

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

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Knox R. McMahon, Circuit Court Judge

JUN 12 2013

Opinion No. 2013-UP-152 (S.C. Ct. App. filed April 10, 2013) ~~S.C. Supreme Court~~

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State of South Carolina, ..... Respondent,

v.

Andrew E. Torrence, Jr., ..... Petitioner.

---

**APPENDIX**

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Andrew Torrence, Appellant.

Appellate Case No. 2011-194612

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Appeal From Lexington County  
R. Knox McMahon, Circuit Court Judge

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Unpublished Opinion No. 2013-UP-152  
Heard March 5, 2013 – Filed April 10, 2013

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**AFFIRMED**

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John S. Nichols and Blake A. Hewitt, Bluestein Nichols  
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Floyd, of West Columbia, for Appellant.

Attorney General Alan Wilson, Assistant Attorney  
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Respondent.

---

**PER CURIAM:** Andrew Torrence appeals his conviction of voluntary manslaughter for the shooting death of Zach Chaplin. He argues the circuit court erred when it did not charge the jury on involuntary manslaughter because there is

evidence in the record showing Torrence did not intend to inflict great bodily harm or death. We affirm.

In the early morning hours of September 28, 2008, Torrence and Chaplin got into a physical altercation while at a bar. Although Torrence initially exited the bar after the fight, he decided to go back in with his gun to make a citizen's arrest and detain Chaplin for the earlier assault. He testified he brought the gun with him as a deterrent against any further violence and had no intent to shoot the gun. However, while Torrence was conducting the alleged citizen's arrest, Chaplin charged him from across the bar. Torrence admitted he fired the gun twice at Chaplin. Both bullets struck Chaplin, and he died from complications of his injuries.

At trial for murder, the court charged voluntary manslaughter but refused Torrence's request to charge involuntary manslaughter. The jury found Torrence guilty of voluntary manslaughter, and the court sentenced him to twenty-five years imprisonment.

The law to be charged is determined from the evidence presented at trial. *State v. Gibson*, 390 S.C. 347, 355, 701 S.E.2d 766, 770 (Ct. App. 2010). The trial court commits reversible error if it refuses a request for a jury instruction on a lesser-included offense that is supported by the evidence. 390 S.C. at 355-56, 701 S.E.2d at 770.

Involuntary manslaughter is defined as the unintentional killing of another without malice while (1) engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) engaged in a lawful activity with reckless disregard for the safety of others. *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). Generally, a charge of involuntary manslaughter is inappropriate where the defendant admits he or she intentionally fired a gun. *See State v. Pickens*, 320 S.C. 528, 531-32, 466 S.E.2d 364, 366-67 (1996) (holding defendant not entitled to involuntary manslaughter charge because defendant admitted intentionally shooting the gun); *Gibson*, 390 S.C. at 357-58, 701 S.E.2d at 771-72 (holding defendant not entitled to charge of involuntary manslaughter because "the essence of involuntary manslaughter is the involuntary nature of the killing" and he intentionally fired the gun); *State v. Morris*, 307 S.C. 480, 484, 415 S.E.2d 819, 821-22 (Ct. App. 1991) (holding defendant not entitled to involuntary manslaughter charge because the act must be unintentional and defendant intentionally fired the gun).

We reject Torrence's argument that the word "unintentional" in the involuntary manslaughter definition should mean the defendant's intent to cause the consequence of death or serious bodily harm when he fired the gun. Instead, we consider the word "unintentional" to relate to the defendant's intent to voluntarily fire the gun. *See Bozeman v. State*, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (explaining involuntary manslaughter charge inappropriate even though defendant "only meant to shoot over the victim's head" because he intended to shoot the gun). Therefore, because there is no evidence that Torrence did not intentionally fire his gun at Chaplin, he was not entitled to a charge of involuntary manslaughter. Moreover, this case does not fall under either prong of the involuntary manslaughter definition because: (1) firing a gun is considered conduct naturally tending to cause death or great bodily harm; and (2) Torrence was not acting lawfully by brandishing the gun in a bar. *See id.* 307 S.C. at 177, 414 S.E.2d at 147 (observing that firing a gun "naturally tends to cause death or bodily harm"); *State v. Rivera*, 389 S.C. 399, 403, 699 S.E.2d 157, 159 (2010) (agreeing with State's argument that brandishing a weapon was unlawful conduct naturally tending to cause death or great bodily harm); S.C. Code Ann. § 16-23-465 (2003) (unlawful to carry a firearm onto the premises of a building selling alcoholic liquors).

Torrence cites cases from North Carolina in support of his claim that the facts warrant a charge of involuntary manslaughter. However, we must analyze this case under the law as it currently exists in South Carolina. Under South Carolina law, the facts of this case require us to find that a charge of involuntary manslaughter was not supported by the evidence. Therefore, the circuit court's refusal to charge involuntary manslaughter is

**AFFIRMED.**

**FEW, C.J., and GEATHERS and LOCKEMY, JJ., concur.**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APR 23 2013

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of General Sessions

Knox R. McMahon, Circuit Court Judge

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Op. No. 2013-UP-152 (S.C. Ct. App. filed Apr. 10, 2013)

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The State of South Carolina, ..... Respondent,

v.

Andrew E. Torrence, Jr., ..... Appellant.

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**PETITION FOR REHEARING**

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*First*, the purpose of this petition is to preserve Mr. Torrence's ability to request that the Supreme Court review the arguments he offered this Court on the merits. To that end, Mr. Torrence incorporates the arguments from his principle and reply briefs by reference.

