY YOU MUST WEIGH, THAT IS, DETERMINE THE

CREDIBILITY, THE BELIEVABILITY OF THE VARIOUS WITNESSES WHO HAVE TESTIFIED. NOW, YOU MAY BELIEVE ONE WITNESS AGAINST SEVERAL OR YOU MAY BELIEVE SEVERAL WITNESSES AGAINST ONE OR IF YOU HAVE GOOD REASON TO YOU MAY BELIEVE PART OF WHAT ONE WITNESS SAYS AND DISBELIEVE ANOTHER PART. YOU CAN TAKE INTO CONSIDERATION MANY THINGS IN DETERMINING WHAT THE TRUTH IS AND JUDGING THE CREDIBILITY OF A WITNESS. YOU HAVE SEEN THE WITNESSES APPEAR BEFORE YOU AND TESTIFY AND YOU CAN JUDGE THE DEMEANOR OF THE WITNESSES WHO TESTIFIED. ANY SPECIAL KNOWLEDGE OR INFORMATION ANY WITNESS MIGHT HAVE IN TESTIFYING AS HE OR SHE MIGHT HAVE TESTIFIED. ANY SPECIAL--ANYTHING TO GAIN OR LOSE THAT A WITNESS MIGHT HAVE IN TESTIFYING. ANY BIAS OR PREJUDICE ANY WITNESS MIGHT HAVE. BUT WHAT IT REALLY BOILS DOWN TO, MR. FOREMAN AND LADIES AND GENTLEMEN OF THE JURY, YOU CAN TAKE INTO CONSIDERATION ANYTHING WHICH IN YOUR GOOD JUDGMENT HELPS YOU ARRIVE AT WHAT THE TRUE FACTS ARE IN THIS CASE.

NOW, THROUGHOUT THIS TRIAL SINCE I AM THE JUDGE THAT DECIDES WHAT THE LAW IS AND MAKES RULINGS OF LAW I HAVE MADE VARIOUS RULINGS FOR AND AGAINST VARIOUS PARTIES IN THIS CASE. I WANT TO ASSURE YOU OF ONE THING. NEVER IN THE RULINGS THAT I HAVE MADE HAVE I INTENDED OR HAVE MEANT TO SUGGEST AT ALL ANY OPINION I MIGHT HAVE ABOUT THE FACTS. I'M NOT ALLOWED TO HAVE AN OPINION ABOUT THE FACTS. AND IF YOU THOUGHT I DID BY RULING AS I DID, PLEASE DISREGARD IT BECAUSE I HAVE NO

OPINION BECAUSE YOU HAVE TO BE THE ONES WHO DECIDE WHAT THE FACTS ARE. THEY ARE SOLELY IN YOUR BALLPARK. THAT'S SOLELY YOUR PREROGATIVE. YOU CAN'T GET ANY FACTS FROM ME AND YOU CAN'T GET ANY FACTS FROM THESE LAWYERS. THE LAWYERS CAN'T TESTIFY AND I CAN'T TESTIFY. YOU GET YOUR FACTS FROM THE WITNESSES AND THE EVIDENCE THAT'S BEEN ADMITTED INTO EVIDENCE. YOU ARE THE SOLE JUDGES OF THE FACTS. YOU HAVE BEEN SELECTED BY THE ATTORNEYS IN THIS CASE BY THE STATE AND THE DEFENSE TO BE FAIR AND IMPARTIAL. TO BE FAIR AND IMPARTIAL TO BOTH SIDES. YOU HAVE NOT BEEN SELECTED--I EMPHASIZE THIS--YOU HAVE NOT BEEN SELECTED TO PUNISH ANYBODY AND YOU HAVE NOT BEEN SELECTED TO REWARD ANYBODY EITHER. YOU HAVE BEEN SELECTED TO LISTEN TO THE TESTIMONY AND THE EVIDENCE AND DETERMINE WHAT THE TRUTH IS AND MAKE A DECISION BASED UPON THAT AND THAT ALONE AND NOT BE INFLUENCED BY ANY BIAS OR PREJUDICE.

NOW, YOU ARE THE SOLE JUDGES OF THE FACTS. SO, THEREFORE, ONCE YOU GO BACK IN THAT JURY ROOM AND ONCE YOU HAVE DECIDED WHAT THE FACTS ARE THEN YOUR NEXT DUTY IS TO TAKE THE LAW OF THE STATE OF SOUTH CAROLINA AS I GIVE IT TO YOU, APPLY THAT LAW TO THE FACTS THAT YOU HAVE DETERMINED SO THAT YOU'LL RENDER A VERDICT WHICH SPEAKS THE TRUTH BOTH IN FACT AND IN LAW. NOW, I SAID YOU MUST TAKE THE LAW AS I GIVE IT TO YOU BECAUSE THAT'S MY PREROGATIVE. IT'S MY JOB TO TELL YOU WHAT THE LAW IS AND YOU MUST TAKE IT AS I GIVE IT TO YOU,

NOT AS YOU THINK IT OUGHT TO BE, NOT AS YOU THINK IT SHOULD BE BUT AS I EXPLAIN THE LAW TO YOU BECAUSE THAT'S MY RESPONSIBILITY JUST LIKE FINDING THE FACTS ARE YOURS. YOU TAKE THE FACTS THAT YOU DETERMINE, THE LAW THE I GIVE YOU, PUT THEM TOGETHER, APPLY THE LAW TO THE FACTS AND THEN YOU'LL RENDER A VERDICT WHICH SPEAKS THE TRUTH AND THAT'S WHAT YOUR JOB IS.

NOW, THIS DEFENDANT IS CHARGED--WE ARE TALKING ABOUT MURDER FIRST. HE IS CHARGED WITH MURDER. SINCE THE GREATER ALWAYS INCLUDES THE LESSER, MURDER ALSO INCLUDES A LESSER INCLUDED OFFENSE OF MANSLAUGHTER SO I'M GOING TO HAVE TO TELL YOU WHAT BOTH OF THEM ARE. AND IF YOU HAVE A REASONABLE DOUBT IN YOUR MIND AFTER CONSIDERING WHETHER HE'S GUILTY OF MURDER OR NOT GUILTY, IF YOU HAVE A REASONABLE DOUBT AS TO WHETHER HE'S GUILTY OF MURDER OR MANSLAUGHTER, YOU HAVE TO RESOLVE THAT DOUBT IN HIS FAVOR AND FIND HIM GUILTY OF MANSLAUGHTER AS BETWEEN THE TWO OF THEM. ANY TIME YOU HAVE A REASONABLE DOUBT IN A CRIMINAL CASE YOU HAVE TO RESOLVE THAT DOUBT IN FAVOR OF THE DEFENDANT. HE'S ENTITLED TO EVERY REASONABLE DOUBT. MURDER IS THE KILLING OF ANY PERSON WITH MALICE AFORETHOUGHT. MURDER IS THE KILLING OF ANY PERSON WITH MALICE AFORETHOUGHT. IN ORDER TO CONVICT THE DEFENDANT OF MURDER, THE STATE MUST NOT ONLY PROVE THAT THE DEFENDANT KILLED THE DECEASED, BUT THAT THE KILLING WAS DONE WITH MALICE AFORETHOUGHT AND SUCH PROOF MUST BE BEYOND A

REASONABLE DOUBT. WHAT IS MALICE? MALICE IS DEFINED AS A TERM OF ART IMPORTING WICKEDNESS AND EXCLUDING JUST CAUSE OR EXCUSE. MALICE IS SOMETHING WHICH SPRINGS FROM WICKEDNESS AND FROM A DEPRAVED SPIRIT. IT IS ILL WILL, IT IS HATRED. NOW, MALICE MAY BE SHOWN TO EXIST EITHER EXPRESSLY OR IMPLIEDLY. I CHARGE YOU THAT THE WORDS EXPRESSED OR IMPLIED MALICE DO NOT MEAN DIFFERENT KINDS OF MALICE BUT MERELY THE MANNER IN WHICH MALICE IS SHOWN TO EXIST TO YOU OR ME. THAT IS, BY EITHER POSITIVE EVIDENCE OR BY INFERENCE. EXPRESSED MALICE IS WHERE ONE PERSON KILLS ANOTHER WITH A SEDATE, DELIBERATE MIND, A FORMED DESIGN, SUCH FORMED DESIGN BEING EVIDENCED BY THE EXTERNAL CIRCUMSTANCES DISCLOSING HIS INWARD INTENTIONS. IT MAY BE EXPRESSED, FOR EXAMPLE, WHERE THERE ARE PREVIOUS THREATS OR WHERE ONE IS LYING IN WAIT ON SOMEBODY. AMBUSH. IN OTHER WORDS, EXTERNAL CIRCUMSTANCES THAT YOU MAY CONSIDER. MALICE MAY BE IMPLIED FROM THE WILFUL, DELIBERATE AND INTENTIONAL DOING OF AN UNLAWFUL ACT WITHOUT JUST CAUSE OR EXCUSE. IT IS FOR THE JURY TO DETERMINE FROM ALL THE EVIDENCE WHETHER OR NOT MALICE HAS BEEN PROVEN BEYOND A REASONABLE DOUBT. I CHARGE YOU THAT THE LAW SAYS IF ONE INTENTIONALLY KILLS ANOTHER WITH A DEADLY WEAPON, AND A GUN IS A DEADLY WEAPON, I CHARGE YOU THAT THE LAW SAYS IF ONE INTENTIONALLY KILLS ANOTHER WITH A DEADLY WEAPON THE INFERENCE OF MALICE MAY ARISE. IF FACTS ARE PROVED BEYOND A REASONABLE DOUBT SUFFICIENT TO RAISE AN

