PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2009-140446
Heard October 17, 2013- Filed November 27, 2013

STATE OF SOUTH CAROLINA ..... Respondent,

v.

CHRISTOPHER SPRIGGS ..... Petitioner

AMENDED
PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 21, 2014.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that petitioner was not denied a fundamentally fair trial guaranteed by South Carolina law and the Due Process Clause where the trial judge made an unequivocal pretrial promise to allow petitioner to go "all or nothing," defense counsel made important strategic decisions in reliance on that promise, and then the trial court *sua sponte* revoked that promise and instructed the jury on voluntary manslaughter over petitioner's objection?

2. Did the Court of Appeals err in holding that the trial court's erroneous instruction that malice may be inferred from the use of a deadly weapon was harmless beyond a reasonable doubt where petitioner presented extensive evidence of self-defense and defense of others? *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (holding the "use of a deadly weapon" implied malice instruction has no place in a murder prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing).

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STATEMENT OF THE CASE

Petitioner, Christopher T. Spriggs, was indicted for murder arising from the death of Kindu Molique Bost, a drug user and dealer who was attacking Spriggs and his mother on December 8, 2007, in the parking lot of the Best Western Hotel on Savannah Highway in Charleston County. *App.18, lines 4-7; App. 796, line 23- p.797, line 3.* Spriggs was seventeen years old at the time of the incident, and had no prior history of violent crime.[1] *App. 452, lines 13-14.* Spriggs admitted to stabbing Molique, but maintained that he did so only because it was necessary to protect his mother. *App. 430, lines16-19; App. 436, line 22 – p.439, line 4.* He rejected all plea offers and exercised his Sixth Amendment right to trial by jury.

The trial began on March 30, 2009, before the Honorable Deadra L. Jefferson. *App. 3.* Marybeth Mullaney and Beattie Butler, both experienced criminal defense attorneys, represented Spriggs. *Id.* Culver Kidd and Peter McCoy served as solicitors. *Id.* After six hours of deliberation, the jury returned a verdict of voluntary manslaughter. *App. 977, line 25 – p.979, line 10.* The trial court sentenced Spriggs to fifteen years in prison. *App. 1001, lines 18-19.* Spriggs filed a Motion for Reconsideration of Sentence and a Motion For New Trial on April 13, 2009. *App. 1003 - 1030.* The trial court denied both motions by separate orders issued on August 17, 2009. *App. 1031 - 1088.* Spriggs filed and served the notice of appeal on August 26, 2009. The Court of Appeals affirmed Spriggs' conviction. *State v. Christopher Spriggs*, Op. No. 2013-UP-435 (S.C. Ct. App. filed Nov. 27, 2013). Petitioner filed a timely petition for rehearing which was denied on March 21, 2014. Petitioner seeks a writ of certiorari to review that decision.

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[1]Spriggs had prior juvenile convictions for shoplifting and simple possession of marijuana. *App. 734, lines 12-15.*

STATEMENT OF FACTS

I. THE TRIAL COURT MADE A PRE-TRIAL PROMISE TO DEFER TO SPRIGGS' DECISION TO GO "ALL OR NOTHING."

Based on their trial preparation and review of all the discovery materials, Spriggs' trial counsel felt strongly that the evidence of malice was so weak that the State could not prove murder. *April 13, 2009 Affidavit of Beattie Butler ("Butler Affidavit") App. 1012.*[2] And, in fact, the State seemed to view its own case with some hesitancy; before opening statements even began, the State had already indicated that it intended to ask for a manslaughter charge. *App. 4, lines 3-6.* As any competent and experienced criminal defense attorneys would, defense counsel made a pre-trial effort to determine whether or not the court would give the manslaughter charge because it would impact their trial strategy. The following exchange took place:

> Mr. Butler: I believe your Honor was in receipt of emails from the State indicating that prior to submitting the case to the jury they intend to ask for a manslaughter charge.
>
> The Court: I'm not dealing with any of that.
>
> Mr. Butler: I know. But I just want to put on the record that they have already decided they plan to ask for that and it will become relevant later.
>
> The Court: Well, I haven't read that frankly and, you know, I'm not going to prepare the jury charge until I've heard all the evidence.
>
> Mr. Butler: I understand.
>
> The Court: And the Court will only charge the applicable law as supported by the facts of the case.

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[2] This affidavit, along with several others, was offered into the record as part of the defendant's motion for a new trial. *See Motion for New Trial, filed April 13, 2009; App. 1003-1024.*

Mr. Butler: Yes, ma'am.

The Court: And I don't know how it's going to develop.

Mr. Butler: Yes, ma'am.

The Court: So I don't know whether any lesser-included is going to be appropriate or whether he's going to request any. ***And, frankly I'm going to defer to what the defendant wants. So if he wants to go all or nothing I'm going to give it to him. That should resolve that for everybody.***

Mr. Butler: That resolves that perfectly, thank you.

App. 4, line 3 – p.5, line 4 (emphasis added).

Relying upon the trial judge's pledge, defense counsel went forward with their plan to show the jury that Spriggs had a strong case of self-defense and defense of others. During her opening statement, Mullaney told the jurors:

> This is not a case of murder. It is a story about a son and his love for his mother. And on December 2007, that horrible night, the evidence will show that Christopher Spriggs *was not acting with malice*, he was acting to protect his mother.

App. 32, lines 4-9 (emphasis added).