*Second*, although the Court's decision contains a correct recital of language from *State v. Pickens*, *State v. Gibson*, and *State v. Morris*, the language of those cases is not consistent with current South Carolina law — in some circumstances, it is appropriate to charge involuntary manslaughter despite the fact that the defendant intentionally discharged a firearm. One need look no further than the *Morris* decision itself, which favorably cited *State v. Quick*. In *Quick*, the Supreme Court affirmed an involuntary manslaughter conviction where the defendant admitted firing the gun. See *Morris*, 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991) (citing *Quick*, 168 S.C. 76, 167 S.E. 19 (1932)).

There is more to the inconsistency. After citing *Quick*, the *Morris* decision says “the act must be unintentional.” 307 S.C. at 483, 415 S.E.2d at 821. This cannot be a correct statement of the law. Without *some* intentional conduct, there can be no criminal liability. Without some intentional conduct, the killing must be excused as an accident.

*Morris* is a 1991 decision of this Court, and what has happened is that subsequent decisions have used this phrase from *Morris* to unhitch South Carolina’s involuntary manslaughter jurisprudence from its moorings. Not all shootings are created equal; the defendant who coolly and deliberately shoots at someone else is materially different from the defendant who shoots during the course of a brief but violent physical altercation and who shoots without the deliberate intent to kill. This loose language from *Morris* draws an arbitrary line in the sand, and the problem is that this view is erroneous under current South Carolina law. *Quick* is a Supreme Court decision, and it has never been overruled.

The jury could have found that Mr. Torrence was at-fault in bringing on the difficulty, and the jury would thus have been required to take self-defense off the table. The same jury might have found that Mr. Torrence did not intend to injure anyone, thus removing voluntary manslaughter as a possibility. There is not a category of killings that count as “nothing” — a killing is either self-defense, accident, involuntary manslaughter, voluntary manslaughter, or murder. This Court is bound by the Supreme Court’s decisions, but it is possible to rule in favor of Mr. Torrence while still remaining faithful to South Carolina’s definition of involuntary manslaughter and the case law that properly applies that definition.

*Third*, the question whether Mr. Torrence was acting lawfully while carrying his firearm inside the bar involves questions that were for the jury; specifically, whether Mr.

Torrence had the right to perform a citizen's arrest and whether he had the right to use deadly force (or a show of force) during that arrest. See *State v. Cooney*, 320 S.C. 107, 463 S.E.2d 597 (1995). No one has argued that Mr. Torrence's decision to take a firearm in this building was a prudent one, but for a court to say that death or serious injury was a *probable* result of this conduct — as opposed to a *possible* result — is to usurp the jury's role.

*Finally*, there is *some* evidence that Mr. Torrence did not intentionally discharge his firearm at the deceased. Mr. Torrence explained that he “had to make a fast decision and went with instinct,” and that he did not know “how else to explain [it].” (R.p.382, lines 22-24). When asked whether there was a struggle for control of the weapon, he replied “Yeah, there was a struggle . . . I don't remember whether [the deceased] touched the weapon or not.” (R.p.393, line 11 - p.394, line 2). The first statement is functionally equivalent to *State v. Crosby*, where the defendant said he pulled his gun, raised it, and “pulled the trigger, [but] I didn't even know I pulled the trigger.” See 355 S.C. 47, 53, 584 S.E.2d 110, 112 (2003). In a similar fashion, several decisions recognize that evidence of a struggle for control of a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury. *State v. Light*, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (citing *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991)). A fair reading of the evidence is that this shooting was instinctive and occurred the moment before a struggle for the gun or at the same time a struggle for the gun began.

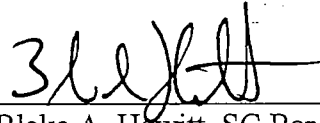
#### CONCLUSION

The way to write this case in Mr. Torrence's favor is for the Court to write that while it questions whether some of the statements from cases like *Gibson*, *Morris*, and *Pickens* are

faithful to involuntary manslaughter doctrine if applied literally, it is not necessary to resolve this doctrinal conflict because this shooting is not a run-of-the-mill “intentional shooting.” There is *some* evidence that this shooting was instinctive — not deliberate — and occurred the moment before a struggle for the gun began or at the same time a struggle for the gun was beginning. This resolution is faithful to involuntary manslaughter doctrine and takes this potential conflict out of play. For the reasons set forth in this petition and in Mr. Torrence’s merits briefs, the Court should reverse.

April 19, 2013

Respectfully submitted,



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# The South Carolina Court of Appeals

The State, Respondent,

v.

Andrew Torrence, Appellant.

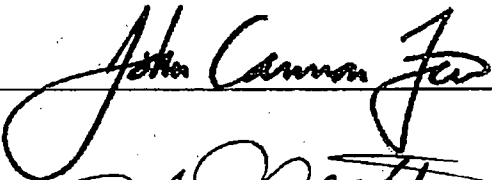
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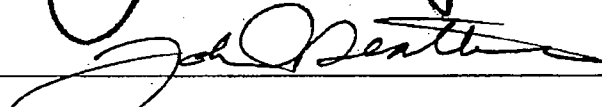
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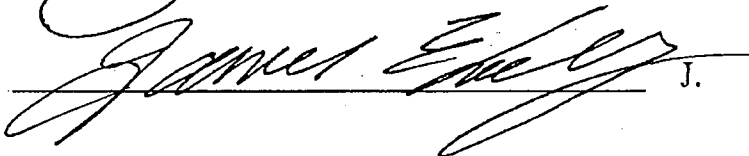
## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_  
C.J.

  
\_\_\_\_\_  
J.

  
\_\_\_\_\_  
J.

Columbia, South Carolina

cc:

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FILED

May 8, 2013

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of General Sessions

Knox R. McMahon, Circuit Court Judge

---

Case Nos. 2010-GS-32-2318, and 2011-GS-32-1440 & -1444

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The State of South Carolina, ..... Respondent,

v.

Andrew E. Torrence, Jr., ..... Appellant.