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INFERENCE OF MALICE TO YOUR SATISFACTION, THIS INFERENCE WOULD BE SIMPLY AN EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION BY YOU ALONG WITH ALL THE OTHER EVIDENCE IN THE CASE AND YOU MAY GIVE IT SUCH WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE. NOW, YOU'LL NOTICE THAT I SAID THAT MURDER IS THE UNLAWFUL OR FELONIOUS KILLING OF ANOTHER PERSON WITH MALICE AFORETHOUGHT. THE STATE MUST ALSO PROVE AS EVERYTHING ELSE BEYOND A REASONABLE DOUBT THAT MALICE EXISTED IN THE HEART OR THE MIND OF THIS DEFENDANT AFORETHOUGHT. THAT MEANS THAT SOME TIME PRIOR TO THE SHOT BEING FIRED OR THE BLOW BEING STRUCK THAT MALICE MUST HAVE EXISTED IN HIS MIND NOT AFTERWARDS, BUT BEFORE, AND IT DOES NOT HAVE TO EXIST IN THE MIND FOR ANY APPRECIABLE LENGTH OF TIME BUT AT SOME POINT IN TIME NO MATTER HOW SHORT THAT MALICE MUST BE SHOWN TO HAVE EXISTED. THAT ILL WILL OR HATRED MUST HAVE EXISTED AT SOME TIME PRIOR TO THE ACT BEING DONE. SO, MURDER IS THE FELONIOUS OR UNLAWFUL KILLING OF ANOTHER HUMAN BEING WITH MALICE AFORETHOUGHT. AND I REMIND YOU AGAIN THE STATE MUST PROVE ALL OF THIS TO YOU BEYOND A REASONABLE DOUBT BEFORE YOU CAN FIND THE DEFENDANT GUILTY OF MURDER. IF YOU HAVE A REASONABLE DOUBT IN YOUR MIND AS TO WHETHER THE STATE HAS PROVEN THIS TO YOU BEYOND A REASONABLE DOUBT, THEN YOU MAY THEN CONSIDER THE CRIME OF VOLUNTARY MANSLAUGHTER.

AS I HAVE ALREADY INDICATED TO YOU, AN INDICTMENT FOR MURDER INCLUDES THE LESSER INCLUDED CRIME OF INVOLUNTARY

MANSLAUGHTER. A DEFENDANT INDICTED FOR MURDER MAY BE CONVICTED OF MANSLAUGHTER IF THE EVIDENCE WARRANTS IT AND THE STATE PROVES IT TO YOU BEYOND A REASONABLE DOUBT. VOLUNTARY MANSLAUGHTER IS THE UNLAWFUL, FELONIOUS KILLING OF ANOTHER PERSON WHEN THERE IS NO MALICE EITHER EXPRESSED OR IMPLIED. YOU WILL NOTICE THAT THE ABSENCE OF MALICE IS WHAT DISTINGUISHES MANSLAUGHTER FROM MURDER. MANSLAUGHTER IS THE TAKING OF THE LIFE OF ANOTHER WHEN IT'S DONE IN SUDDEN HEAT AND PASSION UPON A SUFFICIENT LEGAL PROVOCATION. THE LAW RECOGNIZES THE FACT THAT SUDDEN HEAT AND PASSION MAY TEMPORARILY DISTURB THE SWAY OF REASON OF AN ORDINARY, REASONABLE PERSON AND, THEREFORE, IN SUCH CASES REDUCES THE CRIME TO MANSLAUGHTER FROM MURDER PROVIDED THERE WAS SUFFICIENT LEGAL PROVOCATION. BEFORE I GO INTO SUFFICIENT LEGAL PROVOCATION I WANT TO TELL YOU THE SUDDEN HEAT AND PASSION, THE SUDDEN HEAT AND PASSION I'M TALKING ABOUT WHICH REDUCES A HOMICIDE, A MURDER, TO MANSLAUGHTER, WHILE THAT SUDDEN HEAT AND PASSION NEED NOT DETHRONE THE REASON OR SHUT OUT KNOWLEDGE AND VOLITION IT MUST BE SUCH AS WOULD NATURALLY DISTURB THE SWAY OF REASON AND RENDER THE MIND OF AN ORDINARY, REASONABLE PERSON INCAPABLE OF COOL REFLECTION. BEAR IN MIND, LADIES AND GENTLEMEN, THAT THE HEAT AND PASSION MUST BE AROUSED UPON A SUFFICIENT LEGAL PROVOCATION. A MAN CANNOT FLY INTO A PASSION OVER A MERE MINOR INCIDENT OR A MERE TRIFLE WHICH WAS NOT CALCULATED TO STIR THE BLOOD OF A

MAN OF ORDINARY FIRMNESS AND REASON AND TAKE THE LIFE OF HIS FELLOW MAN AND SAY THAT IT WAS DONE IN SUDDEN HEAT AND PASSION AND, THEREFORE, IT'S NOT MURDER. WHAT MAKES THE SUDDEN HEAT AND PASSION LEGALLY SUFFICIENT UNDER THE LAW AND UNDER THE FACTS OF THE CASE HAS TO BE DETERMINED BY THE FACTS AND CIRCUMSTANCES OF EACH INDIVIDUAL CASE. IT'S UP TO YOU TO DETERMINE WHETHER THIS SUDDEN HEAT AND PASSION, IF IT EXISTS, WAS LEGALLY SUFFICIENT, IF IT WAS SUFFICIENT ENOUGH TO MAKE AN ORDINARY, REASONABLE MAN HAVE SUDDEN HEAT AND PASSION. NOW, MERELY BY WAY OF EXAMPLE AND ILLUSTRATION, AND I SAY BY WAY OF EXAMPLE ONLY, IF A PERSON WOULD WALK UP TO SOMEONE IN A PUBLIC PLACE AND HIT THEM IN THE FACT, SLAP THEM IN THE FACE AND THAT PERSON REACTED IMMEDIATELY AND STRUCK BACK, THE LAW WOULD SAY HE ACTED IN SUDDEN HEAT AND PASSION.

NOW, YOU MUST REMEMBER THE DEFINITION OF MANSLAUGHTER IS THE UNLAWFUL KILLING OF ANOTHER PERSON WHEN IT'S DONE IN SUDDEN HEAT AND PASSION AFTER HE'S BEEN PROVOKED TO DO IT. AND I SAID SUDDEN HEAT AND PASSION UPON A SUFFICIENT LEGAL PROVOCATION. YOU MUST NOTICE THAT I SAID SUDDEN HEAT AND PASSION FOR THE LAW SAYS THAT A PERSON, AN ORDINARY, REASONABLE PERSON, IF HE HAS HAD TIME TO COOL OFF, GAIN CONTROL OF HIMSELF, THERE'S BEEN SUFFICIENT TIME FOR COOLING, THEN YOU CANNOT SAY THAT THE KILLING WAS DONE IN SUDDEN HEAT AND PASSION. THE KILLING THEN WOULD NOT BE ATTRIBUTED TO SUDDEN HEAT AND PASSION BUT TO MALICE. MALICE IS WHAT

DIFFERENTIATES MURDER FROM MANSLAUGHTER. THE SUFFICIENCY OF COOLING TIME WOULD DEPEND ON THE CIRCUMSTANCES OF THE CASE OF WHETHER THERE WAS TIME ALL CIRCUMSTANCES BEING CONSIDERED FOR A REASONABLE, ORDINARY MAN TO HAVE COOLED OFF.

