THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEE COUNTY
IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
GEORGE C. JAMES, JR. Chief Administrative Judge
Third Judicial Circuit Court

CASE No. 2012-CP-31-0173

FREDDIE GARDNER #178124. . . . . Applicant,

V.

THE STATE OF SOUTH CAROLINA. . . . . Respondent.

RULE 243 (c) EXPLANATION REQUIRED

Freddie Gardner #178124

Freddie Gardner #178124
Perry Correctional Institution B-X-18
430 Oaklawn Road
Pelzer S.C. 29669

April 17, 2013

Other Counsel of record:
Office of the Attorney General
Assistant Attorney General, Megan E. Harrigan
P.O. Box 11549
Columbia S.C. 29211

1. Did trial Counsel render ineffective assistance of Counsel when he precise admissions his client guilt without consent in his closing argument which violated Sixth and Fourteenth Amendments rights of United States Constitution?

The Applicant contends that his counsel's admission of his guilt without consent in his closing argument constituted ineffective assistance of Counsel in violation of Sixth and Fourteenth Amendments rights of united States Constitution to a fair trial. See Transcript of Record (Trial) pg. 201, lines 21-25, pg. 202, lines 6-9, pg. 205, lines 22-25 and pg. 206, lines 1-7.

21. the State has a high burden of proof in a criminal
22 case, such as this. You heard before reasonable doubt. They
23 have to prove their case beyond a reasonable doubt, which
24 means that there can be no doubt about Freddie Gardner's
25 guilt.

6 Ladies and Gentlemen, there are three choices in
7 this case: either Freddie Gardner is guilty of murder; he is
8 guilty of voluntary manslaughter; or he is innocent by reason
9 of self-defense.

22 Ladies and Gentlemen, it is a very difficult -- very
23 difficult case. No one is going to bring back Mr. Wylie, but
24 they've got Mr. Gardner here and they've got him charged with
25 a crime. and it is your job to decide what, if anything, Mr.
1 Gardner is guilty of.
2 Ladies and Gentlemen, I contend, as I view the
3 evidence in this case, it is not murder, Ladies and Gentlemen,
4 not some grand plan that Freddie Gardner had to kill Mr. Wylie
5 that evening. They didn't bring any body to state that he had
6 told some body before he left his house that night he was going
7 to go out and kill Mr. Wylie.

See Wiley v. Sowders 647 F.2d 642 (1981), Since Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), the Sixth Amendment of the United States Constitution has been construed to require that a criminal defendant be afforded effective assistance of Counsel.[7] As the Supreme Court noted in McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), Counsel's performance must be "within the range of competence demanded of attorneys in criminal cases." Id., at 771, 90 S.Ct. at 1449.

In his opinion in Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) Judge Celebrezze Chronicled the history of law of ineffective counsel with this circuit. The opinion recounts the early "see-saw between a 'reasonably effective assistance of counsel' standard [United States v. Johnston, 318 F.2d 288 (6th Cir. 1963)] and a 'farce and mockery' test [O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961)]." Beasley, supra, at 695. Beasley resolved this fluctuation by adopting a standard more probing and more objective than the farce and mockery standard. Beasley held the Sixth Amendment to require that "[d]efense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by considerations." Id., at 696.

The Beasley standard of effective counsel incorporates several well-settled principle of law. The requirement that counsel be effective is not a result-oriented standard. Counsel is required to be competent, but not necessarily victorious. The measure of competence is that of the ordinary practitioner in the heat of trial. Counsel's effective assistance is not to be judged from hindsight. Id., at 696. Error-free representation is not required. Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970).

Any claim alleging counsel's ineffective trial performance requires the court to mediate between the fundamental due process rights of the accused and the need of defense counsel to structure his case. It is not the purpose of this court to second-guess counsel's judgment and trial strategy. As Justice Harlan asserted in his concurring opinion in this case of Brookhart v. Janis, 384 U.S. 1, 8, 86 S.Ct. 1245, 1249, 16 L.Ed.2d 314 (1966):

"

> . . . a lawyer may properly make the tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."

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7. The Sixth Amendment of the United States Constitution guarantees that "[in] all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of counsel for his defence."

The welfare of the client, our adversarial system and orderly judicial procedure require that an attorney chart his course of litigation free from undue intervention. It is axiomatic that no two lawyers would ever try the same case in exactly the same manner. The Court is particularly sensitive to counsel's need to freely structure his own argument on his client's behalf.