II. THE TRIAL PROCEEDED IN A MANNER FAVORABLE TO THE DEFENSE.

The State called several witnesses who were present in the parking lot as the events unfolded at the Best Western Hotel on December 8, 2007. *App. 32-64; App. 469-534; App. 545-591; App. 594-631; App. 636-688; App. 688-727.* Their testimony established that Christopher Spriggs lived with his mother, Shelly Greene, and her boyfriend, David Deschene, in Moncks Corner. *App. 548, line 9 – p.549, line 9; App. 596, lines 15-22; App. 643, line 21 – p.644, line 3.* Greene was thirty-three years old, and an admitted drug addict. *App. 795, lines 22-23; App. 797,*

lines 17-19. She became involved with Molique, a drug user and dealer from whom she purchased drugs and sometimes traded sex for drugs. *App. 797, lines 20-25.*

A. THE STATE'S WITNESSES TESTIFIED THAT SPRIGGS WENT TO HIS MOTHER'S AID AFTER SHE TOLD HIM THAT SHE HAD BEEN BEATEN BY MOLIQUE.

On December 8, 2007, Spriggs was at home hanging out with his teenage friends: Charles Weaver, Steven Turnage, Jessica Gyulai and Tyler Kent. *App. 471, lines 12-25; App. 550, line 24 – p.551, line 1; App. 596, line 23 – p.597, line 5; App. 691, lines 18-24.* Deschene was also at home watching television in his bedroom. *App. 472, line 19 – p.473, line 2; App. 551, lines 5-9; App. 587, lines 6-9; App. 696, lines 17-19; App. 692, lines 2-5.* In the early morning hours, Deschene received a frantic phone call from Shelly Greene who reported that Molique had been beating and torturing her for the last four hours. *App. 647, line 23 – p.648, line 4; App. 677, lines 17-25.* Greene also spoke to Spriggs and asked both Deschene and Spriggs to come and get her at the InTown Suites in North Charleston. *App. 648, lines 18-24; App. 649, line 16 – p.650, line 5; App. 678, lines 1-8.*

All of the State's witnesses agreed that Spriggs and his four friends – Weaver, Turnage, Gyulai and Kent – got into Turnage's grey Mitsubishi and headed off to rescue Spriggs' mother. *App. 433, lines 14-16; App. 474, lines 4-14; App. 552, line 25 – p.553, line 24; App. 599, line 25 – p.600, line 4; App. 649, line 25 – p.650, line 2; App. 693, lines 16-21.* Spriggs took a knife from the kitchen drawer of Deschene's home and placed it in the glove box of Steven Turnage's car. *App. 439, lines 11-14; App. 599, lines 5-22.* Deschene got into his truck and drove separately to the InTown Suites where the group found Greene, obviously bruised and battered. *App. 650, line 11 – p.651, line 18.* By all accounts, Greene's face was "bumpy" and "black and blue;" she had fingerprints around her neck; both of her eyes were filled with blood from broken

blood vessels; and, she had blood dripping from one ear.[3] *App. 498, lines 5-11; App. 561, lines 18-24; App. 618, lines 5-15; App. 650, line 24 – p.651, line 18; App. 700, lines 4-15.*

Greene was sitting alone in an orange Chevy Aveo rental car registered in Deschene's name. *App. 433, lines 8-12; App. 650, lines 11-19.* She was too shaken and distraught to drive, so Deschene left his truck at the InTown Suites and drove Greene in the orange Chevy over to the Best Western Hotel, where she had previously been held and beaten by Molique, to retrieve her luggage. *App. 652, lines 2-20.* Spriggs and his friends followed in the grey Mitsubishi. *App. 478, lines 2-12; App. 558, lines 4-8; App. 697, lines 14-18.*

Both cars arrived at the Best Western; the parties got out, retrieved Greene's luggage from the hotel room, and loaded it into the cars. *App. 482, line 11 – p.483, line 13; App. 562, lines 2-14; App. 604, lines 1-8; App. 699, lines 5-25.* Then, everyone prepared to leave. Spriggs, Weaver, Turnage, Gyulia and Kent got into the grey Mitsubishi and closed the doors. *App. 483, lines 13-18; App. 653, line 25 – p.654, line 1.* Deschene got into the driver's seat of the orange Chevy. *App. 655, lines 1-14.* Greene was standing outside of the hotel room door, carrying some final items, when Molique arrived at the parking lot in a taxi cab. *App. 483, lines 15-23; App. 562, line 15 – p.563, line 5; App. 655, lines 6-19.*

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[3] Richard Burris, a physician's assistant who later examined Shelley Greene after her arrest on December 10, 2007, testified that he observed blood in her eyes and several marks on her neck that were all consistent with strangulation. *App. 761, line 8 – p.763, line 23.* He identified a photograph of Greene showing subconjunctival hemorrhages in her eyes – injuries that Burris had seen in hundreds of other prisoners who were strangled. *App. 767, line 15 – p.768, line 15.* Burris also treated Greene for an ear infection, which he testified could have been caused by bleeding in the ears. *App. 766, lines 7-12.*

B. ALL OF THE WITNESSES AGREED THAT MOLIQUE ATTACKED THE GROUP TWICE BEFORE SPRIGGS ACTED TO PROTECT HIMSELF AND HIS MOTHER.