NOW, LADIES AND GENTLEMEN OF THE JURY, I TELL YOU AGAIN IF YOU HAVE A REASONABLE DOUBT AS TO WHETHER THE DEFENDANT IS GUILTY OF MURDER OR MANSLAUGHTER YOU WOULD ALWAYS HAVE TO RESOLVE THAT DOUBT IN HIS FAVOR AND FIND HIM GUILTY OF MANSLAUGHTER BUT, OF COURSE, YOU COULD NOT FIND HIM GUILTY OF MANSLAUGHTER UNLESS THE STATE HAS PROVEN TO YOU THAT HE KILLED THE DECEASED IN SUDDEN HEAT AND PASSION UPON BEING SUFFICIENTLY LEGALLY PROVOCATED AND DID IT SUDDENLY.

I CHARGE YOU, LADIES AND GENTLEMEN OF THE JURY, THAT THE DEFENDANT HAS ALSO BEEN ACCUSED OF BURGLARY. BURGLARY IN THE FIRST DEGREE. BURGLARY IN THE FIRST DEGREE. I'M READING TO YOU FROM THE STATUTE ITSELF, THE LAW ITSELF. A PERSON IS GUILTY OF BURGLARY IN THE FIRST DEGREE IF THE PERSON, THAT IS, THE DEFENDANT, ENTERS A DWELLING--THAT MEANS WHERE SOMEONE LIVES--WITHOUT CONSENT AND WITH INTENT TO COMMIT A CRIME THEREIN AND EITHER WHEN EFFECTING ENTRY OR WHILE IN THE DWELLING OR IN IMMEDIATE FLIGHT FROM THAT DWELLING PARTICIPATES IN THE CRIME. IN OTHER WORDS, AFTER THE PERSON WAS IN THE HOUSE OR LEAVING THE HOUSE OR SOMETIME WHILE HE WAS IN THERE HE DID COMMIT THE CRIME OR THAT HE WAS ARMED WITH A DEADLY WEAPON OR THAT HE CAUSED PHYSICAL INJURY TO ANY

PERSON IN THE HOUSE WHO WAS NOT A PARTICIPANT IN THE CRIME. FOR EXAMPLE, A CO-DEFENDANT. THE STATE MUST PROVE TO YOU THIS BEYOND A REASONABLE DOUBT FOR A PERSON TO BE FOUND GUILTY OF BURGLARY IN THE FIRST DEGREE. THEY MUST PROVE TO YOU THAT THE DEFENDANT ENTERED INTO THIS DWELLING HOUSE OF THIS PERSON WHO OWNED IT WITHOUT THAT PERSON'S CONSENT WITH THE INTENT TO COMMIT A CRIME THEREIN, AND THAT WHILE IN THERE HE DID ONE OF THOSE THREE THINGS I JUST STATED TO YOU. HE EITHER CAUSED INJURY TO ANOTHER PERSON IN THAT HOUSE, KILLING WOULD BE AN INJURY, OF COURSE; OR THAT HE WAS ARMED WITH A DEADLY WEAPON OR THAT WHILE HE WAS IN THERE HE PARTICIPATED IN THE CRIME THAT HE INTENDED TO ENTER THE HOUSE FOR. I CHARGE YOU THAT IT SAYS THAT HE MUST ENTER WITHOUT CONSENT. IT ALSO SAYS THAT HE HAS TO DO IT WITH THE INTENT TO COMMIT A CRIME THEREIN. THAT INTENT MUST BE THERE WHEN HE ENTERED THE HOUSE. INTENT IS A STATE OF MIND THAT AN INDIVIDUAL HAS. THAT STATE OF MIND WHICH IS SHOWN BY CIRCUMSTANCES OF THE CASE. IT'S BY EXTERNAL ACTIONS OR WORDS OR WHATEVER BUT A PERSON'S INTENTIONS HAS TO BE SHOWN BY THE CIRCUMSTANCES OF THE CASE. SO, YOU HAVE TO LOOK AT ALL THE CIRCUMSTANCES OF THE CASE WHETHER OR NOT HE'S GUILTY OF BURGLARY WITH INTENT--ENTERED WITH THE INTENT TO COMMIT A CRIME THEREIN.

NOW, LADIES AND GENTLEMEN OF THE JURY, ANY TIME THE STATE INTENDS TO PROVE A CASE IN COURT THEY MAY PROVE THAT CASE IN ONE OF THREE WAYS. THEY MAY PROVE THAT CASE BY

DIRECT EVIDENCE. THEY MAY PROVE IT BY INDIRECT OR WHAT WE CALL CIRCUMSTANTIAL EVIDENCE OR THEY MIGHT SHOW IT BY A COMBINATION OF THE TWO. NOW, DIRECT EVIDENCE IS SUCH EVIDENCE THAT IS SOMETHING PERCEIVED BY SOME OF YOUR FIVE SENSES AND YOU COME INTO COURT AND TELL ABOUT IT. FOR EXAMPLE, IF I CAME INTO COURT AND I SAID I SAW THIS MAN SHOOT THIS MAN, THAT'S DIRECT EVIDENCE. SOMETHING I COULD SEE AND I CAME IN AND I TOLD YOU ABOUT IT. INDIRECT EVIDENCE OR CIRCUMSTANTIAL EVIDENCE IS MEANT THE PROOF OF SOME OTHER FACT OR FACTS FROM WHICH TAKEN EITHER SINGLY OR COLLECTIVELY THE EXISTENCE OF THE PARTICULAR FACT IN QUESTION MAY BE INFERRED AS A NECESSARY CONSEQUENCE. CIRCUMSTANTIAL OR INDIRECT EVIDENCE IS JUST AS GOOD AS DIRECT EVIDENCE PROVIDED IT MEETS THE TEST THAT THE LAW SETS DOWN. TO THE EXTENT THAT THE STATE RELIES ON CIRCUMSTANTIAL EVIDENCE, THE STATE MUST PROVE ALL THE CIRCUMSTANCES RELIED ON BEYOND A REASONABLE DOUBT. THEY BE WHOLLY AND IN EVERY PARTICULAR CONSISTENT WITH ONE ANOTHER AND THEY MUST POINT CONCLUSIVELY, THAT IS, TO A MORAL CERTAINTY, TO THE GUILT OF THE ACCUSED TO THE EXCLUSION OF EVERY OTHER REASONABLE HYPOTHESIS. THAT IS THEY MUST BE ABSOLUTELY INCONSISTENT WITH ANY OTHER REASONABLE HYPOTHESIS OTHER THAN THE GUILT OF THE ACCUSED. IN OTHER WORDS, IN CONSIDERATION OF CIRCUMSTANTIAL EVIDENCE YOU MUST SEEK SOME REASONABLE EXPLANATION THEREOF OTHER THAN THE GUILT OF THE ACCUSED AND IF SUCH REASONABLE EXPLANATION CAN BE FOUND, OF

COURSE, YOU COULD NOT CONVICT HIM ON CIRCUMSTANTIAL EVIDENCE. CIRCUMSTANTIAL EVIDENCE, LADIES AND GENTLEMEN, IS LIKE A CHAIN, A LINK CHAIN, AND IT HAS TO GO FROM ONE END TO THE OTHER IN ORDER TO DO THE JOB OF PULLING SOMETHING AND IF ANY LINK OF THAT CHAIN IS NOT PROVEN SOUND BEYOND A REASONABLE DOUBT, THAT CHAIN WILL BREAK AND, THEREFORE, THE CHAIN CAN'T DO ITS JOB, NOR CAN THE CIRCUMSTANTIAL EVIDENCE HOLD UP BECAUSE THE CIRCUMSTANTIAL EVIDENCE MUST POINT CONCLUSIVELY FROM THE BEGINNING TO THE END AND POINT CONCLUSIVELY TO THE GUILT OF THE ACCUSED TO THE EXCLUSION OF EVERY OTHER REASONABLE HYPOTHESIS.