Notwithstanding the strong policy favoring attorney autonomy, ethical, professional and constitutional principles establish limits to counsel's control over a criminal case. Canon 7 (EC 7-24) of the Code of Professional Responsibility of the American Bar Association provides:

"The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact."

The decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969). The defendant's decision to plead guilty cannot be presumed from the plea itself in the context of an otherwise silent record. Instead, the trial court must make an on the record inquiry of the defendant to insure that the defendant's plea is voluntary and intelligent. Id, at 243-244, 89 S.Ct at 1712-1713. Similarly, an attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of "not guilty" unless the defendant unequivocally understands the consequences of the admission. Brookhart v. Janis, supra. Counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof. However, an attorney may not stipulate to facts which amount to the "functional equivalent" of a guilty plea. United States v. Brown, 428 F. 2d 1100 (D.C. Cir. 1970); Cox v. Hutto, 589 F. 2d 394 (8th Cir. 1979); Achtien v. Dowd, 117 F. 2d 989 (7th Cir. 1941).

Appellee relies on Meadows v. Commonwealth, Ky., 550 S.W. 2d 511 (1977), for the proposition that in Kentucky an appeal to the jury's mercy accompanied by a concession of guilt is a permissible trial tactic. That is not a correct reading of meadows. Meadow's counsel, in closing argument, said, "I think he deserves punishment." The Court held this did not constitute a plea of guilty, but instead was a "ploy." The Court went on to say:

"The action of trial counsel in this particular instance may have amounted to a tactical retreat but certainly it did not surrender the cause." Id., at 512.

Here, however, the admissions of Wiley's Counsel constituted a surrender of the Sword.

In People v. Carter, 41 ILL. App. 3d 485, 354 N.E. 2d 482 (1976), the Appellate Court of Illinois analyzed a factual and legal situation similar to the case at bar. In Carter, the defendant was charged with armed robbery. The victim testified that after the defendant lost his money in a dice game, he pulled a gun and stated that this was a stickup. The defendant took the stand and denied robbing the victim or taking a gun to the apartment. Defense counsel, during closing argument, not only stated that his client was not very brilliant in doing what he did, but specifically declined to discuss the factual discrepancy concerning whether the defendant was armed. Reversing the defendant's conviction on the grounds the defendant was denied effective assistance of Counsel by defense counsel's closing argument, the court stated:

"In the instant case, we believe defendant was denied the effective assistance of Counsel. Counsel's closing argument is the most notable incident that leads us to this conclusion. A defendant's closing argument permits an answer to the State on the law and the facts and a presentation of the defense theory... Here, Counsel's closing argument not only failed to perform this function, but was tantamount to an admission of his client's guilt... Counsel abdicated his client's position... such failures cannot be overlooked as mere errors in judgment or trial strategy." (Citation omitted, emphasis added.) Id., at 485.

Also, in Commonwealth v. Lane, 382 A.2d 460 (1978), the Supreme Court of Pennsylvania analyzed a similar situation. The defendant was charged with knowingly receiving stolen property. During closing argument, defense counsel said this to the Court, "If he didn't have a record I would ask your Honor to give him the benefit of the doubt and find him not guilty." Reversing the defendant's conviction because he was denied effective assistance of Counsel, the Court stated:

"It is urged Counsel was engaged in a strategic trial tactic to obtain leniency for his client. We are not so persuaded. At the particular moment, Lane was challenging his guilt and the issue confronting the court was guilt or innocence. We are unable to see how trial Counsel's statement would aid Lane's claim of innocence." Id., at 461.

Throughout the closing arguments, both attorneys for petitioner repeatedly stated to the jury that petitioner was "guilty"; "guilty as charged," and "guilty beyond reasonable doubt." Counsel's argument represented the precise admission which the defendant rejected in making his earlier plea of "not guilty." Counsel made his remarks with knowledge of petitioner's earlier "not guilty" plea, and without petitioner's

Consent.[8]

A plea of "not guilty" has at least two dimensions recognizable by this court. First, in pleading "not guilty" a defendant reserves in to to those constitutional rights fundamental to a fair trial. Included in this category of constitutional rights is the accused's right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. Boykin, Supra. Second, in pleading "not guilty," a defendant exercises his right to make a statement in open court that he intends to hold the government to strict proof beyond a reasonable doubt as to the offense charged. Byrd v. United States, 342 F.2d 939 (D.C. Cir. 1965).

Unquestionably, the constitutional right of a criminal defendant to plead "not guilty," or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea. We, therefore, hold that petitioner was deprived of effective assistance of Counsel when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy. In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin, Supra.