Molique immediately jumped from the cab and charged toward Spriggs' mother. *App. 484, lines 21-25; App. 564, line 14 – p.565, line 3; App. 656, lines 19-23.* Although the witnesses were not uniform in their recollection of whether Molique was carrying a knife, there was ample evidence from which the jury could conclude that, at the very least, Spriggs reasonably believed that Molique possessed a knife at the time. Specifically, Jessica Guyali and Shelly Greene both testified that they saw Molique with a knife. *App. 611, line 17 – p.612, line 15; App. 821, lines 2-7.* Guyali identified a photograph of the knife she believed she saw in Molique's hand. *App. 611, line 23 – p.612, line 8.* Steven Turnage testified that he saw a shiny object in Molique's hand and heard Spriggs say "he's got a knife." *App. 567, lines 5-16; App. 584, line 18 – p.585, line 1.* Finally, Spriggs gave a detailed statement to the police in which he essentially recounted the same story that the State's witnesses told at trial. *App. 436, line 6 – p.440, line 4.* In his statement, Spriggs told police "I heard my mom say that Molique had a knife." *App. 437, line 23; App. 438, lines 9-10.*

Thus, believing that Molique posed a threat of imminent harm, Spriggs leapt from the grey Mitsubishi and intercepted Molique. *App. 484, line 23 – p.485, line 22; App. 566, lines 6-20; App. 703, lines 7-19.* Steven Turnage and Tyler Kent got out to assist Spriggs, and the three engaged in a fist-fight with Molique.[4] *App. 486, lines 2-6; App. 703, line 17 – p.705, line 20.* Within a few minutes, the teens were able to subdue Molique. They left him lying on the ground and returned to the grey vehicle in a second attempt to leave the scene. *App. 489, lines 5-20;*

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[4]Christopher Weaver also got out of the car. He was wearing a cast up to the knee on one leg. He was quickly knocked to the ground and returned to the car. *App. 486, line 8 – p.487, line 21; App. 488, lines 21-25.*

App. 569, line 17 – p.570, line 8; App. 608, line 18 – p.609, line 2; App. 706, line 11 – p.707, line 7. Spriggs' mother returned to the passenger side of the orange Chevy. *App. 658, lines 3-19.*

Before the group could get away, however, Molique got up from the ground and charged again. Catching the passenger side door before Shelly Greene could pull it closed, Molique then jumped inside the orange car and attacked a second time. *App. 490, lines 11-24; App. 570, line 24 – p.571, line 25; App. 609, lines 5-22; App. 707, line 23 – p.708, line 17.* Spriggs got out of the grey Mitsubishi in a second effort to protect his mother. This time, he took the kitchen knife from the glove box with him. *App. 572, lines 8-14.* Tyler Kent followed. The two teens first attempted to pull Molique from the car, but they were unable to get him out. *App. 708, line 18 – p.709, line 25.* Kent testified that he pulled Molique by the hair so hard that some of his braids ripped out, and still Molique would not relent. *App. 722, lines 17-24.* Finally, Spriggs swung the knife, stabbing Molique twice in the back. *App. 438, lines 11-15.* In the process, Tyler Kent also sustained a cut on the arm. *App. 710, line 9 – p.711, line 13.* Kent ran back to the grey car, bleeding profusely. *App. 492, lines 10-12; App. 573, lines 5-9.* He was followed shortly thereafter by Spriggs, who was crying and apologizing for accidentally injuring him. *App. 492, lines 13-24; App. 577, lines 6-10.* Despite his wounds, Molique continued to try to get inside the car containing Spriggs' mother. *App. 492, line 24 – p.493, line 9; App. 574, line 6 – p.575, line 7.* She and David Deschene eventually succeeded in pushing him out of the car, and both groups drove away from the hotel.[5] *App. 574, line 22 – p.575, line 7.* Molique died from his injuries

[5] There was conflicting evidence about whether or not Greene's car ran over Molique as it was exiting the parking lot. The pathologist testified that Molique suffered an injury to his arm that could have been caused by a slow moving vehicle, but it was impossible to make a conclusive determination. *App. 278, line 23 – p.279, line 9.* Greene testified that she thought she had run over Molique, but later determined that she had run over a speed bump. *App. 829, lines 9-15.* Those in the grey car testified that their car did not run over Molique, but they did not know if

approximately one hour later at the Medical University of South Carolina.[6] *App. 119, lines 14-18.*

III. AFTER THE STATE'S CASE FOR MURDER PROVED WEAK, SPRIGGS DECIDED NOT TO TESTIFY IN HIS OWN DEFENSE, BELIEVING THAT THE JURY'S ONLY OPTIONS WOULD BE A MURDER VERDICT OR AN ACQUITTAL.

The State's presentation proved even more favorable than defense counsel had anticipated. *Butler Affidavit at p. 2, App. 1013.*[7] There had been no surprises. Each witness had testified that Molique charged on two separate occasions – attacking Spriggs, his mother, or his mother's boyfriend – before Spriggs ultimately stabbed Molique. *Id.* All of the witnesses agreed that Spriggs was *attempting to leave the scene*, but was prevented from doing so by Molique's attacks. *Id.* Even the taxi cab driver who brought Molique to the hotel, the only witness that defense counsel did not have the opportunity to interview before trial, testified consistently with the other witness's accounts.[8] *Id.* At the close of the State's case, the only version of events

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Greene's car had run over him. *App. 439, line 25 – p.440, line 3; App. 494, lines 18-19; App. 624, lines 7-12.*

[6] Dr. Presnell, who performed Molique's autopsy at MUSC on December 9, 2009, testified that his blood alcohol level was .156 at the time of his death. *App. 296, lines 17-21.* Because the average male metabolizes alcohol at a rate of approximately .015 per hour, Molique's blood alcohol was approximately .17 at the time of the incident, or twice the legal limit. *App. 296, line 22 – p.298, line 2.*

[7] Much of this evidence was offered through affidavits included with the defendant's motion for a new trial because the trial court would not allow defense counsel to proffer evidence regarding the decisions they made in reliance on the judge's promise at trial. *App. 913, line 25 – p.916, line 5.*