YOU RECALL, LADIES AND GENTLEMEN OF THE JURY, I TALKED TO YOU EARLIER ABOUT AN ALLEGED CONFESSION ON THE PART OF THIS DEFENDANT. AS I TOLD YOU THEN AND I TELL YOU AGAIN THAT BEFORE YOU CAN CONSIDER THAT CONFESSION IN ANY MANNER, BEFORE YOU CAN CONSIDER IT IN ANY MANNER, THE STATE MUST PROVE TO YOU BEYOND A REASONABLE DOUBT THAT IT WAS FREELY AND VOLUNTARILY GIVEN, THAT IT WAS GIVEN BY THIS DEFENDANT WITHOUT BEING THREATENED, WITHOUT BEING INTIMIDATED, WITHOUT BEING PROMISED ANYTHING OR OFFERED A REWARD OR GIVEN ANY HOPE OF REWARD. IN OTHER WORDS, JUST LIKE THE ENGLISH LANGUAGE SAYS, IT WAS FREELY AND VOLUNTARILY GIVEN ON HIS PART. AND THAT BEFORE HE GAVE THAT STATEMENT HE WAS WARNED OF HIS CONSTITUTIONAL RIGHTS, WHAT WE CALL THE MIRANDA DECISION, WHICH SAYS THAT HE HAD THE RIGHT TO REMAIN SILENT, THAT

ANYTHING HE SAID COULD AND WOULD BE USED AGAINST HIM IN A COURT OF LAW, THAT HE HAD THE RIGHT TO TALK TO A LAWYER; IF HE COULDN'T AFFORD ONE, ONE WOULD BE GIVEN TO HIM BY THE COURT,. THAT IF HE WANTED TO ANSWER QUESTIONS WITHOUT THAT LAWYER HE COULD DO SO BUT HE HAD THE RIGHT TO STOP AT ANY TIME OR IF HE HAD THE LAWYER WITH HIM HE HAD THE RIGHT TO STOP AT ANY TIME AND THAT HE ACKNOWLEDGED THAT HE UNDERSTOOD THOSE RIGHTS AND THAT HE VOLUNTARILY WAIVED THOSE RIGHTS. AND IF THEY'VE PROVED THAT TO YOU, ALL OF THESE THINGS TO YOU BEYOND A REASONABLE DOUBT, YOU CAN GIVE THAT CONFESSION WHATEVER WEIGHT YOU DEEM IN YOUR MIND IS PROPER ALONG WITH ALL THE OTHER EVIDENCE YOU HAVE. AND IF YOU ARE NOT SO CONVINCED YOU SHOULD DISREGARD IT COMPLETELY.

NOW, LADIES AND GENTLEMEN OF THE JURY, YOU'VE HEARD SOME TESTIMONY ABOUT THE CHARACTER OR THE REPUTATION OF THIS DEFENDANT. I CHARGE YOU THAT THE STATE ALLOWS TESTIMONY ABOUT GOOD REPUTATION. THE LAW PERMITS THE PROOF OF GOOD REPUTATION BECAUSE UNDER CERTAIN CIRCUMSTANCES YOU, THE JURY, SHOULD CONSIDER THAT BECAUSE A PERSON COULD BE ENTITLED TO A VERDICT OF NOT GUILTY TAKING INTO CONSIDERATION HIS GOOD REPUTATION. IN OTHER WORDS, GOOD REPUTATION GOES TO CREDIBILITY AND BELIEVABILITY AND A PERSON IS ENTITLED TO HAVE A GOOD REPUTATION BEFORE THE JURY FOR YOU TO CONSIDER BECAUSE SOMETIMES A GOOD REPUTATION WILL MAKE THE DIFFERENCE IN GUILTY OR NOT GUILTY.

NOW, LADIES AND GENTLEMEN OF THE JURY, I TOLD YOU EARLIER THAT YOU ARE THE SOLE JUDGES OF THE FACTS AND I TELL YOU AGAIN YOU ARE NOT HERE TO PUNISH ANYBODY. YOU ARE HERE TO MAKE A DETERMINATION OF WHETHER THE DEFENDANT IS GUILTY OR NOT GUILTY BASED UPON THE EVIDENCE AND TESTIMONY YOU HAVE AND AS I TOLD YOU EARLIER I CANNOT TESTIFY FOR YOU, I CAN'T TELL YOU WHAT I THINK ABOUT ANYTHING, I'M NOT ALLOWED TO. MY DUTY IS TO STATE THE LAW TO YOU AND TO MAKE RULINGS OF LAW TO SEE THAT THIS CASE IS RUN ACCORDING TO THE LAWS OF THE STATE OF SOUTH CAROLINA. THESE ATTORNEYS CAN'T TESTIFY TO YOU EITHER. YOU HAVE TO GET YOUR FACTS FROM WHAT YOU'VE HEARD. AND I'VE NOTICED THROUGHOUT THIS TRIAL YOU HAVE BEEN VERY ATTENTIVE TO EVERYTHING THAT'S HAPPENED IN THIS COURTROOM, YOU HAVE LISTENED VERY CAREFULLY TO ALL OF THE WITNESSES WHO HAVE TESTIFIED AND I APPRECIATE THAT BECAUSE THAT'S WHAT YOU ARE SUPPOSED TO DO. AND YOU HAVE LISTENED TO EVERY WITNESS WHO HAS TESTIFIED. NOW, MR. FOREMAN, I'M GOING TO SEND THESE INDICTMENTS BACK TO YOU TO THE JURY ROOM IN A FEW MOMENTS. THEY DO NOT CONTAIN EVIDENCE, THEY MERELY CONTAIN THE WRITTEN CHARGES AGAINST THE DEFENDANT. I'M SENDING THEM BACK THERE FOR YOU TO WRITE YOUR VERDICT ON. BACK HERE ON THE BACK OF THIS INDICTMENT WHICH SAYS INDICTMENT FOR BURGLARY, FIRST DEGREE OVER HERE, THERE'S A PLACE ON THE BACK THAT SAYS "VERDICT." THAT'S WHERE YOU WRITE YOUR VERDICT. THERE ARE SOME LINES UNDER THERE. DEPENDING UPON THE JURY'S DECISION

YOU WILL EITHER WRITE THE WORDS NOT GUILTY OR THE WORD GUILTY DEPENDING UPON WHAT THE JURY'S VERDICT IS AND THEN YOU'LL SIGN YOUR NAME ON THE BOTTOM LINE WHERE IT SAYS FOREMAN AND DATE IT. DO YOU UNDERSTAND, SIR?

MR. FOREMAN: YES, SIR.

THE COURT: NOW, ON THE INDICTMENT FOR MURDER THERE ARE THREE POSSIBLE VERDICTS THAT YOU COULD RENDER IN THAT CASE. IF THE STATE PROVES TO YOU, IF YOU FIND HIM GUILTY OF MURDER, THEN YOUR VERDICT WOULD BE GUILTY. IF THE STATE HAS NOT PROVEN TO YOU THAT HE'S GUILTY OF MURDER OR IF YOU HAVE A REASONABLE DOUBT AS TO WHETHER IT'S MURDER OR MANSLAUGHTER, THEN YOU CONSIDER MANSLAUGHTER. IF YOU FIND HIM GUILTY OF MANSLAUGHTER BEYOND A REASONABLE DOUBT, THE VERDICT WOULD BE GUILTY OF VOLUNTARY MANSLAUGHTER. ON THE OTHER HAND, IF THE STATE DOES NOT PROVE TO YOU EITHER ONE OF THEM BEYOND A REASONABLE DOUBT, THE FORM OF YOUR VERDICT THEN WOULD BE NOT GUILTY. NOW, I HAVE WRITTEN THESE THREE VERDICTS OUT ON THESE YELLOW SHEETS OF PAPER. I HAVE NOT EXPLAINED THEM TO YOU IN ANY PARTICULAR ORDER, NOR DO I HAND THEM TO YOU IN ANY PARTICULAR ORDER. I'M GOING TO STICK THEM IN THE INDICTMENT SO WHEN I SEND IT BACK TO YOU YOU'LL HAVE THEM, BUT THOSE ARE THE THREE POSSIBLE VERDICTS THAT YOU CAN RENDER--EITHER GUILTY WHICH MEANS GUILTY OF MURDER OR NOT GUILTY WHICH MEANS NOT GUILTY OF EITHER ONE OF THEM OR GUILTY OF VOLUNTARY MANSLAUGHTER. SO, WHATEVER THE VERDICT IS YOU HAVE IT IN

HERE. ANY VERDICT THAT THIS JURY RENDERS MUST BE A UNANIMOUS VERDICT. IT TAKES ALL TWELVE OF YOU TO AGREE ON ANY VERDICT. NOW, MR. FOREMAN, WHEN YOU GO BACK IN THE JURY ROOM, I'M GOING TO ASK YOU TO WITHHOLD YOUR DELIBERATIONS FOR JUST A MOMENT WHICH WILL GIVE ME TIME TO CHECK MY NOTES AND TALK WITH THE ATTORNEYS TO SEE IF THERE IS ANYTHING THAT I HAVE FORGOTTEN TO TELL YOU AND IF I DO NEED TO BRING YOU BACK OUT I'LL BRING YOU DIRECTLY BACK OUT. IF NOT, I'LL SEND THESE INDICTMENTS BACK IN TO YOU, MR. FOREMAN, ALONG WITH THE EXHIBITS THAT HAVE BEEN OFFERED INTO EVIDENCE AND WHEN I DO THAT YOU MAY START DELIBERATING. WHEN YOU HAVE REACHED A VERDICT, THEN LET US KNOW AND WE'LL BRING YOU BACK IN AND LET YOU PUBLISH YOUR VERDICTS IN OPEN COURT. PLEASE RETIRE TO THE JURY ROOM.