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**BRIEF OF APPELLANT**

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**SC Court of Appeals**

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## STATEMENT OF ISSUE ON APPEAL

Whether Andrew Torrence was entitled to a charge on involuntary manslaughter when he admitted intentionally firing his weapon, but other circumstances indicated that he did not intend to inflict serious injury or death.

## STATEMENT OF THE CASE

This case arises out of a bar room shooting in West Columbia, South Carolina. After being involved in a fight inside the bar, Andrew Torrence, who is the Appellant in this appeal, went outside to his vehicle, retrieved a pistol, and re-entered the bar. As Mr. Torrence—his gun at his side and pointed to the floor—attempted to perform a citizen's arrest on one of the men he believed had assaulted him minutes before, the other man involved in the fight threw a barstool at Mr. Torrence from across the room and charged him. Mr. Torrence ultimately fired twice. Both rounds struck this individual, and he died about a month and a half later. A jury found Mr. Torrence guilty of voluntary manslaughter, and the trial judge sentenced Mr. Torrence to a 25-year term of imprisonment. The issue in this appeal is whether the circumstances of this killing, viewed in the light most favorable to Mr. Torrence, entitled him to a charge on involuntary manslaughter.

This incident occurred in the early morning hours of September 28, 2008. In August of 2010, a grand jury indicted Mr. Torrence for murder (a violation of section 16-3-10 of the South Carolina Code). In May of 2011, a grand jury added charges of carrying a firearm onto the premises of a building selling alcoholic liquors (a violation of section 16-23-465), and possession of a weapon during a violent crime (a violation of section 16-23-490). The case was tried over four days—May 31 through June 3—in 2011.

As relevant to the murder charge, the trial court instructed the jury on murder and the lesser-included offense of voluntary manslaughter. See (R.p.590, line 10-p.594, line 11). The court also charged the jury on the defense of self-defense. See (R.p.598, line 3-p.602, line 22). Immediately following the jury charges, Mr. Torrence objected to the court's failure to charge involuntary manslaughter. (R.p.610, lines 19-20). There was no contemporaneous ruling on this objection, but the trial court's second set of jury instructions did not include involuntary manslaughter. (R.p.611, line 14-p.615, line 5). The issue of involuntary manslaughter was raised again later; during jury deliberations, the jury sent a written question to the court asking whether it could consider the crime of involuntary manslaughter. See (R.p.620, line 20-p.621, line 5). Mr. Torrence renewed his request for the court to charge involuntary manslaughter, see (R.p.621, lines 3-5), and the trial court refused that request. See (R.p.622, lines 17-25).

The jury found Mr. Torrence guilty of voluntary manslaughter and the two firearms charges. See (R.p.617, line 18-p.618, line 5). The jury returned its verdict on June 3, 2011. Five days later, Mr. Torrence filed a written motion for a new trial and for reconsideration of the sentence. See (R.p.2). The court's refusal to charge involuntary manslaughter were the first grounds offered in support of this motion. See *Id.* The court denied the motion in an order dated June 15, 2011 and filed the next day. (R.p.1). Mr. Torrence served and filed a notice of appeal six days later.

#### **STATEMENT OF (CONTESTED) FACTS**

The purpose of this separate statement of facts is to present the relevant background information while still abiding by the rule that the "statement of the case" shall not include

contested matters. See Rule 208(b)(1)(C), SCACR. This shooting occurred inside a bar at approximately 6:30 in the morning on a Sunday. The physical aspects of the shooting and the fight that preceded it were, in large part, captured on the bar's video surveillance equipment. See (State's Exhibit 17) (the compiled surveillance videos).

The video shows a U-shaped bar that at 6:30 a.m., has seven people seated around it and a bartender cleaning behind it. The video shows Mr. Torrence seated by himself at one corner of the bar. To his right are the two people seated closest to the surveillance camera. Moving down the bar to Mr. Torrence's left, he appears to be separated from the next individual at the bar by one or two chairs. To that individual's left there was a party of three, seated at the other corner of the bar. This party of three consisted of the decedent, whose name was Zach Chaplin, a woman named Donna Muszynski, and a gentleman named Lee Buchanan.

At about 6:31 a.m., Mr. Torrence picked up his drink and walked down the bar to his left. Mr. Torrence turned the corner of the bar, walked past the decedent and Ms. Muszynski, and took a seat at the end of their party next to Mr. Buchanan. The video shows Mr. Torrence sitting at the bar but turned to his right and facing Mr. Buchanan, and it also shows Mr. Torrence lean towards Mr. Buchanan as if the two are talking. Within a minute of Mr. Torrence's sitting down, the conversation appears to get animated. Mr. Buchanan begins to gesture with his arms and hands, moving them as if he is saying something with deliberate emphasis and insistence. About 20 seconds after Ms. Buchanan appears to get animated, the video shows the decedent get up from his seat at the bar, walk past Ms. Musyznski and Mr. Buchanan, and punch Mr. Torrence in face. Mr. Torrence responds by raising both of his

arms and pushing at the decedent, and Mr. Buchanan appears to attempt to separate the men by stepping between them and holding Mr. Torrence back. The fight continues for approximately 15 seconds with the decedent continuously punching Mr. Torrence in the face as Mr. Buchanan restrains Mr. Torrence, preventing him from retaliating. This incident does not appear to evoke any significant reaction from the bartender or the other patrons in the bar. After Mr. Buchanan and Ms. Muszyznski separated the decedent and Mr. Torrence, Mr. Buchanan assisted Mr. Torrence in looking for his eyeglasses and in leaving the bar. According to the clock on the video, Mr. Torrence left the bar at approximately 6:34 a.m.