[8] The taxi cab driver testified that he took Molique to the Best Western Hotel parking lot, where Molique "immediately charged toward the two cars that were parked." *App. 37, lines 4-6.* Molique engaged in a fight with three or four guys who got out of one of the cars. *App. 38, lines 22-25.* Then Molique broke away from the group and ran towards a female who was yelling "stop, stop, stop, my baby," near the passenger side door of the other car. *App. 39, line 23 –*

before the jury was that Spriggs was defending himself or others when the incident occurred. *Id.* Thus, believing that the jury's only verdict options would be murder or an acquittal, the defense team began to rethink their earlier recommendation that Spriggs take the witness stand. *App. 1014; App. 1018; App. 1021; App. 1023-24.*

Prior to the close of the State's case, the defense team concluded that Spriggs would make a good witness and should testify in his own defense. *App. 1012; App. 1018; App. 1024.* On Thursday, April 2, 2009, before the close of the State's case, Spriggs told the Court that he planned to take the stand. *App. 735, line 15 – p.738, line 9.* After seeing the State's entire presentation, however, Mullaney and Butler began to reconsider. They consulted with several defense team members, as well as two outside observers. *Butler Affidavit at p. 3, App. 1023; Affidavit of Brent McDonald ("McDonald Affidavit") at p.1, App. 1023; Affidavit of Martha Dicus ("Dicus Affidavit") at p.1, App. 1024.* The unanimous consensus was that Spriggs need not bear the risks of cross-examination because the trial had gone so well for the defense and because there would be no opportunity for a jury compromise without a charge of manslaughter. *Id.* No one believed that the jury would convict Spriggs of murder; and, because defense counsel believed that the only other option would be not guilty, the defense team anticipated an acquittal even without Spriggs' testimony. *Butler Affidavit at p.3, App. 1014.* Relying on the advice of his counsel, Spriggs told the Court that he had changed his mind and would not testify. *App. 870, line 16 – p.871, line 11.*

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p.40, line 4. Molique caught the door before she could shut it and he was immediately throwing punches through the passenger door of the first car. *App. 40, lines 5-10.* The guys in the second car tried to get Molique out of the first car, but they could not get him out. *App. 40, lines 11-20.* Shortly after that, the taxi cab driver drove away. *Id.*

IV. THE TRIAL JUDGE BROKE HER PRE-TRIAL PROMISE REGARDING THE MANSLAUGHTER CHARGE AND ALSO GAVE AN IMPROPER CHARGE ON IMPLIED MALICE, RESULTING IN A COMPROMISE VERDICT.

After the close of the defense case, *and without a request from either party*, the trial judge indicated that she planned to breach her earlier promise and would charge the jury on the lesser-included offense of voluntary manslaughter. *App. 880, lines 23 -25.* Defense counsel objected, reminding the court of their discussion on the first day of trial. *App. 888, lines 14-17.* The court responded: "That was before I heard all of the case. And generally I give the defendant exactly what they ask for, but I'm not required to do that. . . . Now, if you all agree not to charge voluntary manslaughter, that's a different circumstance." *App. 888, line 18 – p.889, line 3.* Counsel responded that it was his understanding that the court would only charge manslaughter if the defendant asked for it. *App. 889, lines 24-25.* The court replied: "That's not exactly what I said." *App. 890, line 1.* Counsel reiterated, "[T]hat was my understanding." *App. 890, line 2.* Counsel then attempted to explain that the defense team had made a number of strategic decisions in reliance on the court's promise, but the trial judge rebuffed these efforts, saying "that lacks veracity to me." *App. 890, line 3 – p.893, line 13.*

After a break for lunch, defense counsel raised the issue again by moving for a mistrial and attempting again to explain that the court's promise had influenced the defense team's decision to recommend that Spriggs change his position as to his decision to testify, as well as the way in which the defense had cross examined some of the State's witnesses. *App. 913, line 25 – p.914, line 4.* The court stated, "I have already heard from you regarding that. You went through whatever your posture was on it. I told you I felt that it lacked veracity and it was disingenuous." *App. 1038, lines 16-19.* Defense counsel then asked to "submit an affidavit saying what I would have done differently had I not relied on the statement," but the court again

indicated that it believed that "the record is replete that you feel you would have done something differently." *App. 914, line 23 – p.915, line 3.* Defense counsel again stated, "I'm asking to proffer what I would have done differently." *App. 915, line 25 – p.916, line 1.* The court denied counsel's request, saying "I don't think it really would have any bearing on the court's charge." *App. 916, lines 3-4.* The court then submitted the manslaughter charge to the jury over petitioner's objection. *App. 961, line 23 – p.962, line 6.*

In addition to the manslaughter charge, defense counsel objected to the court's intention to charge the jury that malice may be inferred from use of a deadly weapon. Counsel raised this objection on the basis that the malice inference issue was pending before this Court in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), at that time. *App. 895, line 12 – p.898, line 11.* The trial court stated that since *Belcher* had not yet been decided, the malice inference was still good law and the court would give that charge. *App. 897, lines 17-24.* Counsel responded, "and in case they change it in State v. Belcher, I want to be able to take advantage of that change." *App. 897, line 25 – p.898, line 2.* The trial court ruled, "[w]ell, you're asking to argue against precedent and that is not granted."[9] *App. 898, lines 9-10.*

After overruling defense counsel's objections to these two instructions, the trial court submitted the case to the jury. First, the court instructed the jury as to the elements of murder:

> Ladies and gentlemen, the defendant is charged with murder. The State must prove beyond a reasonable doubt that the defendant

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[9] Six months later, this Court held in *Belcher* 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." 385 S.C. at 600, 685 S.E.2d at 804. Further, the Court held that "[b]ecause our decision represents a clear break in 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." *Id.* at 612, 685 S.E.2d at 810.

> killed another person with malice aforethought. Malice is hatred, ill-will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

App. 959, line 24 – p.960, line 7. Further, the court told the jury that it could infer the element of malice by the use of a deadly weapon:

> Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm.