(THE JURY LEAVES THE JURY BOX AT 3:05 P.M.)

THE COURT: I NEED TO SAY ONE MORE THING. MY LAW CLERK REMINDED ME I FORGOT TO TELL THEM. BRING THEM BACK IN.

(THE JURY RETURNS TO THE JURY BOX AT 3:05 P.M.)

THE COURT: JUST A MOMENT. LET ME READ THE CHARGE TO YOU ON BURGLARY FIRST DEGREE AGAIN BECAUSE I MIGHT HAVE READ SOMETHING WRONG TO YOU. A PERSON IS GUILTY OF BURGLARY IN THE FIRST DEGREE IF THE PERSON ENTERS A DWELLING HOUSE WITHOUT CONSENT AND WITH THE INTENT TO COMMIT A CRIME THEREIN AND WHEN EFFECTING--AND WHEN EFFECTING ENTRY OR WHILE IN THE DWELLING HOUSE OR IN IMMEDIATE FLIGHT THEREFROM HE OR ANOTHER

PERSON PARTICIPATES IN THE CRIME OR HE'S ARMED WITH A DEADLY WEAPON OR HE CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT IN THE CRIME. SO, ANY OF THOSE THREE THINGS THAT I READ TO YOU UNDER BURGLARY MAKES IT BURGLARY IN THE FIRST DEGREE IF THAT'S PROVEN TO YOU BEYOND A REASONABLE DOUBT. I TOLD YOU ABOUT INTENT, I WON'T TELL YOU THAT AGAIN. I DO CHARGE YOU THIS AND I FORGOT THIS AND I MEANT TO TELL YOU. I HAD A NOTE ON IT. IN MANSLAUGHTER SUDDEN HEAT AND PASSION UPON SUFFICIENT LEGAL PROVOCATION, I CHARGE YOU THAT WHERE A KILLING IS DONE WITH A DEADLY WEAPON WORDS AND WORDS ALONE NO MATTER HOW OFFENSIVE, HOW ATROCIOUS THEY ARE, HOW DEVASTATING THEY ARE TO ANOTHER PERSON, HOW BAD THOSE WORDS ARE, WORDS AND WORDS ALONE ARE NOT SUFFICIENT TO BE LEGAL PROVOCATION. WORDS AND WORDS ALONE ARE NOT SUFFICIENT LEGAL PROVOCATION TO REDUCE A KILLING FROM MURDER TO MANSLAUGHTER WHERE THE KILLING IS DONE WITH A DEADLY WEAPON SUCH AS A PISTOL. NOW, YOU CAN RETIRE TO THE JURY ROOM.

(THE JURY LEAVES THE JURY BOX AT 3:08 P.M.)

THE COURT: ALL RIGHT. ANYTHING FROM THE STATE? ANY EXCEPTIONS TO THE CHARGE?

MR. GIESE: NO, YOUR HONOR.

THE COURT: ANYTHING FROM THE DEFENSE? ANY EXCEPTION TO THE CHARGE?

MR. DELGADO: YOUR HONOR, YES, SIR. IF YOU WILL JUST GIVE ME ONE MOMENT. YOUR HONOR, DID I PROPOSE TO YOU --

385 S.C. 597

The STATE, Respondent,

v.

Johnny Rufus BELCHER, Appellant.

No. 26729.

Supreme Court of South Carolina.

Heard May 14, 2009.

Decided Oct. 12, 2009.

Background: Defendant was convicted by jury in the Circuit Court, Laurens County, William P. Keesley, J., of murder and possession of a firearm during the commission of a violent crime, and he appealed.

Holdings: The Supreme Court, Kittredge, held that:

(1) jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide;

(2) the "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill);

(3) trial court's error in charging jury that malice could be inferred by the use of a deadly weapon could not be considered harmless; and

(4) Supreme Court's ruling would be effective for all cases which were pending on direct review or not yet final where the issue was preserved; overruling *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898; *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339; *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631; *State v. Mattison*, 276 S.C. 235, 277 S.E.2d 598; *State v. Arnold*, 266 S.C. 153, 221 S.E.2d 867; *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252; *State v. Maxey*, 262 S.C. 504, 205 S.E.2d 841; *State v. Martin*, 216 S.C. 129, 57 S.E.2d 55; *State v. Deas*, 262 S.C. 9, 23 S.E.2d 820; *State v. Martin*, 149 S.C. 464, 147 S.E. 606; *State v. Cleland*, 148 S.C. 86, 145 S.E. 628; *State v. Strickland*, 147 S.C. 514, 145 S.E. 404; *State v. Wilson*, 115 S.C. 248, 105 S.E. 341; *State v. Hardin*, 114 S.C. 280, 103 S.E. 557; *State v. Hollis*, 108 S.C. 442, 95 S.E. 74; *State v. Jones*, 101 S.C. 111, 85 S.E. 239; *State v. Crosby*, 88 S.C. 98, 70 S.E. 440; *State v. Owens*, 79 S.C. 125, 60 S.E. 305; *State v. Byrd*, 72 S.C. 104, 51 S.E. 542; *State v. Foster*, 66 S.C. 469, 45 S.E. 1; *State v. Taylor*, 56 S.C. 360, 34 S.E. 939; *State v. Petsch*, 43 S.C. 132, 20 S.E. 993; *State v. Symmes*, 40 S.C. 383, 19 S.E. 16; *State v. McIntosh*, 40 S.C. 349, 18 S.E. 1033; *State v. Ballington*, 346 S.C. 262, 551 S.E.2d 280; and *State v. McLemore*, 310 S.C. 91, 425 S.E.2d 752.

Reversed and remanded.

1. Homicide ⇐1392

A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide; overruling *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898; *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339; *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631; *State v. Mattison*, 276 S.C. 235, 277 S.E.2d 598; *State v. Arnold*, 266 S.C. 153, 221 S.E.2d 867; *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252; *State v. Maxey*, 262 S.C. 504, 205 S.E.2d 841; *State v. Martin*, 216 S.C. 129, 57 S.E.2d 55; *State v. Deas*, 202 S.C. 9, 23 S.E.2d 820; *State v. Martin*, 149 S.C. 464, 147 S.E. 606; *State v. Cleland*, 148 S.C. 86, 145 S.E. 628; *State v. Strickland*, 147 S.C. 514, 145 S.E. 404; *State v. Wilson*, 115 S.C. 248, 105 S.E. 341; *State v. Hardin*, 114 S.C. 280, 103 S.E. 557; *State v. Hollis*, 108 S.C. 442, 95 S.E. 74; *State v. Jones*, 101 S.C. 111, 85 S.E. 239; *State v. Crosby*, 88 S.C. 98, 70 S.E. 440; *State v. Owens*, 79 S.C. 125, 60 S.E. 305; *State v. Byrd*, 72 S.C. 104, 51 S.E. 542; *State v. Foster*, 66 S.C. 469, 45 S.E. 1; *State v. Taylor*, 56 S.C. 360, 34 S.E. 939; *State v. Petsch*, 43 S.C. 132, 20 S.E. 993; *State v. Symmes*, 40 S.C. 383, 19 S.E. 16; *State v. McIntosh*, 40 S.C. 349, 18 S.E. 1033; *State v. Ballington*, 346 S.C. 262, 551 S.E.2d 280; *State v. McLemore*, 310 S.C. 91, 425 S.E.2d 752.

2. Homicide ⇐1392

Because the evidence in murder prosecution presented a jury question on self-defense, it was error for trial court to charge the jury that it could infer malice from the use of a deadly weapon.

3. Criminal Law ⇐778(6)
Homicide ⇐1392

The "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).

4. Criminal Law ⇐1162, 1172.1(1)

Errors, including erroneous jury instructions, are subject to harmless error analysis.

5. Criminal Law ⇐1172.2

Trial court's error in charging jury that malice could be inferred by the use of a deadly weapon could not be considered harmless in murder prosecution; evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge, and it was entirely conceivable that the only evidence of malice was defendant's use of a handgun.

6. Criminal Law ⇐778(6)
Homicide ⇐1392

Where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon; the permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

7. Courts ⇐100(1)
Criminal Law ⇐1181(2)

Supreme Court's ruling that the "use of a deadly weapon" implied malice instruction had no place in a murder (or assault and battery with intent to kill) prosecution when evidence was presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill) represented a clear break from modern precedent, and thus, the Court's ruling would be effective for all cases which were pending on direct review or not yet final where the issue was preserved; however, Court's ruling would not apply to convictions challenged on post-conviction relief.