Although statments made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, Counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession

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8 Petitioner first raised before the Kentucky Supreme Court his assertion that he did not consent to counsel's concession of guilt by his response to the amicus brief submitted by his trial counsel. No claim was ever made by trial counsel in their amicus brief to the Kentucky Supreme Court that their trial strategy was made known or consented to by petitioner. Petitioner reaffirmed his non-consent in his sworn petition for habeas corpus. Respondent did not dispute this issue. The United States Magistrate, in his finding of fact number 11, summarized the facts surrounding trial counsel's confession of guilt without mentioning that petitioner did not consent to this confession. The Magistrate's conclusion of law number 3 noted that no facts were in dispute. Petitioner objected to these findings insofar as they did not reflect his lack of consent to counsel's trial tactic. Petitioner's statement that he did not consent to counsel's trial tactic is not controverted. In any event, an alleged consent in the present case cannot be presumed from a silent trial record. Consent obtained without the protection of an on the record inquiry as required by Boykin, supra, is a nullity.

Of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Finally, the question remains open whether an adjudication of ineffective assistance requires a showing that defense counsel's performance adversely affected the trial's outcome and, if such a showing is required, on whom the burden of proving or disproving prejudice falls. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Yelardy, 567 F.2d 863 (6th Cir. 1978), Cert. denied, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978); and United States v. Beasley, Supra. Under the facts of this case, however, no such claim could seriously be raised. Despite strong circumstantial evidence against petitioner, no witness observed the burglary. No one saw a gun in the hand of either defendant. Yet use of a "deadly weapon" is one of the essential elements under Kentucky law of first degree burglary. Who can be sure that both or either of these brothers would have been convicted had not the jury been told by defendant's own attorney "they're guilty"?

A criminal defendant has a constitutional right to expect during trial that his attorney will, at all times, support him, never desert him, and will perform with reasonable competence and diligence. Defense counsel in this case fell short of this modest standard.

Accordingly, the judgment of the district court is reversed and the case is remanded to the district court with instructions to grant petitioner's release unless the state initiates procedures to retry him within a reasonable period of time.

See also State v. Harbison 337 S.E.2d at 506-508 (N.C. 1985) turning to the merits of this appeal, the defendant contends that his counsel's admission of his guilt and plea for a manslaughter conviction constituted ineffective assistance of counsel in violation of his right to a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States. The test for resolving claims of ineffective assistance of counsel was recently articulated by this court and by the Supreme Court of the United States. In state v. Braswell 312 N.C. 553, 324 S.E.2d 241 (1985), this court adopted the Supreme Court's language in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and enunciated the following two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that Counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting Strickland, 466 U.S. at ____, 104 S.Ct.

at 2064, 80 L.Ed.2d at 693).

The defendant cites several cases in support of the proposition that a counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance of counsel. In Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), the defendant's lawyer admitted his client's guilt and pled for mercy. The Court held the defendant was deprived of his Sixth Amendment right to effective assistance when his counsel admitted guilt without first obtaining the defendant's consent to this trial tactic. See also, King v. Strickland, 748 F.2d 1462 (11th Cir. 1984); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Young v. Zant, 677 F.2d 792 (11th Cir. 1982); Commonwealth v. Lane, 476 Pa. 258, 382 A.2d 460 (1978). Although we find such authority persuasive, we conclude that the defendant in the present case need not show any specific prejudice in order to establish his right to a new trial due to ineffective assistance of counsel.

Although this court still adheres to the application of the Strickland test in claims of ineffective assistance of counsel, there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." United States v. Cronic, 466 U.S. 648 ——, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657, 667 (1984); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Supreme Court has presumed prejudice in various Sixth Amendment cases. That Court has, for example, "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." Cronic, 466 U.S. at ——, 104 S.Ct. at 2047, 80 L.Ed.2d at 668, n. 25. See, e.g., Geder's v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (defense counsel was not allowed to make closing argument); Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (prejudice presumed when counsel affected by actual conflict of interest). Likewise, when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.

A defendant's right to plead "not guilty" has been carefully guarded by the Courts. See Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981). When a defendant enters a plea of "not guilty," he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt. Wiley, 647 F.2d at 650.