App. 961, lines 2-7. Next, the court instructed the jury on voluntary manslaughter:

> Included within the offense of murder is the lesser offense of voluntary manslaughter. To prove manslaughter the State must prove beyond a reasonable doubt that the defendant took the life of another in sudden heat of passion based on sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter.

App. 961, line 23 – p.962, line 6. Finally, the court instructed the jury that Spriggs had raised the defense of self-defense. *App. 963, lines 13-18.* The court explained that the elements of self-defense are: (1) the defendant was without fault in bringing about the difficulty; (2) the defendant was actually in or believed he was in imminent danger of death or serious bodily injury; (3) the defendant's fear was reasonable and would have been felt by an ordinary person in the same situation; and, (4) the defendant has no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase. *App. 964, line 2 – p.966, line 21.* The court instructed the jury that the defendant may take another's life in defense of others if that other person or persons "would have had the same right of self-defense." *App. 967, lines 5-25.*

Deliberations began at 3:50 p.m. and continued for six hours. *App. 973, lines 21-22.* During the course of their deliberations, the jury contacted the court once to ask about scheduling. One juror wanted to know if he would be able to attend his music job at 7:00 p.m.; another planned to run in the Cooper Rive Bridge Run on the following morning and did not want to deliberate past 10 p.m. *App. 975, line 5 – p.976, line 9.* The court instructed them that the court would address those issues if necessary, but that they should deliberate without concern for scheduling. *Id.* Later, the jury contacted the court a second time to ask for a compact-disc player so that they could listen to a telephone message that Molique left on a friend's cell phone prior to his arrival at the scene. *App. 976, line 23 – p.978, line 8.* Finally, at 9:50 p.m., the jury reentered the courtroom and announced a verdict of voluntary manslaughter. *App. 979, lines 9-25.* The trial court sentenced Spriggs to fifteen years in prison. *App. 1001, lines 18-19.*

V. THE TRIAL COURT CLAIMED THAT THE JURY'S INITIAL VOTE WAS 10-2 IN FAVOR OF MURDER.

On April 13, 2009, Spriggs moved for a new trial, asserting a number of errors, including the court's decision to reverse her earlier promise and to instruct the jury on voluntary manslaughter. *See Motion for New Trial, filed April 13, 2009, App. 1003 - 1024.* The trial court issued an order denying this motion on August 17, 2009. The August 17th Order contained a footnote which stated:

> It came to the Court's attention that the jury was polled at the conclusion of the case and it was 10-2 in favor of a murder verdict. Therefore, it would have been an error and grossly prejudicial to the defendant not to have charged the lesser included offense where ample evidence supported instructing it. Doing so would have exposed the defendant to a minimum sentence of thirty years and a maximum sentence of life.

Order Denying Defendant's Motion for New Trial at p. 7, n.16, App. 1039.

Contrary to this assertion, John E. "Rett" Guerry, an attorney at Motley Rice LLC, who served as the jury foreperson, subsequently executed a sworn affidavit stating that the majority of the jury was never in favor of murder. *App. 1126.* His affidavit stated:

> I served as a juror in the case of State v. Spriggs and was appointed as juror foreman by Judge Deadra Jefferson.
>
> I consider it an honor to have served with my fellow jurors who all acted with the greatest sense of civic duty and who followed both the judge's instructions and the law as given at all times.
>
> After hearing the facts presented during the trial and receiving the law to be applied from the judge, it was my personal opinion, and vote, that the state had not proved the charge of murder. I would never have voted to convict Mr. Spriggs of murder under the facts as presented and the law as given.
>
> I conducted a preliminary polling of the jury at the beginning of jury deliberations which revealed that there were four jurors who would vote not guilty, four jurors who would vote for a murder conviction, and four jurors who either wished to vote for a finding of voluntary manslaughter or who had not made up their mind at that time.
>
> Following significant and studied jury deliberations the jury entered a unanimous verdict of voluntary manslaughter.

Id. at ¶¶ 4-8.

Defense counsel filed a motion to allow Guerry to submit his affidavit to rebut the trial court's erroneous factual assertion regarding the jury vote. *See Motion to Allow Juror to Submit Affidavit to Defense to Rebut Court Order, filed August 24, 2009, App. 1094-1097.* The same day, the trial judge held a recorded telephone conference in which counsel for both parties and Guerry participated. *See Transcript of Record, In-Chambers Conference Call, August 24, 2009, App. 1098-1124.* During the recorded call, the trial judge stated that her factual assertion in footnote sixteen of her August 17th Order was based on courthouse gossip. *App. 1120, lines 5-9*

("It just says that it came to my attention that the jury was informally polled and it was 10/2 for murder. And that came from court personnel to me, you know, as it normally does after a trial sometimes where I will hear different things."). The solicitor confirmed that Guerry had related to him that the trial judge's assertion was incorrect, but argued that any affidavit from Guerry was inadmissible under Rule 606(b), SCRE. *App. 1118, lines 4-10.* Defense counsel argued that this was not a Rule 606(b) situation because the affidavit was not offered "to attack the integrity or the validity of the verdict." *App. 1118, lines 13-16.* Rather, defense counsel stated, "[w]e just want to correct the numbers that were stated in the Court's order, and that's it." *App. 1118, lines 17-24.*

The trial judge told Guerry that he was "free to do whatever he'd like to do," but did not rule on whether his affidavit was admissible. *App. 1123, lines 6-7.* The trial judge also stated that she was considering amending her August 17th Order to eliminate the footnote in question. *App. 1122, lines 11-13.* Defense counsel advised that they had to file a notice of appeal within two days. *App. 1122, lines 23-25.* Although the trial court stated that two days would be sufficient time for her to file an amended order, she never did so, and her original August 17th Order (including her erroneous factual assertion in footnote 16) remains part of the record. *App. 1122, line 11 – p.1123, line 3.* Following the telephone conference, Guerry submitted his affidavit.[10] *See Affidavit of John E. Guerry, III, filed August 26, 2009, App. 1126.* Defense counsel filed a notice of appeal two days after the recorded telephone conference.