C. Rauch Wise, of Greenwood, and James E. Bryan, Jr., of Laurens, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, of Columbia, and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

Justice KITTREDGE.

Appellant Johnny Rufus Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin, Fred Suber. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Of special significance was the jury instruction that permits an inference of malice from the use of a deadly weapon.

[1] It has long been the practice for trial courts in South Carolina, as sanctioned by this Court, to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon. We granted Belcher's petition to argue against this precedent. Having carefully scrutinized the historical antecedents to this permissive inference, we hold today that a jury charge

instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide. We therefore reverse Belcher's convictions and remand for a new trial.

I.

Fred Suber was shot and killed during a cookout with family and friends. Those in attendance included Suber's ex-girlfriend and Hansel Brown, whom Suber believed was the father of his ex-girlfriend's child. Suber confronted Brown and an argument ensued. Belcher interceded.

The testimony presented at trial revealed conflicting versions of the event. The State's view tended to show that after Belcher confronted Suber, Belcher retrieved a gun from Brown and, with no justification or excuse, fatally shot Suber. Conversely, Belcher presented evidence that after the confrontation between Suber and Brown was seemingly resolved, Suber without provocation confronted him (Belcher) with a gun. Belcher fled to Brown's truck where he retrieved a gun from Brown and fired it at Suber while he (Suber) was approaching, gun in hand.

The jury was instructed that "malice may be inferred by the use of a deadly weapon" and convicted Belcher of murder and the related firearm charge. This direct appeal is before us pursuant to Rule 204(b), SCACR, certification.

II.

A.

[2] Because the evidence presented a jury question on self-defense, Belcher asserts it was error to charge the jury that it may infer malice from the use of a deadly weapon. We agree.

The trial court charged the jury, in part, as follows:

> Murder is the unlawful killing of another person with malice aforethought either expressed or inferred.... Malice can ... be inferred from facts and circumstances that are proven by the State. Malice may be inferred by the use of a deadly weapon. But these inferences are evidentiary only and may be considered by you along with all the other evidence and given such weight, if any, as you determine that they should receive.

The charge given by the trial court has heretofore been considered textbook. Yet when confronted with Belcher's challenge, the learned and experienced trial court judge expressed "concern about [the charge] rising to a charge on the facts."

Where a jury is asked to consider a lesser included offense of murder or a defense, Belcher asserts the permissive inference charge violates our common law and our constitutional prohibition against charging juries on the facts.[1] We elect to decide this appeal solely under the common law. Relying on Belcher's common law challenge, we conclude that our modern day usage of this jury charge has strayed from this Court's original jurisprudence.

B.

We begin by reviewing the progression of the jury charge in this state.[2]

We begin with *State v. Hopkins*, 15 S.C. 153 (1881). Hopkins was convicted of murder. He pled accident, and objected to the following "use of a deadly weapon" implied malice instruction: "In every case of intentional homicide the presumption of malice arises, and the fact of killing intentionally by the use of a deadly weapon being shown in any case, the burden of proof is thereby imposed upon the defendant to rebut such presumption, unless the facts and circumstances shown in the testimony in behalf of the [S]tate incidentally rebut it."[3] *Id.* at 156. Under the circumstances, the charge was error, and Hopkins was granted a new trial.

Hopkins cited to the rule that "[t]here is no doubt whatever of the isolated proposition that the law presumes malice from the mere fact of homicide, but there are cases as made by the proof to which the rule is inapplicable." The Court explained that, "[w]hen all the circumstances of the case are fully proved there is no room for presumption. The question becomes one of fact for the jury, under the general principle that he who affirms must prove, and that every man is presumed innocent until the contrary appears." *Id.* at 156–57 (citing *State v. Coleman*, 6 S.C. 185 (1875)). Hopkins then quoted at length from *Coleman:*

> This presumption is not applicable when the facts and circumstances attending the homicide are disclosed in evidence so as to draw a conclusion of malice or want of malice, as one fact, from the evidence. Presumptions of this class are intended as substitutes in the absence of direct proof, and are in their nature indirect and constructive. The best evidence of the state of mind attending any act is what was said and done by the person whose motive is sought for. The motive that impels to the taking of human life is no exception to this rule, and the importance of the consequences that depend on the accurate ascertainment of its nature in such cases, affords the strongest ground for limiting indirect and constructive proofs to the narrow grounds within which they belong. It appears, from the record before us, that the proofs embraced a statement of the origin of the difficulty between the parties; their conduct towards each other down to the time of the killing, and, to some extent, the subsequent conduct of the prisoner. When the evidence is of such a character, it must be presumed to be sufficient to enable the jury to draw from it a conclusion of fact one way or the other. Under such circumstances there was no necessity, and, therefore, no propriety in resorting to any general presumption arising by operation of law. When the circumstances preceding and attending an act of this character are full, as in the present case, the prisoner is entitled to the benefit of any doubt that may arise, and cannot be deprived of such benefit by any presumption of guilt arising by operation of law from the naked fact of homicide. A charge may be erroneous, although the propositions of which it is composed may *severally* be conformable to recognized authority, if in its scope and bearing in the case it was likely to lead to a misconception of the law.

Id. at 157–58 (quoting *Coleman*, 6 S.C. at 186–87).

We next review the case of *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991). Levelle killed his wife and was convicted of murder. He appealed on several grounds, including a challenge to the State's requested jury instruction that "malice will be inferred from the use of a deadly weapon." Although that precise charge was not given, the Court addressed the issue, noting:

> [E]ven if it be assumed that the judge must be regarded as adopting the language used in the solicitor's ninth request, quoted above, we still think there was no error. In 2 Bish. Crim. Law[ ] § 680, it is said: "*As general doctrine, subject, we shall see, to some qualification, the malice of murder is conclusively inferred from the unlawful use of a deadly weapon, resulting in death.*" And to the same effect, see 3 Greenl. Ev. §§ 145, 147. This doctrine has also been recognized in this state. *See State v. Toohey*, [2 Rice Dig. 195 (1819)]; *State v. Ferguson*, [20 S.C.L. (2 Hill) 619 (1835)]; *State v. Smith*, [32 S.C.L. (2 Strob.) 77 (1847)]. It is true that the inference of malice drawn from the use of a deadly weapon may be rebutted by testimony, but, in the absence of any such testimony, malice may be and is inferred from the use of a deadly weapon causing death.

1. S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

2. We have selected a series of cases which represent our jurisprudence in this area.

3. In reviewing this dated precedent, we note that the law then imposed the burden of proving various defenses (self-defense, for example) on the defendant. Under modern jurisprudence, burden shifting is not permitted. For this reason, we analyze this older precedent in light of prevailing law that forbids burden shifting.

Levelle, 34 S.C. at 127, 13 S.E. at 320 (emphasis added).

Levelle's reliance on section 680 of *2 Bishop Criminal Law*, a criminal law treatise, is instructive but not entirely complete. It is our view that *Levelle* considered and incorporated the referenced "qualification" when it concluded that, "[i]t is true that the inference of malice drawn from the use of a deadly weapon *may be rebutted by testimony, but, in the absence of any such testimony,* malice may be and is inferred from the use of a deadly weapon causing death." *Id.* at 127, 13 S.E. at 320 (emphasis added). The recognition that some facts will not permit the inference of malice from the use of a deadly weapon lies at the heart of the qualification.

More specifically, Bishop's criminal law treatise ties the qualification to the proposition that malice is inferred from the "unlawful use of a deadly weapon." The malice inference would, therefore, have no place where the use of a deadly weapon was "lawful." As we shall see, the significant import of the qualifying term "lawful" was effectively abandoned in our subsequent decisions.

Levelle never expanded upon the "in the absence of any such testimony [rebutting malice]" qualification, perhaps because it was not necessary to the disposition of the appeal. We are persuaded, though, that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified. Our belief is supported by *Hopkins* and a comment in the section in Bishop's treatise immediately following the one cited in *Levelle*:

> If there is to be a rigid rule of law on the subject, it is reasonable to hold, that, where one uses a deadly weapon *without justification*, he evinces a disregard for human life and safety amounting to "malice."