A plea decision must be made exclusively by the defendant. "A plea of guilty or no

Contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury." State V. Sinclair, 301 N.C. 193, 197, 270 S.E. 2d 418, 421 (1980). Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences. Boykin v. Alabama, 395 U.S. 238, 89 S.ct. 1709, 23 L. Ed. 2d 274 (1969); N.C. G.S. § 15 A-1011 through § 15 A-1026; State v. Sinclair, 301 N.C. 193, 270 S.E. 2d 418 (1980).

This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the state to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury. Wiley, 647 F.2d at 649-50.

For the foregoing reasons, we conclude that ineffective assistance of counsel, per-se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent. Accordingly, we must arrest the judgments against the defendant for murder and assault and remand these matters to the superior court, Burke County, with instructions to that court to award the defendant a new trial.

On January 26, 1995, the Applicant timely filed a "PCR" Application (95-cp-31-13) which comply with the filing procedures of the Uniform Post-Conviction Procedure Act S.C. Code Ann. § 17-27-10 to 160 S.C. Code Ann. § 17-27-45(A) raising the following:

1. Ineffective Assistance of Counsel.
2. State fail to evaluation [sic] my head before trial of murder.

An evidentiary hearing was convened on August 7, 1996, at the Sumter County Courthouse. In that ORDER OF DISMISSAL (95-cp-31-13) with prejudice on September 13, 1996, by Honorable Judge Cooper Jr. The Applicant's first allegation is that he was denied effective assistance of trial counsel. This Court finds that the attorney for the Applicant was diligent in his representation of the Applicant; performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S.C. 1,

239 S.E. 2d 750 (1977); Marzullo v. Maryland, 561 F. 2d 540 (4th cir. 1977). The proper standard for attorney performance is that of reasonable effective assistance. Strickland v. Washington, 466 U.S. 668, 104 S.ct. 2052 (1984). A convicted defendant's claim that Counsel's assistance was so defective as to require reversal of the conviction requires that the defendant show first, that counsel's performance was deficient and; second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington, supra. See also Butler v. State, 286 S.C. 441, 334 S.E. 2d 813 (1985). This Court finds that the performance of the Applicant's attorneys was not deficient nor was the Applicant prejudiced in any way by his attorney's performance. This was error.

The Applicant is not raising a new ineffective assistance of counsel, but trying to Corrected the error make in original PCR Application and the error in ORDER OF DISMISSAL (95-CP-31-13) by Judge Cooper Jr. The Applicant raised ineffective assistance of counsel in his original PCR application (95-cp-31-13) but fail to show that Counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and fail to show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable or what error the counsel made during trial. The Applicant (95-cp-31-13) Application for post Conviction relief was inadequated fill out by another inmate which didn't have no argument or identify the ineffective assistance of Counsel. The ground was inadequately raised nor was it asserted properly. But told Applicant that appoint PCR counsel would amend the application. Rule 71.1 (d) provides: Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary. This was not done by appointed PCR Counsel. The Applicant was depending on appointed PCR counsel to corrected any error and raised any ground he may have. The PCR hearing afford to the Applicant was inadequately because appointed PCR Counsel did not presented an argument on Applicant behalf, but ask the Applicant question at the hearing. See 1997 Appendix, Page 267-277. But instead, "it is one thing for a prisoner be told that appointed Counsel see no way to help him and quite another for him to feel sandbagged when Counsel appointed by one arm of the government seems to be helping another to seal his doom." Suggs v. United States, 391 F. 2d 971, 974 (1968).

The Applicant held that statute of limitations does not apply to S.C. Code Ann. § 17-27-45 (C) read as follows: If the Applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the Conviction or sentence, the application must be filed under this chapter within one

year after the date of actual discovery of the facts by Applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Applicant actual discovery on June 5, 2012, make this Application for post-conviction relief timely under S.C. Code Ann. §17-27-45(C).

2. Trial Court error in jury instruction that malice may be inferred by the use of a deadly weapon which violated common law and constitutional of S.C. Const. art. V §21?

Where a jury is asked to consider a lesser included offense of murder or self-defense, Applicant asserts the permissive inference charge violates our common law and our constitutional prohibition against charging juries on the facts. S.C. Const. art. V § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.") The Applicant asserts it was error to charge the jury that it may infer malice from the use of a deadly weapon. The trial court charged the jury, see Transcript of Record (Trial) pg. 232, lines 24-25, pg. 233, lines 1-25, pg. 234, lines 1-25 and pg. 235, lines 1-12.