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[10] Defense counsel also filed objections to the trial court's August 17th Order, again arguing that the factual assertion in footnote 16 was incorrect. *See Notice of Objections to Facts Set Forth in Court Order Denying Defendant's Motion For a New Trial, filed August 26, 2009, App. 1089 - 1093.*

On October 29, 2010, the Court of Appeals remanded the issue of the juror affidavit to the trial court for a ruling. The trial judge ultimately ruled that Guerry's affidavit was inadmissible. *App. 1218 - 1226.* The Court of Appeals affirmed that decision. The trial court's erroneous assertion about the initial jury vote remains part of the record.

ARGUMENT

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE VOLUNTARY MANSLAUGHTER INSTRUCTION.

As stated above, petitioner's trial counsel were convinced the State could not prove that Spriggs was guilty of murder. Therefore, in formulating their trial strategy they reasonably attempted to determine whether the trial judge was going to charge voluntary manslaughter. The State and the trial judge herself have both argued that the court's pretrial decision was not final. *App. 1028; App. 987, lines 2-4.* But that is clearly not what the trial judge's statements conveyed. Defense counsel asked whether or not the court was going to give the instruction, and, after some hemming and hawing, the trial judge's final word on the matter was: "***I'm going to defer to what the defendant wants. So if he wants to go all or nothing I'm going to give it to him. That should resolve that for everybody.***" *App. 4, line 24 – p.5, line 2.* Counsel naturally interpreted this statement as a binding decision, and he indicated as much by responding, "[t]hat resolves that perfectly, thank you." *App. 5, lines 3-4.* It is simply not plausible to interpret this exchange as conveying anything other than a conclusive promise that Spriggs would be allowed to go all or nothing if he so desired. Spriggs does not dispute that the trial judge could have simply stated that she would not make a decision regarding the charge until after she had heard all of the evidence. *But that is not what happened.* Once the court promised that she would "defer to what the defendant wants," Spriggs was entitled to rely upon that promise, and he

reasonably did rely, and the court's subsequent change in position rendered his trial fundamentally unfair.

This Court's decision in *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981) is instructive on this point. Woomer was charged, along with a co-conspirator, with carrying out a planned scheme to rob and kill John Turner in Colleton County. *Id.* at 171-72, 284 S.E.2d at 357-58. He was convicted and sentenced to death. In the guilt-or-innocence phase of his capital trial, the trial court agreed to allow Woomer to take the stand in the jury's presence for the limited purpose of addressing the voluntariness of his confession. *Id.* at 172, 284 S.E.2d at 358. On cross-examination, the solicitor asked Woomer, "don't you want to tell the jury exactly what happened that day?" *Id.* The trial court sustained an objection to this question and the solicitor then showed Woomer his confession and asked, "what you told them here was the truth, wasn't it?" *Id.*

On appeal, Woomer argued that the solicitor's cross-examination went to the question of Woomer's guilt or innocence and violated the limitation that the trial court had placed on the scope of his testimony. *Id.* This Court agreed and remanded for a new trial, ruling that although a criminal defendant typically waives any privileges by taking the stand and must answer all proper questions, Woomer was entitled to rely on the trial court's promise of a limited scope:

> We know of no rule of procedure or principle of law which allows a defendant to take the stand in the presence of the jury for a limited purpose. . . . [However], ***[o]nce the trial court induced appellant to testify by limiting the scope of the testimony, Woomer had a right to rely on that assurance***, and the solicitor's violation of the limited scope of cross examination was fundamentally unfair.

Id. at 173, 284 S.E.2d at 358 (emphasis added).

More recently, this Court cited *Woomer* in reversing a case with a similar instance of reliance. In *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001), the trial court held a charge conference during which the court stated an intention to give the reasonable doubt charge outlined in *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991), which suggests that the jury be charged, "A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act." *Id.* at 417, 409 S.E.2d at 375. Defense counsel incorporated this language into his closing argument, telling the jury that "when you go through this testimony and this evidence in this case, you're gonna hesitate." *Jones*, 343 S.C. at 576, 541 S.E.2d at 820. Following closing arguments, the solicitor asked the trial judge to alter the charge, arguing that, given defense counsel's closing argument, the "hesitate to act" language would tell the jury that deliberation is hesitation and therefore reasonable doubt. *Id.* at 577, 541 S.E.2d at 821. The trial court found that there was nothing improper about defense counsel's closing argument, but agreed to remove the "hesitate to act" language from his instructions so that the jury would "feel alright" about deliberating. *Id.*

On appeal, this Court held that it was fundamentally unfair for the trial judge to alter the reasonable doubt charge after defense counsel structured and delivered his argument around the "hesitate to act language." *Id.* The Court pointed out that although the trial court was not *required* to give the *Manning* charge, once he promised to do so appellant was entitled to rely on that judicial pledge:

> The *Manning* charge, although not required, is a correct statement of South Carolina law. Appellant reasonably relied upon the judge's representation that he intended to give that charge to the jury. The decision to alter the charge, after the argument, was fundamentally unfair.

Id. at 578, 541 S.E.2d at 821; *see also United States v. Kostoff*, 585 F.2d 378, 380 (9th Cir. 1978) (holding that the trial court erred by approving instructions proposed by the defense and then changing them after the defendant's closing argument, which relied on the originally proposed language; as a result, "counsel was misled by the court to the defendant's prejudice").