Mr. Torrence re-entered the bar about four minutes later. The video shows Mr. Buchanan open the door to let Mr. Torrence enter, then run from the door after he apparently sees the gun Mr. Torrence is holding. Mr. Torrence entered the bar with the gun held by his right side in his right hand. The gun was pointed down at the floor, and after entering the bar, the video shows Mr. Torrence gesture at Mr. Buchanan with his left hand as if giving directions. Mr. Buchanan testified Mr. Torrence told him to put his hands on the bar. (R.p.183, lines 16-18). Mr. Torrence's testimony was similar. (R.p.380, line 24-p.381, line 3). Mr. Torrence then moved toward Mr. Buchanan—according to Mr. Torrence, to search him for weapons and to perform a citizen's arrest, see (R.p.381, lines 2-11)—and the video shows a chair being thrown at Mr. Torrence from across the bar. Moments later, the decedent ran around the bar and charged Mr. Torrence. The video appears to show the decedent swing at Mr. Torrence with his right hand and reach for the gun with his left.

Mr. Torrence admitted that he fired his weapon twice, see (R.p.385, lines 14-17), when the decedent got “[w]ithin a foot maybe.” (R.p.383, lines 12-17). Both bullets struck

the decedent; one in the right arm, the other behind the right ear. The bullet that struck the decedent behind his right ear injured his spinal cord and paralyzed him from the chest down. (R.p.60, lines 21-24). Though the decedent was eventually released from the hospital and transferred to a rehabilitation facility, he died in November of 2008. (R.p.49, lines 3-4).

The State's theory of the case was that Mr. Torrence viewed the decedent as a rival for Ms. Muszynski's affections. (R.p.6, line 18-p.7, line 7) (from the State's opening argument); also (R.p.549, line 8-p.550, line 5) (from the State's closing argument). The State contended Mr. Torrence became angry when Ms. Muszynski supposedly turned her attention away from Mr. Torrence and towards the decedent, and the State argued that Mr. Torrence's act of shooting the decedent was both premeditated and an act of "beating" the decedent or "winning." (R.p.6, line 18; p.548, lines 10-11) (arguing "to be the man, you have to beat the man"). The State explained the decedent's battery on Mr. Torrence by arguing that Mr. Torrence had been making derogatory comments to several individuals in the bar and that the decedent "put [Mr. Torrence] in his place." (R.p.554, ll. 4-6). Mr. Torrence's comments had included drawing attention to Mr. Buchanan's sexual orientation. *Id.* at 176, lines 16-21.

Mr. Torrence admitted making some of the alleged statements to Mr. Buchanan and Ms. Muszynski, but he denied making others and he denied any malicious intent. See, e.g., (R.p.427, line 22-p.428, line 5) ( his version of the statement to Ms. Muszynski); see also (R.p.424, lines 20-25) (denying one of the statements to Mr. Buchanan). Mr. Torrence said he went to sit by Mr. Buchanan in order to apologize for his earlier comments, and according to Mr. Torrence, Mr. Buchanan got upset and indicated he did not want to hear an apology. (R.p.375, line 15-p.376, line 6). At that point, the fight with decedent began. *Id.*

## ARGUMENT

Several South Carolina cases seem to stand for the proposition that the intentional discharge of a firearm prevents a charge on involuntary manslaughter. Mr. Torrence's argument is that although intentionally shooting a firearm could preclude involuntary manslaughter in *some* circumstances, it should not do so in *all* circumstances.

All killings that result in criminal liability involve some intentional conduct. If they did not, the killing would be excused as an accident. One characteristic distinguishing involuntary manslaughter from voluntary manslaughter is that voluntary manslaughter is an intentional killing, and involuntary manslaughter is an *unintentional* killing. South Carolina should recognize that a killing can be mitigated under certain circumstances, but still criminalized, if it is the unintentional result of the use of a deadly weapon—if the circumstances indicate that the defendant did not intend to inflict serious injury or death. North Carolina allows for such mitigation. South Carolina should be no different.

By proper application of that principle, Mr. Torrence was entitled to an involuntary manslaughter charge. If this killing was committed without malice, it cannot be murder. If it was not committed during an "irresistible impulse to do violence," it cannot be voluntary manslaughter. The only means left for criminal liability is involuntary manslaughter. A reasonable jury could find that Mr. Torrence did not enter the bar intending to fire his weapon, that he shot as the decedent reached for the weapon, that he shot only at the last second, and that he shot based on "instinct." The jury could thus find that Mr. Torrence did not intend to inflict serious injury or death, and that this was an unintentional killing caused by the exceptionally reckless decision to take a gun inside a bar.

**A. South Carolina Cases Suggest That the Intentional Discharge of a Firearm Precludes a Charge on Involuntary Manslaughter, but This Is Not Consistent with Involuntary Manslaughter Doctrine.**

In South Carolina, involuntary manslaughter is the unintentional killing of another person that is committed without malice while (a) engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm, or (b) engaged in a lawful activity with reckless disregard for the safety of others. See, e.g., *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). It has been described as “criminal negligence,” which is statutorily defined as “reckless disregard for the safety of others.” See *State v. Crosby*, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003) (citing S.C. Code Ann. § 16-3-60 (1985), presently found in the bound volume of title 16 published in 2003).

Several principles in South Carolina jurisprudence relate different acts with firearms to whether those acts do or do not qualify for a charge on involuntary manslaughter. One such principle is that the negligent or reckless handling of a loaded firearm generally entitles a defendant to a charge on involuntary manslaughter. A common application of this principle is the case where the defendant admits *some* intentional act—pointing a gun at the decedent or grabbing a gun in the course of a conflict—but says the gun “just went off.” See, e.g., *Crosby*, 355 S.C. at 50, 584 S.E.2d at 111 (as the decedent charged him, the defendant pulled a gun out of his pocket, closed his eyes and pulled the trigger, but claimed he did not realize he pulled the trigger); and *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (as the decedent began moving threateningly toward the defendant, the defendant grabbed his own gun and “it fired”). Several cases state this principle in the converse; meaning, several cases hold that there is no evidence to support a charge of involuntary manslaughter if the

defendant admits intentionally shooting the gun. See, e.g., *State v. Pickens*, 320 S.C. 528, 531-32, 466 S.E.2d 364, 366 (1996) (citing *State v. Morris*, 307 S.C. 480, 415 S.E.2d 819 (Ct. App.1991)).