Now, murder is the unlawful killing of any person with malice aforethought, either express or implied -- excuse me, express or inferred from the circumstances. So murder is the unlawful killing of a human being with malice aforethought. Now, manslaughter is the unlawful killing of a human being without malice, either express or inferred. Manslaughter is an unlawful killing without malice. The crucial factor that distinguishes murder from manslaughter is the absence of malice aforethought. Let me go through these things. "Aforethought" means kind of the opposite of "Afterthought". So that malice, that ill will, that I will explain to you in a minute, with which a person commits the killing and thus makes it murder has got to exist before or can be formed simultaneous with the act. It can exist for a split second as long as it exists in the head of the person at the time that the unlawful killing is committed. In its popular sense, the term "malice" conveys the meaning of hatred, ill will or hostility towards another. In the legal sense, as it is used in the description of malice, malice means that, but it does not necessarily mean ill will towards the individual injured, but signifies a general belligerent, mean, nasty, recklessness; for the lives and safety of others or a darkened heart lacking in social duty and fatally bent on mischief. "Meanness," "evil," that is what malice means. The term "aforethought," as I told you, that accompanies the malice, as I said, is best understood in contrasting it to "afterthought." It has got to exist before or simultaneously with the act. It doesn't have to exist for any appreciable period at all, but it can exist or must exist and you must find beyond a reasonable doubt that it existed at the time that the fatal act was committed, if you find that a fatal act was committed by the defendant beyond a reasonable doubt in this case. Malice can

be of two types. It can be either express, where there is manifested a violent, deliberate intention to unlawfully take away the life of another human being, for instance, by direct words accompanying the act. If there were direct words that imported malice accompanying the act of the killing, then that is express malice. In every case, the defendant may not necessarily express malice, for instance, by direct words. There is in our law a permissible inference for inferred malice that may arise from the use of a deadly weapon. When I say that it may arise, because it doesn't have to arise, in short, if you find that, beyond a reasonable doubt, of course, that a killing was done with malice aforethought-- excuse me, by the defendant and you find that a deadly weapon was used--and I will charge you in this regard that a fire arm or a pistol is a deadly weapon-- you may infer from the use of that deadly agency or weapon or pistol, you may infer malice. You are permitted to infer that, that is, to deduce that or to conclude that under the law. You don't have to. The use of a deadly weapon, if you find beyond a reasonable doubt that one was used, is another evidentiary factor that you may take into account with all other evidentiary factors in rendering your decision in this case, and you don't have to infer malice from the use of a deadly weapon, but the law allows you to do so if you find that to be the case from that fact and other circumstances, all of the other circumstances that exist in the case. So, again, murder is the unlawful killing of a human being with malice aforethought either express or implied.

State v. Johnny Rufus Belcher opinion No. 26729, 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, 511 A. 2d 1110, 1126 (Md. Ct. Spec. App. 1986). In discussing its meaning behind this observation, Glenn notes that malice includes the absence of justification, excuse and mitigation. 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.

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.

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 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.

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.

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. Here, however, the error in 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.

Today we return to the rationale underlying Hopkins, Levelle 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. 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).

On September 1, 2012, Applicant actual discovery of facts of new law rule in State v. Johnny Rufus Belcher make his application for post-conviction relief timely under S.C. Code Ann. §17-27-45 (B) and (C). The Applicant held that statute of limitations does

Not apply to S.C. Code Ann. § 17-27-45 (B) and (C). PCR Act now "comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence." S.C. Code Ann. §17-27-20 (1985); Finklea v. State, 255 S.E. 2d 447 (1979) (aim of PCR Act is to consolidate in one simple statute all the remedies presently available for challenging the validity of a sentence of imprisonment).

Where there has been a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. Gibson supra, Butler v. State 397 S.E. 2d 87.

3. Trial Court was without subject matter jurisdiction to try the defendant for possession of weapon during violent crime where there was no arrest warrant issued for that offense.

The defendant contends trial court improperly sentence him to 5 years for possession of weapon during violent crime. The only arrest warrant issue was D-204828 on April 18, 1993, for Murder - Common law S.C. Code §16-3-10. A report of preliminary hearing AW-0++ # D-20 4828; Offense: Murder; S.C. Code sec. 16-310, Heard before this court at chambers in the Bishopville Muncipal Building Courtroom at 10:45 A.M. Mon, May 17, 1993. He was indicted for Murder and Possession of weapon during violent crime on May 24, 1993, by Lee County Grand Juror at Court of General Sessions and tried before Honorable Costa M. Pleicones; and a Jury on the Same day May 24, 1993, at Lee County Court of General Sessions. Trial court was without subject matter jurisdiction for possession of weapon during violent crime where there was no arrest warrant issued for that offense pursuant to S.C. Code Ann. §24-21-450 (1989). See Exhibit

Failure to comply with the warrant procedures set forth in section 24-21-450 deprives the trial court of subject matter jurisdiction to try the defendant for possession of weapon during violent crime. Gray v. State, 276 S.C. 634, 281 S.E. 2d 226 (1981). The offense of possession of weapon during violent crime without the benefit of a warrant is a nullity. Id.