There is no material distinction between this case and *Woomer* and *Jones*. Here, although the trial judge was not required to tell defense counsel whether or not she would give the voluntary manslaughter instruction prior to the charge conference, that is, in fact, what she clearly did. She told Spriggs that she was going to "defer to what the defendant wants. So if he wants to go all or nothing I'm going to give it to him." *App. 4, line 24 – p.5, line 1.* Once the trial judge assured trial counsel that she would defer to what he wanted, Spriggs was entitled to rely on that assurance. And, Spriggs reasonably did rely. Defense counsel made important strategic decisions in reliance on the court's promise.

First, Spriggs and his defense team made a strategic decision not to have Spriggs testify in his own defense because they believed that the jury's only options would be a murder verdict or an acquittal. *Butler Affidavit at p.3, App. 1014; Mullaney Affidavit at p.2, App. 1018; Shafer Affidavit at p.2, App. 1021; McDonald Affidavit at p.1, App. 1023; Dicus Affidavit a p. 1, App. 1024.* Given that the case had gone so well for the defense, Spriggs and his trial counsel determined that it was not worth the risk of subjecting Spriggs to cross-examination, since a jury faced with only the options of murder or an acquittal would certainly not vote for a murder conviction. *Id.* Had counsel not believed that the trial judge would instruct the jury as previously promised, they would never have recommended that Spriggs change his position and elect not to take the witness stand. *Butler Affidavit at p. 3, App. 1014; Mullaney Affidavit at p.2, App. 1018.*

Second, although all of the witnesses testified that Spriggs stabbed Molique only after Molique charged and attacked Spriggs, Spriggs' mother or his mother's boyfriend, some of the witnesses did describe Spriggs as angry or upset earlier in the evening when he first received the telephone call from his mother. *Butler Affidavit at p.2, App. 1013.* Defense counsel made no attempt to clarify with these witnesses that their descriptions of his mood were limited to the earlier period when Spriggs was at home, or in the car, rather than when he reacted out of fear in the parking lot. *Id.; Mullaney Affidavit at p.1, App. 1017; Shaffer Affidavit at p.2, App. 1021.* Counsel believed that there was no need to potentially confuse the jury with such points since manslaughter would not be an option and all of the witnesses agreed that Spriggs appeared to act out of fear and the need to protect himself when the stabbing actually occurred. *Butler Affidavit at p.2, App. 1013.*

Therefore, because defense counsel were misled to Spriggs' detriment, his conviction violates this Court's precedents, the Sixth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution. His conviction must be reversed and the case should be remanded for a new trial.

II. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE *BELCHER* ERROR WAS NOT HARMLESS.

A. THE IMPLIED MALICE CHARGE IS NO LONGER GOOD LAW UNDER *STATE V. BELCHER*.

Six months after Spriggs' trial concluded, this Court, overruling a long line of precedent, held in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), 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." *Id.* at 611, 685 S.E.2d at 809. In explaining its decision

in *Belcher*, this Court noted that malice includes the absence of justification, excuse and mitigation.

> 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.

Id. at 609-10, 685 S.E.2d at 808-09 (citing *Glenn v. State*, 68 Md.App. 379, 511 A.2d 1110, 1122 (1986)). The Court looked to a number of other jurisdictions that had also rejected the implied malice charge for similar reasons. *Id.* at 610, 685 S.E.2d at 809 (citing, *inter alia*, *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")).

Thus, although the trial court charged the jury in adherence to the law at the time of the charge, *Belcher* now establishes that the implied malice charge is a clear error, and this Court must reverse.[11]

B. THE TRIAL COURT'S ERROR WAS NOT HARMLESS.

It is true that 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). The Court of Appeals held that the error was harmless because the jury found petitioner guilty of manslaughter rather than murder. But, given the evidence in this case, the erroneous instruction was clearly

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[11] Because the *Belcher* decision represented a clear break with modern precedent, the Court held that its ruling would apply to "all cases which are pending on direct review or not yet final where the issue is preserved." *Id.* at 612, 685 S.E.2d at 810. Here, defense counsel properly preserved the *Belcher* issue for appellate review by objecting to the charge and noting that the issue was pending at that time. *App. 895, line 12 – p.897, line 14.*

prejudicial and respondent cannot meet its burden of demonstrating "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Arnold v. State/Plath v. State*, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992), (quoting *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)); *see also*, *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991) (holding the court must "find that error unimportant in relation to everything else the jury considered on the issue in question as revealed in the record").

A number of courts have concluded that an implied malice instruction cannot be deemed harmless in a case such as petitioner's; *i.e.*, where there is evidence of provocation, justification or excuse. For example, in *Caldwell v. Bell*, 288 F.3d 838 (6th Cir. 2002), the defendant, Caldwell, was charged with killing the victim after the two met in a dance hall in Chester County, Tennessee. *Id.* at 840. Caldwell admitted to the killing, but claimed that the victim provoked him by making sexual advances toward Caldwell and his son and then "slapping" whiskey into Caldwell's eye, thus reducing the offense to manslaughter. *Id.* The trial court told the jury that it could convict Caldwell of first-degree murder, second-degree murder, voluntary manslaughter or involuntary manslaughter. *Id.* at 841. The court gave a proper instruction on first-degree murder, but erroneously instructed the jury that malice was presumed by the use of a deadly weapon with regard to the second-degree murder charge.[12] *Id.* at 841. The jury convicted Caldwell of first-degree murder. In federal habeas corpus proceedings, the state argued any error on the second-degree murder instruction was harmless because the jury did not find Caldwell guilty of that offense. The Sixth Circuit held that the error was not harmless:

> We believe the instruction did particular damage by undermining Caldwell's alternative theory of the killing based on a claim of 'provocation.' . . . The unconstitutional jury instructions in effect

[12] Malice is an element of both first and second-degree murder in Tennessee. *Id.* at 841.