2 JOEL PRENTISS BISHOP, COMMENTARIES OF THE CRIMINAL LAW § 681 (6th ed. 1877) (emphasis added).

Beyond the support we find in *Hopkins*, our imputation of section 681 of Bishop's treatise into the meaning of *Levelle's* qualifying language is further supported by the case of *State v. Jackson*, 36 S.C. 487, 15 S.E. 559 (1892). *Jackson* affirmed a murder conviction where "there was not a shadow of testimony tending to show any excuse or provocation for firing the fatal shot which resulted in the instant death of the [victim]." *Id.* at 490, 15 S.E. at 560. The Court approvingly noted that "[t]he proof tends to show that the killing was done with a deadly weapon, and, under such circumstances, the law implies malice, and the killing would be murder, *unless there were some circumstances of justification or excuse in the case*" *Id.* at 490, 15 S.E. at 561 (emphasis added).

We pause here, for we view the approach to the "use of a deadly weapon" implied malice charge as seemingly settled law from *Hopkins* and the *Levelle-Jackson* qualification. This Court, however, then began a slow, and at first an almost imperceptible, retreat, as *State v. Byrd* illustrates. 72 S.C. 104, 51 S.E. 542 (1905).

In *Byrd*, this Court, in reviewing the jury instruction stated that: "The use of a deadly weapon presumes malice, *but the presumption may be rebutted.* So, after all, it is left for the jury to say, from all the facts and circumstances, whether the killing was done with malice, or not." *Id.* at 110, 51 S.E. at 544 (emphasis added). Relying on *Levelle* and *Jackson*, the *Byrd* Court found no error associated with the jury charge: "This was in exact accordance with the law...." *Id.* at 110, 51 S.E. at 544. *Byrd* references *Levelle* and *Jackson*, yet approved of the charge even with evidence of mitigation.

The Court never expressly confronted the contradiction of inviting a jury to infer malice from the use of a deadly weapon where evidence was presented that would reduce, mitigate, excuse or justify the homicide, which was the core feature of *Hopkins*. In fact, whatever vestige remained of the *Levelle-Jackson* qualification was unceremoniously abandoned in two cases from 1920.

The first case is *State v. Hardin*, 114 S.C. 280, 103 S.E. 557 (1920). Hardin was indicted for murder. He pled self-defense and was convicted of manslaughter. Hardin presented the same argument Belcher advances. The jury in *Hardin* was charged that "malice

may be implied from the use of a deadly weapon." Hardin excepted as follows:

> The error is that his honor had no right to instruct the jury that they might infer malice from the mere fact of killing with a weapon calculated to do serious bodily harm or to take life, for the reason that this is a charge on the facts contrary to the Constitution, in that it undertakes to intimate to and instruct the jury what facts in the case are evidence of malice.
>
> It was also error, in that after all the evidence is out, the presumption of malice from the use of a deadly weapon fades from the case, and the jury must find malice, if at all, from the evidence, without any aid from the court as to what weight should be attached to killing with a deadly weapon, or what inference they may draw from such.

Id. at 290, 103 S.E. at 560.

Without discussion, the *Hardin* Court rejected the challenge to the jury instruction: "The exceptions are all overruled, being without merit." *Id.* at 295, 103 S.E. at 561.

The second case from 1920 is *State v. Wilson*, 115 S.C. 248, 105 S.E. 341 (1920). Wilson claimed the killing was accidental but was convicted of murder. The jury was charged that "[m]alice may be implied from the intentional use of a deadly weapon." *Id.* at 249, 105 S.E. 341. Significantly, the trial court omitted the qualifying words "without just cause or excuse[,]" to which Wilson excepted. *Id.* at 249, 105 S.E. 341. Notwithstanding the absence of the language "without just cause or excuse[,]" *Wilson* held the "presiding judge[ ] delivered a full, clear, and able charge." *Id.* at 249, 105 S.E. 341.

Hardin's summary approval of the charge that malice may be presumed in any homicide from the use of a deadly weapon, coupled with *Wilson's* approval of omitting the language "without just cause or excuse[,]" marked the end of the *Levelle-Jackson* qualification.

Subsequently, in the case of *State v. Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956), an extensive malice charge was upheld that included the instruction "that implied malice is presumed from the use of a deadly weapon...."[4] *Id.* at 445, 93 S.E.2d at 467. This portion of the malice charge was not central to Fuller's appeal, for Fuller's appeal focused on the purported lack of malice due to his deficient mental state.

After *Fuller*, no reported decisions addressed this charge until the case of *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). In *Lee*, this Court noted that, "the use of a deadly weapon implies malice." *Id.* at 318, 178 S.E.2d at 656. To support this statement of law, *Lee* cited to *Byrd*, discussed *supra*.

On the heels of *Lee*, we come to *State v. Maxey*, 262 S.C. 504, 205 S.E.2d 841 (1974) and *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252 (1975). *Maxey* and *Alford* upheld the "use of a deadly weapon" implied malice instruction where self-defense was submitted to the jury. *Maxey*, 262 S.C. at 507–08, 205 S.E.2d at 842; *Alford*, 264 S.C. at 34, 212 S.E.2d at 255. In fact, part of the charge in *Alford* was "[t]he State could just prove that the act was done with a deadly weapon and stop right there and malice would have been proven." *Alford*, 264 S.C. at 34, 212 S.E.2d at 255. The *Alford* Court found no error.

Thus, with this Court's continuing imprimatur, by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that "malice is presumed from the use of a deadly weapon." The critical observation is that the charge was proper even where evidence was presented that would reduce, mitigate, excuse or justify the killing.

C.

The law, of course, today speaks in terms of "permissive inferences," not "presumptions." This transition resulted from the United States Supreme Court's pronounce-

4. The complete portion of this charge was: "I charge you that implied malice is presumed from the use of a deadly weapon, or from the wilful, deliberate and intentional doing of an unlawful act without just cause or excuse." The language may appear to incorporate the *Levelle-Jackson* qualification, but the use of the disjunctive term "or" maintains the "use of a deadly weapon" inference as a standalone, independent statement of the law.

ment that the Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant. *See Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (holding that "burden-shifting presumption[s]" or "conclusive presumption[s]" deprive a defendant of the "due process of law" and are therefore unconstitutional); *Mullaney v. Wilbur*, 421 U.S. 684, 703–04, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (holding that the "Due Process Clause" forbids a state from placing the burden on the accused to prove his actions reduced the crime from "murder to manslaughter").

Following *Sandstrom* and its progeny, this Court followed suit. In *State v. Mattison*, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981), we stated that an "appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it."

Mattison, however, expressed no reluctance with the underlying premise that malice is inferred from the use of a deadly weapon. The jury in *Mattison* was charged: "[T]he law says that if one intentionally kills another with a deadly weapon, the implication of malice arises. In other words, the law implies malice from the use of a deadly weapon." *Id.* at 237, 277 S.E.2d at 599–600. As discussed more fully below, the transparent error in the use of the word "intentional" is that self-defense involves an intentional act.

Two years later, in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991), this Court again addressed the challenged jury instruction in light of the burden shifting jurisprudence of the United States Supreme Court. The instruction used in Elmore's trial was held to have been a mandatory presumption, rather than a permissive inference, and therefore unconstitutional. The *Elmore* Court went on to set forth a jury charge it felt comported with the Due Process Clause.

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts[ ] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. at 421, 308 S.E.2d at 784. The Court noted that "only slight deviations from this charge will be tolerated." *Id.* at 421, 308 S.E.2d at 784. *Elmore* articulated the contemporary jury charge, until today.

D.

In examining the legal proposition in a homicide prosecution that an inference of malice may arise from the use of a deadly weapon, we are unable to harmonize the earlier writings of this Court with our modern jurisprudence.

One appellate court has described this jury charge as a "half-truth." *Glenn v. State*, 68 Md.App. 379, 511 A.2d 1110, 1126 (1986). In discussing its meaning behind this observation, *Glenn* notes that malice includes the absence of justification, excuse and mitigation.[5] *Glenn*, 511 A.2d at 1122. When malice is viewed in light of these component parts, it becomes clear that inferring malice from the use of a deadly weapon is indeed only a "half-truth." The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.

5. Under South Carolina law, "[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000); *see also State v. McDaniel*, 68 S.C. 304, 312, 47 S.E. 384, 387 (1904) (same). "It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992); *see also Singletary v. State*, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984) (same); *State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 170 (Ct.App.2007) (same).

The burden shifting present in our earlier cases aside, the holding of *Hopkins* and the qualification set forth in *Levelle* and *Jackson* hew more closely to what we believe is the proper application of the charge than that expressed in *Byrd, Wilson, Hardin, Fuller, Lee, Maxey, Alford, Mattison* and *Elmore*.

[3] Under our policy-making role in the common law, we hold that the "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill[6]) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).