The jurisdiction of a Court over the subject matter of a proceeding is fundamental. Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E. 2d 897, 900 (1989)." Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." Id. It is well-settled that issues related to subject matter jurisdiction may be raised at anytime, including for the first time on appeal in this Court. Carter v. State, 329 S.C. 355, 495 S.E. 2d 773 (1998); State v. Funderburk, 259 S.C. 256, 191 S.E. 2d 520 (1972). Furthermore, "[T]he acts of a court with respect to a matter as to which it has no jurisdiction are void." Funderburk, 259 S.C. at 261, 191 S.E. 2d at 522. Citing Brown v. State 343 S.C. 342, 540 S.E. 2d 846 (S.C. 2001). See also State v. Richburg 403 S.E. 2d 315 (S.C. 1991).

4. Trial Court was without subject matter jurisdiction to try the defendant for Murder where defendant was indicted and tried same day, which violated due process of 14th Amendment of United states constitution.

The defendant was indicted for murder and possession of weapon during violent crime on May 24, 1993, by Lee county Grand Juror at Court of General Sessions and tried before presiding Judge Costa M. Pleicones, and A Jury on the same day May 24, 1993, at Lee County Court of General Session. The defendant contends that presiding Judge Costa M. Pleicones was the same presiding Judge at Court of General session that indictment was submit to the grand jury, act thereon, and report its action. Therefore Costa M. Pleicones, was without subject matter jurisdiction pursuant to S.C. Code Ann. § 14-9-210 to tried the defendant at that term of Court of General Sessions.

The statutory provisions contained in section 14-9-210 provide in pertinent part that: "the county solicitor shall prepare and through the presiding Judge of the Court of General Sessions submit to the grand jury while in attendance upon the Court of General Sessions, bills of indictments in all cases pending in the county court in which the punishment may exceed a fine one hundred dollars or imprisonment for thirty days, when such cases have not been previously acted on by the grand jury. The grand jury shall act thereon, and shall report its action to the presiding Judge of the Court of General Sessions and said Judge shall direct the Clerk of the Court of General Sessions to report the same to the presiding Judge of the county at it's next ensuing term..."

The statutory terms above are clear, unambiguous, require the county solicitor to Prepare and submit bills of indictment through the presiding Judge of the Court of General Sessions to grand jury and the grand jury shall act thereon, shall report its action to the presiding Judge of the Court of General Sessions and said Judge shall direct the clerk of the Court of General Sessions to report the same to the presiding Judge of the county at it's next ensuing term. The next ensuing terms of Circuit Court schedule in third circuit Lee County Court of General sessions is August 16, 1993.

It is a Cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the legislature. Hodges v. Rainey, 533 S.E. 2d 578, 581 (2000), State v. Martin, 358 S.E. 2d 697 (1987). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a Court must apply the statute according to its literal meaning. Carolina Power & light Co v. City of Bennettsville, 442 S.E. 2d 177, 179 (1994). And words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statutes operations. Bryant v. City of Charleston 368 S.E. 2d 899 (1998). Moreover, penal statutes must be construed strictly against the state and in favor of defendant, State v. Blackmon, 403 S.E. 2d 660 (S.C. 1991)

Accordingly, Section 14-9-210, requires, strict Compliance with its provisions, and mandates that the grand jury shall act thereon, and shall report its action to the presiding Judge of the Court of General Sessions and said Judge shall direct the Clerk of the Court of General Sessions to report the same to the presiding Judge of the County at it's next ensuing term...

When a legislative enactment limits the manner in which Something may be done, the enactment also evinces the intent that it shall not be done another way. Thus, since the court utilized an unlawful made of procedure not allowed under section 14-9-210, State lacked the requisite Jurisdiction.

Article V section 4 of our Constitution provides in pertinent part: "The Supreme Court shall make rules governing the administration of all courts of this state, subject to the Statutory law the Supreme Court shall make rules governing the practice and procedures in all such courts." [Emphasis added]

Ordinarily a person should not be tried in Same term of Court in which grand jury makes presentment, but there is no law preventing the solicitor from immediately submitting to grand jury a bill of indictment based on the presentment immediately following the presentment and have the case prepared for trial at the next Succeeding term of Court. 1953-54 Op. Atty. Gen. 133.