> trumped Caldwell's defense of provocation. . . . [O]nce the instruction was given, jurors were unable to fairly consider the defense's theory of provocation leading to manslaughter because manslaughter would be inconsistent with malice and jurors had already been instructed to presume malice from use of a deadly weapon.

Id. at 844; *see also, Houston v. Dutton*, 50 F.3d 381, 386 (6th Cir. 1995) (holding that once jurors had been instructed to presume malice from use of a deadly weapon, they were unable to seriously consider the defense's theory of accident).

Other courts have held that this kind of error cannot be considered harmless in cases involving self-defense or provocation because it is simply impossible to tell what the jurors' thought processes may have been. In essence, the erroneous instruction is a "wild card" that undermines confidence in the jury's verdict. In *State v. Grunow*, 506 A.2d 708 (N.J. 1986), a defendant claiming self-defense was charged with capital murder but convicted of aggravated manslaughter. The trial court gave an improper instruction on passion and provocation that erroneously suggested that the defendant bore the burden to prove their presence beyond a reasonable doubt. *Id.* at 708. The state argued that the error was harmless because the jury convicted the defendant of aggravated manslaughter, an offense that could not be mitigated by passion or provocation. *Id.* at 709. The Supreme Court of New Jersey disagreed, noting that the argument for harmlessness "assumes that the jury inevitably proceeded on a step-by-step basis to consider murder first, and then aggravated manslaughter." *Id.* at 715. The court also rejected the state's parallel argument that the jury, having acquitted the defendant of murder, would have had no occasion to consider provocation:

> The tradition of the common law does not permit us to speculate upon the foundations of a jury verdict. An individualized assessment of the reason for a jury verdict would be based either on pure speculation, or would require inquiries into the jury's

> deliberations that courts generally will not undertake. This springs from the unique role of the jury in the criminal process.

Id. at 716. The court expressed further hesitancy for any kind of harmless error analysis in these circumstances because "[t]he right to trial by jury includes certain intangible but real benefits to a defendant that are lost whenever the jury is induced to think incorrectly in terms of guilt." *Id.* "So solemn is the jury's responsibility that we do not permit it to be mislead by considerations of issues not proper for its deliberation." *Id.*; *see also, Commonwealth v. Talkowski*, 604 N.E.2d 718, 727 (Mass. 1992) (holding erroneous instruction on first-degree murder was not harmless in manslaughter conviction because the court "cannot determine that the jury found guilt without relying on the unconstitutional presumption").

In this case, as in *Belcher*, "it is entirely conceivable that the only evidence of malice" was Spriggs' use of a deadly weapon. 385 S.C. at 612, 685 S.E.2d at 810. All of the witnesses testified that Spriggs was acting to protect himself and others when he stabbed Molique. There was ample evidence from which the jury could have concluded that Spriggs acted in self-defense and/or defense of others. And yet, the jury was also instructed that they could presume malice from the fact that Spriggs used a deadly weapon. Malice, they were told, is "hatred, ill-will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse." *App. 960, lines 2-5.* It would be an error to conclude that the malice instruction had no bearing on the jury's manslaughter verdict, since such a position would inevitably hinge on a number of speculative assumptions about the jury's deliberations. Thus, it is impossible to conclude that the improper malice instruction was harmless beyond a reasonable doubt.

CONCLUSION

Petitioner, Christopher Spriggs, had not only a triable case of self-defense and defense of others, but a very strong one. Although the bulk of the trial went favorably for him, Spriggs' strategy was damaged and his theory of the case was prejudiced when the trial court took back her promise to defer to Spriggs on the lesser included offense issue and then gave an improper charge on implied malice. These two events deprived Spriggs of a fundamentally fair trial and resulted in a compromise verdict of voluntary manslaughter. Moreover, the trial court improperly injected an erroneous factual assertion regarding the initial jury vote to support her rulings, and then denied Spriggs a fair opportunity to rebut her claim. Petitioner's conviction must be reversed; this Court should grant *certiorari* and remand for a new trial.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

May 13, 2014

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

RECEIVED
MAY 15 2014
SC Court of Appeals

Unpublished Opinion No. 2009-140446
Heard October 17, 2013- Filed November 27, 2013

STATE OF SOUTH CAROLINA ..... Respondent,

v.

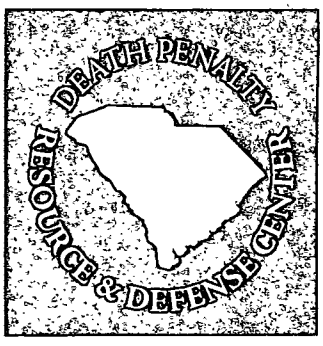
CHRISTOPHER SPRIGGS ..... Petitioner

CERTIFICATE OF SERVICE

I, Jill A. Rider, do hereby certify that I served Petitioner's Amended Petition for a Writ of Certiorari and Appendix upon counsel for Respondent on May 13, 2014, by hand-delivery to:

William Blitch
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

Jill A. Rider



May 13, 2014

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211
VIA HAND-DELIVERY

RE: *State of South Carolina v. Christopher Spriggs*

Dear Mr. Shearouse:

Please find enclosed for filing, with certificate of service, the original and six copies of the Amended Petition for Writ of Certiorari. The original Petition was filed on April 14, 2014 . I am also serving opposing counsel with a copy of the Appendix.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Jill A. Rider

Jill A. Rider
Paralegal

cc: William Blitch, Esq.
Honorable Jenny Abbot Kitchings

RECEIVED
MAY 15 2014
SC Court of Appeals