Another principle relating acts with firearms to involuntary manslaughter is that the unlawful possession of a firearm does not, by itself, preclude the application of voluntary manslaughter. This is because it is possible to be “lawfully armed in self-defense” despite the fact that the gun was initially possessed unlawfully. Chief Justice Toal’s concurring opinion in *State v. Goodson*, 312 S.C. 278, 281-82, 440 S.E.2d 370, 373 (1994), is an explanation of this principle in the context of a claim that the killing was an accident. This Court’s decision in *State v. Gibson*, 390 S.C. 347, 356-57, 701 S.E.2d 766, 771 (Ct. App. 2010) is a recent example that deals with involuntary manslaughter. This principle often appears in “imperfect defense” cases—cases where the defendant cannot meet all of the requirements for the defense of self-defense or accident. In *Goodson*, for example, the defendant was carrying a firearm illegally and claimed he drew the firearm in response to being threatened with a pool stick by another patron in the bar. 312 S.C. at 279, 440 S.E.2d at 371-72. The confrontation with the other patron resolved when the owner of the bar intervened and escorted the defendant outside, and it was there that the gun discharged, allegedly by accident, killing the owner of the bar. Self-defense was not available because the defendant did not present evidence he believed he was in immediate danger at the time of the shooting. *Id.* at 280, 440 S.E.2d at 372. As for the defendant’s being lawfully armed in self-defense while inside the bar, the court wrote the “lawfulness in *Goodson*’s being armed ended when he was no longer threatened.” *Id.* at 282, 440 S.E.2d at 373.

South Carolina courts have described this principle as being based, at least in part, on the notion that the unlawful possession of a firearm is not always the “proximate cause” of the death. The Chief Justice’s concurring opinion in *Goodson*, for example, recites this principle and says “where, as here, the defendant unlawfully possesses a firearm, has been drinking heavily all day, and kills the bar owner with the unlawful firearm, the unlawful possession of the firearm is a proximate cause of the injury.” *Id.* at 282, 440 S.E.2d at 373. Another example is the decision in *State v. Slater*, where the defendant “carried [a] cocked weapon, in open view, into an already violent attack in which he had no prior involvement.” 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007). The court wrote “[the defendant’s] actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim.” *Id.* at 71, 644 S.E.2d at 53.

Neither of these principles—involuntary manslaughter requires evidence that the gun was fired accidentally or handled negligently, and involuntary manslaughter is not available when the illegal possession of the weapon proximately causes the death—is beyond criticism. For one thing, “proximate cause” is normally a question for the jury, see *Kennedy v. Custom Ice Equipment Co.*, 271 S.C. 171, 175, 246 S.E.2d 176, 178 (1978) (stating this in the context of a civil case), and there is no such thing as a directed verdict against a defendant in a criminal case. See, e.g., *State v. Peete*, 517 N.W.2d 149 (Wis. 1994) (“a court may not direct a verdict of guilt against a defendant in a criminal case”). Although some South Carolina cases disallow an involuntary manslaughter charge by saying that the

defendant was engaged in a felony,<sup>1</sup> a defendant who can offer a defense to that felony ought to be able to insist that a jury decide whether his conduct disqualifies involuntary manslaughter. And though the law seems to say that these unlawful acts completely preclude involuntary manslaughter, that rule should not be applied in all circumstances. It is one thing to purposefully display a loaded and cocked weapon while advancing on an ongoing fight, see *Slater*, 373 S.C. at 71, 644 S.E.2d at 53, but it is also possible to display a firearm in an effort to diffuse a situation or deter violence.

Consider also a comparison between acts with firearms and other acts generally found in involuntary manslaughter cases. Reasonable people might readily agree that discharging a firearm is, in general, a rather dangerous activity,<sup>2</sup> but the same might be said for one of the paradigm cases of “unlawful-act” manslaughter: a death occurring as a result of recklessly operating an automobile. See Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* § 79 (1972) (unlawful-act manslaughter is often referred to as “misdemeanor-manslaughter” (compared to felony-murder) and the misdemeanor involved is commonly a traffic offense); see also *State v. Caldwell*, 231 S.C. 184, 188, 98 S.E.2d 259, 261 (1957) (discussing involuntary manslaughter cases involving automobiles and noting “an automobile is a dangerous instrumentality”). And where an automobile accident causes death, the unlawful

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<sup>1</sup>See *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 900–01 (2006) (defendant not entitled to an involuntary manslaughter instruction because he “presented a firearm”); and *State v. Cabrera-Pena*, 361 S.C. 372, 381, 605 S.E.2d 522, 526–27 (2004) (defendant’s conduct constituted a felony of either pointing or presenting a firearm or kidnapping). *Reese* was overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

<sup>2</sup>See *Bozeman v. State*, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (observing that firing a gun “naturally tends to cause death or bodily harm”).

activity—the traffic violation—is often the proximate cause of the death. For a different example, take the person engaged in a fistfight who strikes a blow “intending to inflict only minor harm, but caus[es] a quite unexpected death.” LaFave & Scott, *supra* p.10. Both of these circumstances (the car wreck and the fistfight) involve unlawful acts that are readily identifiable as dangerous. Yet, an unintentional killing resulting from the intentional act of violating the rules of the highway or the rules against combat may result in involuntary manslaughter, but an unintentional killing resulting from intentionally firing a gun may not.