The defendant should have been tried at the next succeeding term of court Schedule in third circuit Lee County Court of General Sessions is August 16, 1993. However, there was terms of Circuit Court Schedule in third circuit, Lee county, Court of General Sessions for September 27, 1993 and November 8, 15, 1993 as well.

Speed Trial Act 18 U.S.C. § 3161 et seq requirement vis-a-vis time lapse between indictment and trial. There was no time lapse between indictment and trial because the defendant was indicted and tried same day May 24, 1993, deprived him of 14th Amendment of United States which states "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And South Carolina Constitution Art. 1 § 3 states the same.

The jurisdiction of the Grand Jury being coextensive with the criminal jurisdiction of the Court. Code 1962 § 43-232; S.C. Const. Art. 1 § 11; the Grand Jury and the Court co-exist, therefore, the Court is without subject matter jurisdiction. State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972).

The jurisdiction of a Court over the subject matter of a proceeding is fundamental. Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989)." Lack of

Subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." Id. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal in this Court. Carter v. State, 329 S.C. 355, 495 S.E. 2d 773 (1998); State v. Funderburk, 259 S.C. 256, 191 S.E. 2d 520 (1972). Furthermore, "[T]he acts of a Court with respect to a matter as to which it has no jurisdiction are void." Funderburk, 259 S.C. at 261, 191 S.E. 2d at 522. Citing Brown v. State 343 S.C. 342, 540 S.E. 2d 846 (S.C. 2001).

The Applicant held that statute of limitations does not apply to subject matter jurisdiction and to S.C. Code Ann. § 17-27-45(C) read as follows: If the Applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by Applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Applicant actual discovery on April 1, 2013, Issue 3, 4. Subject matter jurisdiction is neither untimely nor ~~the issues~~ 1 and 2. Although no South Carolina court has explicitly addressed the question, the authors believe that circumstances satisfying the PCR Act's exceptions to the statute of limitations (i.e., a new retroactive rule of law and newly discovered evidence as defined by S.C. Code Ann. § 17-27-45(2003)) should invariably qualify as a "sufficient reason" permitting a successive petition. C.f. Franklin v. Maynard, 588 S.E. 2d 604, 606 & n.7 (S.C. 2003)(Per Curiam) (allowing an issue to be raised for the first time in a second PCR application in light of a new retroactive rule of law).

Respectful Submitted

Freddie Gardner #178124

Freddie Gardner #178124

Perry C.I. B-X-18
430 Oaklawn Road
Pelzer S.C. 29669

EXHIBIT

Exhibit 1 Arrest Warrant D-204828

Exhibit 2 Report of Preliminary Hearing

Exhibit 3 Indictment for Murder & possession of weapon during violent crime

Exhibit 4 Caption of Transcript of Record (Trial) May 24, 25 & 26, 1993

Exhibit 5 Final Order of Dismissal

ARREST WARRANT

D- 204828 152

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of Bishopville

THE STATE

against

Freddy Freddie Gaedner, JR

Address: [redacted] Bishopville, SC 29010

Phone: _____ SSN: [redacted]

Sex: M Race: B Height: _____ Weight: _____

DL State: _____ DL #: _____

DOB: [redacted] Agency ORI #: _____

Prosecuting Agency: Bishopville Police Dept

Prosecuting Officer: J. D. Dellenger

Offense: Murder

Offense Code: _____

Code/Ordinance Sec. 16-3-10 & Common Law

This warrant is **CERTIFIED FOR SERVICE** in the ☐ County/ ☐ Municipality of Lee. The accused is to be arrested and brought before me to be dealt with according to law.

Marvin A. White (L.S.)

Signature of Judge

4-18-93

RETURN

A copy of this arrest warrant was delivered to defendant Freddie Gardner on 4.18.93

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of Bishopville)

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 518

Personally appeared before me the affiant J. D. Dellenger, BPD who being duly sworn deposes and says that defendant Freddie Gaedner, JR did within this county and state on April 18, 1993 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of Bishopville) in the following particulars:

DESCRIPTION OF OFFENSE: Murder – Common Law + SC Code § 16-3-10

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts: at about 105 AM in the vicinity of Garrett Field, the defendant did shoot and kill Lee Edward Wiley with a small silver handgun with malice aforethought.