The use of the term "intentional" is instructive. Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise." *Elmore*, 279 S.C. at 421, 308 S.E.2d at 784. That highlights the "half-truth" nature of the charge.[7]

E.

We do not reach our decision lightly. The State understandably urges this Court to honor what has been treated as a settled fixture in our criminal law. The able trial judge diligently prepared the charge in faithful adherence to our precedent. Moreover, the trial court charged the jury that the "killing has to be unlawful" and that "[t]here has to be a deliberate and intentional design to use or employ or handle a deadly weapon so as to endanger the life of another without just cause or excuse." Thus, while we acknowledge the State's argument, we are firmly convinced that instructing a jury that "malice may be inferred by the use of a deadly weapon" is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity.

F.

[4, 5] Errors, including erroneous jury instructions, are subject to harmless error analysis. *See Lowry v. State*, 376 S.C. 499, 510–11, 657 S.E.2d 760, 766 (2008). In many murder prosecutions, as Belcher concedes, there will be overwhelming evidence of malice apart from the use of a deadly weapon.[8] Here, however, the error in

6. Because the crime of assault and battery with intent to kill requires malice, our holding today applies to ABWIK. *State v. Wilds*, 355 S.C. 269, 275, 584 S.E.2d 138, 141 (Ct.App.2003).

7. Today's decision does not stand alone. Other states that have addressed this issue have rejected the charge under similar circumstances. *E.g., Farris v. Commonwealth*, 77 Ky. 362 (Ky.1878) (noting that when "there is evidence before the jury from which they might conclude that the killing was done in necessary self-defense or in the sudden heat of passion, such an instruction may be fatally misleading"); *Glenn v. State*, 68 Md.App. 379, 511 A.2d 1110, 1126–28 (1986) (reversing a conviction for "assault with intent to murder" by recognizing that the jury charge only speaks to the "intent [that] may be inferred" from the use of a deadly weapon, but that the charge is misleading because it does not address whether the "intent was unexcused or unjustified or [whether] the intent was unmitigated"); *Erwin v. State*, 29 Ohio St. 186, 191 (Ohio 1876) ("[W]here the attending circumstances [of the killing] are shown in detail, some of which tend to disprove the presence of malice or purpose to kill, it is misleading and erroneous to charge a jury that in such a case the law raises a presumption of malice and intent to kill from the isolated fact that death was caused by the use of a deadly weapon."); *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244, 252 (1994) ("[I]t is erroneous in a first degree murder case to instruct the jury that if the defendant killed the deceased with the use of a deadly weapon, then intent, malice, willfulness, deliberation, and premeditation may be inferred from that fact, where there is evidence that the defendant's actions were based on some legal excuse, justification, or provocation."). For a discussion surrounding the history of this charge, see Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435 (2008).

8. "In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption.... Obviously[,] when a defendant walks into the store [and] shoots and robs the clerk, a charge that the jury may infer malice is not prejudicial to the defendant." (Brief of Appellant 9).

charging that malice may be inferred by the use of a deadly weapon cannot be considered harmless. Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun. We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt.

III.

[6] Today we return to the rationale underlying *Hopkins*, *Leveille* and *Jackson* and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.[9] The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill)

[7] Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved.[10] *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final"); *Harris v. State*, 273 Ga. 608, 543 S.E.2d 716, 717–18 (2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline'—i.e., cases which are pending on direct review or not yet final"). Our ruling, however, will not apply to convictions challenged on post-conviction relief. *See generally Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). We reverse and remand for a new trial.[11]

REVERSED AND REMANDED.

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

9. The standard implied malice charge remains valid, as does the general permissive inference instruction: "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." In addition, we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging. "Do jurors need the court's permission to infer something? The answer is, of course not." Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008).

10. The decision today overrules in part considerable precedent of this Court and the court of appeals. We overrule all cases involving a homicide or a charge of assault and battery with intent to kill where two factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide or the charged ABWIK. We overrule all such cases only insofar as they meet these criteria. The following represents our best efforts to catalogue the cases that are overruled: *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006); *State v. Norris*, 285 S.C. 80, 328 S.E.2d 339 (1985); *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631 (1981); *State v. Mattison*, 276 S.C. 235, 277 S.E.2d 598 (1981); *State v. Arnold*, 266 S.C. 153, 221 S.E.2d 867 (1976); *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252 (1975); *State v. Maxey*, 262 S.C. 504, 205 S.E.2d 841 (1974); *State v. Martin*, 216 S.C. 129, 57 S.E.2d 55 (1949); *State v. Deas*, 202 S.C. 9, 23 S.E.2d 820 (1943); *State v. Martin*, 149 S.C. 464, 147 S.E. 606 (1929); *State v. Cleland*, 148 S.C. 86, 145 S.E. 628 (1928); *State v. Strickland*, 147 S.C. 514, 145 S.E. 404 (1928); *State v. Wilson*, 115 S.C. 248, 105 S.E. 341 (1920); *State v. Hardin*, 114 S.C. 280, 103 S.E. 557 (1920); *State v. Hollis*, 108 S.C. 442, 95 S.E. 74 (1918); *State v. Jones*, 101 S.C. 111, 85 S.E. 239 (1915); *State v. Crosby*, 88 S.C. 98, 70 S.E. 440 (1911); *State v. Owens*, 79 S.C. 125, 60 S.E. 305 (1908); *State v. Byrd*, 72 S.C. 104, 51 S.E. 542 (1905); *State v. Foster*, 66 S.C. 469, 45 S.E. 1 (1903); *State v. Taylor*, 56 S.C. 360, 34 S.E. 939 (1900); *State v. Petsch*, 43 S.C. 132, 20 S.E. 993 (1895); *State v. Symmes*, 40 S.C. 383, 19 S.E. 16 (1894); *State v. McIntosh*, 40 S.C. 349, 18 S.E. 1033 (1894); *State v. Ballington*, 346 S.C. 262, 551 S.E.2d 280 (Ct.App.2001); *State v. McLemore*, 310 S.C. 91, 425 S.E.2d 752 (Ct.App.1992).

11. Belcher's successful challenge to this jury charge requires the Court to reverse his convictions and remand for a new trial. We therefore decline to reach Belcher's remaining appellate issues. *See Hughes v. State*, 367 S.C. 389, 408-09, 626 S.E.2d 805, 815 (2006) (noting that appellate court need not reach remaining issues on appeal when addressed issue is dispositive).

385 S.C. 618

In the Matter of Kenneth L. MITCHUM, Respondent.

No. 26740.

Supreme Court of South Carolina.

Submitted Oct. 13, 2009.

Decided Nov. 9, 2009.

Background: In attorney disciplinary proceeding, attorney and the Office of Disciplinary Counsel (ODC) entered into an Agreement for Discipline by Consent.

Holding: The Supreme Court held that indefinite suspension was warranted as sanction for attorney's admitted misconduct involving the mishandling of client matters.

Indefinite suspension ordered.

Attorney and Client ⇐59.13(7)

Indefinite suspension from the practice of law was warranted as sanction for attorney who admitted to violations of the rules of professional conduct based on his conduct in failing to diligently pursue several cases, signing a stipulation of dismissal without client's knowledge or consent, attempting to provide financial assistance to a client in connection with pending or contemplated litigation, and falsely leading a client to believe that a dismissed matter was still on the docket for trial.

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Kenneth L. Mitchum, pro se, of Georgetown.

PER CURIAM.

In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction provided by Rule 7, RLDE, Rule 413, SCACR. We accept the agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

I.

Respondent represented Complainant A in a civil action. Respondent failed to keep Complainant A reasonably informed regarding the status of the case and failed to diligently pursue the case. In addition, respondent signed a Stipulation of Dismissal in the case without Complainant A's knowledge or consent a nd failed to inform Complainant A that he had signed the Stipulation of Dismissal.

II.

Respondent represented a client in a civil action. Respondent failed to diligently pursue the case. During the representation, respondent was placed on definite suspension for nine (9) months and an attorney was appointed to protect the interests of respondent's clients (ATP). *In the Matter of Mitchum*, 378 S.C. 597, 663 S.E.2d 482 (2008).

STATE OF SOUTH CAROLINA
South Carolina Department of Probation, Parole and Pardon Services
S. Phillip Lenski, Administrative Law Judge
Appellate Case No. 2019-000934

Bernard Bagley, #175851 — Appellant

v.

South Carolina Department of Probation,
Parole and Pardon Services, — Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal conatin all material proposed to be included by the parties and not any other material which complies with Rule 201(g), SCACR.

August 26, 2019

s/
Bernard Bagley
#175851/HD133/Ker/CI
4848 Goldmine Hwy.
Kershaw, SC 29067

pro se