The point is this: the word “unintentional” in the definition of involuntary manslaughter can modify both the action causing death—pulling the trigger—and the consequence of the action, the killing. When an opinion says simply that “the act must be unintentional,” *Morris*, 307 S.C. at 483, 415 S.E.2d at 831, that statement is not accurate. All involuntary manslaughter cases must involve some intentional act. “[W]ithout some intentional act in the chain of causation leading to death[,] there can be no criminal responsibility.” *State v. Wilkerson*, 247 S.E.2d 905, 918 (N.C. 1978).

**B. The Court Should Charge Involuntary Manslaughter When There Is Evidence That the Killing Was the Unintentional Result of the Use of a Deadly Weapon and Circumstances Indicate That the Defendant Did Not Intend to Inflict Serious Injury or Death.**

The Supreme Court of North Carolina has rejected the argument that the discharge of a weapon must be unintentional in order to entitle defendant to an instruction on involuntary manslaughter. See *State v. Brewer*, 386 S.E.2d 569, 583 (N.C. 1989) (calling this argument an “invalid premise”). Drawing from its own precedent, the court wrote “[w]hile involuntary manslaughter imports an unintentional killing, i.e., the absence of a

specific intent to kill, it is . . . accomplished by means of some intentional act.” *Id.* at 583 (quoting *Wilkerson*, 247 S.E.2d at 918). If there was no intentional act, the death “would be the result of accident or misadventure[,]” and would not be a crime. *Wilkerson*, 247 S.E.2d at 918. In North Carolina, “culpable negligence” is one of the states of mind required for an instruction on involuntary manslaughter, and North Carolina defines “culpable negligence” as “an act or omission evidencing a disregard for human rights and safety.” *Brewer*, 386 S.E.2d at 583. That definition is indistinguishable from South Carolina’s definition of “criminal negligence.” See *Crosby*, 355 S.C. at 52, 584 S.E.2d at 112; and S.C. Code Ann. § 16-3-60 (“criminal negligence” is “reckless disregard for the safety of others”).

Though it does not involve a firearm, the case *State v. Debiase*, 711 S.E.2d 436 (N.C. Ct. App. 2011) provides a useful example. The case arose out of a fight at an outdoor party, and the decedent’s death was the result of a large cut in his neck sustained during the fight. The court recited that the facts, viewed in the light most favorable to the defendant, showed the decedent became angry with the defendant when the defendant offered drugs to the decedent’s girlfriend. Other partygoers separated the two men after the decedent either punched or shoved the defendant, and “[the decedent] subsequently charged the defendant, who struck [the decedent] on the top of the head or the side of the neck with a beer bottle.” *Id.* at 441. The defendant and the decedent struggled and fell into the fire, and it was not until after the fight ended that the defendant realized the decedent’s neck had been injured badly.

The *Debiase* court wrote that an involuntary manslaughter charge was appropriate “despite the fact that [the] [d]efendant acted intentionally at the time that he struck [the

decedent] with the bottle[.]” *Id.* at 442. The court explained that involuntary manslaughter is appropriate when “evidence tend[s] to show . . . a killing caused by the negligent or reckless use of a deadly weapon without any intent to inflict death or serious injury[.]” *id.* at 443, and the court explained how to distinguish cases that are appropriate for involuntary manslaughter from cases where involuntary manslaughter is not appropriate. Involuntary manslaughter is not appropriate when a defendant “deliberately engages in an act likely to result in death or serious injury” but claims, somewhat flatly, that he did not mean to kill. *Id.* at 443-444. In *Debiase*, the court noted that the defendant struck the decedent with the beer bottle only after the decedent rushed at him, that the defendant only struck the decedent on one occasion, and that the defendant did not stab the decedent during the resulting melee. *Id.* at 444. The court favorably cited cases where the circumstances suggested that the infliction of the fatal wound was unintentional despite the fact that the defendant had intentionally carried a deadly instrument during the struggle. See *Id.* at 442-443 (citing *State v. Drew*, 592 S.E.2d 27 (N.C. Ct. App. 2004); *State v. Daniels*, 360 S.E.2d 470 (N.C. Ct. App. 1987); *State v. Buck*, 313 S.E.2d 550 (N.C. 1984); and *State v. Fleming*, 251 S.E.2d 430 (N.C. 1979)).

*Debiase*, *Wilkerson*, and the other cases that discuss these principles describe the critical question as whether the defendant’s actions with the weapon evidenced “a heart devoid of a sense of social duty.” *Debiase*, 711 S.E.2d at 442 (quoting *Fleming*, 251 S.E.2d at 433). If the defendant’s actions show “wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief,” the law deems his recklessness to be so severe that it implies malice. If

there is malice, although the killing may have been unintended, it is murder. See *Wilkerson*, 247 S.E.2d at 916 (discussing this in the context of an involuntary manslaughter case); see also *Belcher*, 385 S.C. at 609 n.5, 685 S.E.2d at 808 n.5 (same definition of depraved heart malice in South Carolina). But if the defendant's actions are *not* so severe, involuntary manslaughter is appropriate. These sorts of acts have been variously described as “reckless or careless behavior . . . import[ing] a thoughtless disregard of the consequences[,] . . . [or] showing a heedless indifference to the rights and safety of others[,]” *Wilkerson*, 247 S.E.2d at 917; “[a]n intentional violation of some statute designed for the protection of people which proximately though unintentionally causes death[,]” *id.* at 918; and acts that “do[] not indicate a total disregard for human life and [are] committed with no intent to kill or to inflict serious bodily injury.” *Id.* at 919. Those descriptions would fit Mr. Torrence's conduct here.

There is more than a semantic difference among these standards, and they embody principles that make sense. The circumstances surrounding one person's action with a firearm—including intentionally discharging it—may well be so depraved that the law ought to imply malice and deem the killing to be murder, but other circumstances may demonstrate actions with the firearm that should be *criminal*, but do not show *malice*. South Carolina law should allow a middle ground; voluntary manslaughter is out of bounds if the killing was unintentional, and limiting the options to murder and nothing leaves the options at the extremes. North Carolina's approach is consistent with South Carolina's definition of involuntary manslaughter. Allowing involuntary manslaughter when the injury was caused by the reckless use of a weapon, but without any intent to inflict death or serious injury, is nothing more than a faithful application of the principles underlying South Carolina law.