Sworn to and subscribed before me on April 18, 1993

Signature of Issuing Judge (L.S.)

J. D. Dellenger

Signature of Affiant

Affiant's Address 112 Council Bishopville SC

Affiant's Telephone 484-5309

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of Bishopville)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on April 18, 1993 defendant Freddie Gaedner, JR did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Bishopville) as set forth below:

DESCRIPTION OF OFFENSE: Murder – Common Law + SC Code § 16-3-10

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge (L.S.)

Judge Code: _____

Judge's Address 210 N. Main St Bishopville SC 29010

Judge's Telephone 484-5471

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL

STATE OF SOUTH CAROLINA)
: IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEE)
CITY OF BISHOPVILLE)

REPORT OF PRELIMINARY HEARING

STATE)
)
vs)
Freddie Gardner, JR.)
)
DEFENDANT)

AW-UTT # D-204828
Offense: Murder
S.C. Code Sec. 16-3-10

Heard before this Court at Chambers in the Bishopville Muncipal Building Courtroom at 10:45 A.M., Mon, May 17, 1993, pursuant to Sec. 22-5-310--360, S.C. Code.

Requested By: Atty S. Bryan Daley

Appearing for the State: Asst. Sol. Debbie Nelson
BPD Det. J. D. Dellenger

Appearing for the Defense: Attorney S. Bryan Daley

Defendant: present

UTT-Arrest Warrant Publication: Summarized

Permission to tape record this Hearing: Taped by Court

The State's witnesses, each being duly sworn, testified substantially as set forth on the attached pages: Argument, left, returned + shot victim thru my window. several wits

Unsworn statement by the Defendant: None

Arguments by: None

Findings of this Court: Probable cause exists - Bound over

~~(A) Accused is hereby released from custody and/or Bond.~~

(B) Accused shall remain in custody and/or under Bond and this cause is remanded to the General Sessions Court for submission to the Grand Jury.

AND IT IS SO ORDERED.

Respectfully submitted,

Wm. P. Baskin, III
Municipal Judge- City of Bishopville

Bishopville, S. C.
May 17, 1993

FORM 32 (12/87)

256

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEE)

INDICTMENT FOR
MURDER & POSSESSION OF WEAPON DURING VIOLENT CRIM

At a Court of General Sessions, convened on May 24, 1993, the Grand Jurors of Lee County present upon their oath:

COUNT ONE - MURDER

That one FREDDIE GARDNER, JR. did in Lee County on or about April 18, 1993, feloniously, wilfully and with malice aforethought, kill one Lee Edward Wiley by means of shooting the vicitm with a deadly weapon, to wit: handgun and that the said victim died as a proximate result thereof.

COUNT TWO - POSSESSION OF WEAPON DURING VIOLENT CRIME

That one FREDDIE GARDNER, JR. did in Lee County on or about April 18, 1993, possess or visibly display a firearm, to wit: handgun, during the commission or attempted commission of a violent crime, in violation of § 16-23-490, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Wade S. Kolb, Jr.
SOLICITOR WADE S. KOLB, JR.

WITNESSES

BISHOPVILLE PD

J. D. Dellinger

255

Kenneth Scarborough

Sam Franklin

Willis Frierson

Jose Williams

ARREST WARRANT NO. D 204828

4-18-93

ACTION OF GRAND JURY

True Bill

Davey L. Tyler

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury   Date:

DOCKET NO. [illegible]

#3051

The State of South Carolina,

County of LEE

[illegible]

COURT OF GENERAL SESSIONS

MAY TERM 1993

THE STATE

vs.

FREDDIE [illegible], JR.

Indictment for

MURDER & POSSESSION OF WEAPON DURING VIOLENT CRIME

STATE OF SOUTH CAROLINA

COUNTY OF LEE

COURT OF GENERAL SESSIONS
93-GS-31-136

THE STATE

-VS-

FREDDIE GARDNER, JR.

TRANSCRIPT OF RECORD
(TRIAL)

MAY 24, 25 & 26, 1993
BISHOPVILLE, SC

B E F O R E:

HONORABLE COSTA M. PLEICONES, JUDGE; AND A JURY.

A P P E A R A N C E S:

L. SUZANNE MAYES, ASSISTANT SOLICITOR
APPEARING FOR THE STATE

S. BRYAN DOBY, ESQUIRE
APPEARING FOR THE DEFENDANT

DEBORAH G. MORRIS
CIRCUIT COURT REPORTER