**C. A Jury Could Find Mr. Torrence Did Not Intend to Inflict Serious Injury and That this Was an Unintentional Killing Caused by the Reckless Decision to Take a Gun Inside a Bar.**

The trial court commits reversible error if it refuses a request for a jury instruction on a lesser-included offense that is supported by the evidence. See, e.g., *State v. Light*, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (reversing because the defendant was entitled to jury instructions on involuntary manslaughter and self-defense); and *Crosby*, 355 S.C. at 53, 584 S.E.2d at 112-13 (trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence). Mr. Torrence's case is unusual because even if reversal depended on the likelihood that the jury would have examined the lesser-included offense, there would be no room for speculation on this record. The jury specifically asked whether it could consider involuntary manslaughter.

There are two parts to examining whether the circumstances of Mr. Torrence's case fall within the rule proposed—whether a jury could find that this was a case of an injury caused by the reckless use of a deadly weapon but without any intent to inflict death or serious injury. The first part is whether Mr. Torrence's actions were “reckless.” The second is whether there is evidence showing the absence of intent to inflict death or serious injury.

Mr. Torrence's decision to take the firearm inside the bar was reckless. Taking a firearm inside a bar is unlawful, and Mr. Torrence testified that he knew it was unlawful; he explained he “knew it had to be against some law.” (R.p.449, lines 7-11). But the court should not read too much into the fact that Mr. Torrence knew he was breaking the law; the critical question is whether Mr. Torrence's conduct shows recklessness and culpable negligence or whether it shows malice. Using North Carolina's definition of “culpable

negligence” as including “[a]n intentional violation of some statute designed for the protection of people which proximately though unintentionally causes death,” Mr. Torrence’s violation looks to be of that character. Unlawfully carrying a firearm into a premises selling alcoholic beverages is a misdemeanor that is punishable by a fine of not more than two thousand dollars or a prison sentence of not more than three years. S.C. Code Ann. § 16-23-465 (Supp. 2011). It is reasonable to think that it is *possible* that taking a gun inside a bar will lead to serious injury or death, but it is another thing to conclude that it is *probable*. See 40 Am. Jur. 2d *Homicide* § 88 (2008) (citing cases for the proposition that “depraved indifference” is shown where there is a probability, rather than a mere possibility, that death will result). Taking a gun in a bar also fits within South Carolina’s common law and statutory definitions of recklessness. The criminal statute covering involuntary manslaughter speaks of “reckless disregard for the safety of others[,]” see § 16-3-60, and, in the tort context, South Carolina has defined recklessness as the conduct of someone consciously aware that he was acting negligently. *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996). Intentionally taking a firearm inside a bar seems to fit those descriptions.

As to whether Mr. Torrence intended to inflict serious injury on anyone, his testimony suggests that he did not. Mr. Torrence repeatedly testified that the reason he went back inside the bar was to hold the decedent and Mr. Buchanan until the police arrived. (R.p.378, lines 21-23; p.382, lines 6-8; p.390, lines 17-18; p.442, lines 10-12).<sup>3</sup> Mr. Torrence

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<sup>3</sup>Mr. Torrence consistently claimed he called the police and reported the assault while he was outside the bar, and that his phone stopped working during the call. (R.p.377, line 14-p.378, line 6; p.434, lines 21-23). The parties disputed this point at trial. See, e.g. (R.p.434, line

explained that he took the gun in the bar to act as a deterrent; a show of force to compel compliance with his directions as he held the decedent and Mr. Buchanan and waited for the police. (R.p.379, line 9-p.380, line 5). Mr. Torrence admitted this thought process was “stupid,” see (R.p.442, lines 7-8), but stated that he thought he had just been assaulted by two people. (R.p.376, lines 13-17; p.379, line 20; p.432, lines 5-10). Mr. Torrence testified that he entered the bar with the firearm pointed down and out, not pointing it at anyone, (R.p.380, lines 8-13); that he did not point the weapon at anyone inside the bar, (R.p.380, lines 17-18); and that he did not enter the bar with the intention of firing the weapon. (R.p.380, lines 6-7). This supports the position that Mr. Torrence did not intend to inflict serious injury or death. He did not intend to inflict *any* injury.

Some of the circumstances surrounding Mr. Torrence’s act of firing the gun show the same thing; meaning, there is other evidence to suggest that Mr. Torrence did not shoot to inflict serious injury or death, but instead, he shot to stop the decedent from charging him and getting the gun. This line of reasoning was significant in the decision of the North Carolina Court of Appeals in *Debiase*. The court noted that although the defendant admitted he intentionally hit the decedent on the head with the beer bottle, the defendant struck the decedent only after the decedent rushed at him and the defendant struck the decedent once. 711 S.E.2d at 444. The defendant testified that he struck the decedent with the beer bottle because “it was a reaction almost, it was a flash kind of just—he come toward me; and I was kind of being held; and I was afraid. I was afraid that he was going to come and hurt me.”

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24-p.435, line 2) (the State, arguing that the police department could not find a record of Mr. Torrence’s call).

*Id.* at 440. The *Debiase* court described this as a claim that the defendant “intentionally carried and used [a deadly weapon] during the course of a struggle with the deceased, but claimed that ‘the actual infliction of the fatal wound . . . was not intentional.’” *Id.* at 442 (quoting *Buck*, 313 S.E.2d at 553).

The facts of Mr. Torrence’s case are similar. Mr. Torrence described that, as the decedent charged him, he was “scared,” he “wasn’t thinking,” and he “knew that [he] was in danger.” (R.p.385, lines 11-13). Mr. Torrence also testified that he “had been drinking . . . and [] had to make a very fast decision, and [] went with instinct.” (R.p.382, lines 22-24). When asked whether he pulled the trigger intentionally, Mr. Torrence responded that he had, see (R.p.393, lines 5-9), but he explained that he thought he saw the decedent reach for the gun and that he shot to stop the decedent. See (R.p.393, lines 17-19). He characterized it as “a split-second decision . . . I knew he was coming towards me and I was scared and I shot.” (R.p.439, lines 11-13). Mr. Torrence was unable to retreat once the decedent charged; he was standing at a dead end at the end of the bar in an area that was just over 4 feet wide. See (R.p.300, line 19-p.301, line 13; p.384, line 10-p.385, line 1) (describing the dimensions of the area); see also (R.p.647) (a diagram of the area, referenced in both sections of transcript). He shot only twice; according to him, as fast as he could get the rounds off. (R.p.385, lines 19-20). He described the entire incident as occurring “all so fast.” *Id.*

The testimonial evidence and the surveillance videos do not depict a situation where Mr. Torrence coolly raised his gun, took aim at the charging decedent, and fired. The video does not show clearly that Mr. Torrence ever fully raised the gun off his hip. The jury could

have adopted the view that this was a shooting driven by both fear and instinct. The jury also could have found that the shooting occurred the instant before a struggle for the gun began. The decedent was shot in the right shoulder and behind the right ear, and the bullet that struck the decedent behind the right ear traveled in an unusual direction; it traveled down towards the decedent's shoulders. See (R.p.50, lines 5-7) (one bullet was in the arm, the other bullet was in the upper chest); (R.p.51, line 7-p.52, line 17) (describing the entrance wound and the path of the bullet found in the decedent's chest); (R.p.644) (diagram referenced in this testimony); and (R.p.645) (x-ray referenced in this testimony) (describing chest). The jury could have concluded that these wounds were inflicted in rapid succession as the decedent dove towards the gun and that Mr. Torrence reflexively fired. It would be difficult for these particular wounds to have been inflicted in any other manner.

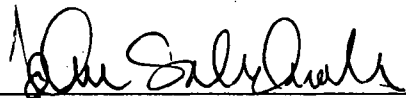
There are circumstances where it might be easier to say that the discharge of a firearm was clearly not intended to inflict serious injury. Target shooting would be one example, shooting at the ground in an effort to scare-off a would-be attacker might be another. But the rule described in *Debiase*—the rule about rapid and instinctual use of deadly weapons—is intellectually honest and legally supportable. There is a difference between deliberately shooting at someone to critically injure him as opposed to making a reactive decision to shoot a firearm in a reflexive effort to stop an assault. Mr. Torrence acknowledges that his decision to take his gun in the bar in an effort to perform a citizen's arrest was "stupid," but it seems excessively harsh to say that he ought to have foreseen that someone would throw a barstool at him and charge him aggressively. It is equally harsh to say that if the killing here was unintentional, it must be murder or nothing.

## CONCLUSION

This Court should recognize that the intentional discharge of a firearm does not preclude a charge on involuntary manslaughter in all circumstances. Rather, a charge on involuntary manslaughter is appropriate when there is evidence that the killing was the unintentional result of the use of a deadly weapon where the defendant did not intend to inflict serious injury or death. Because there is evidence that Andrew Torrence's case fits that circumstance, the Court should reverse his conviction and remand this case for a new trial.

November 5, 2012

Respectfully submitted,



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County  
Honorable Knox R. McMahon, Circuit Court Judge  
Appellate Case No. 2011-194617

THE STATE

Respondent

vs

ANDREW EARL TORRENCE, JR.

Appellant

FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

### I.

Appellant waived his right to appeal the trial judge's ruling denying the involuntary manslaughter charge because Appellant never objected with specificity to the ruling. Furthermore, Appellant was not entitled to an involuntary manslaughter charge because he admitted he intentionally shot the victim.

## STATEMENT OF THE CASE

In August 2010, a Lexington County Grand Jury indicted Appellant for murder pursuant to section 16-3-10 of the South Carolina Code. In May 2012, a Lexington County Grand Jury indicted Appellant for carrying a firearm onto the premises of a building selling alcoholic liquors pursuant to section 16-23-465 of the South Carolina Code and possession of a weapon during a violent crime pursuant to section 16-23-490 of the South Carolina Code.

On May 31, 2011, Appellant proceeded to trial. On June 3, 2011, the jury found Appellant guilty of voluntary manslaughter and the two firearms charges. (R. pp. 617-618.) Thereafter, the Honorable Knox R. McMahon sentenced Appellant to twenty-five years of imprisonment for the voluntary manslaughter conviction and five years for each firearm charge. (R. p. 642.) Appellant filed a timely notice of appeal.

## STATEMENT OF FACTS

In the early morning hours of September 28, 2008, Appellant shot Zach Chaplin. Approximately six weeks later, Chaplin died as a result of the gunshot wounds. (R. p. 49; R. pp. 60-63.)

At trial, Appellant's former employer, Tonya Mozenko testified for the State. Mozenko hired Appellant as a part-time security guard. (R. pp. 82-83.) Appellant wanted to be an armed guard; however, Mozenko's company did not have any armed positions available. (R. p. 88.) On several occasions, Appellant told Mozenko that he wanted to be a police officer. (R. p. 89.) Eventually, Mozenko had to fire Appellant because Appellant could not do the job. (R. p. 84.)

A few hours before Appellant shot Chaplin, Appellant had a conversation with Mozenko and her friend, Stephen Smith, at Shaggy's Bar. Appellant told Mozenko and Smith that he tried to buy Donna Muszynski a drink earlier that night, and he was upset Muszynski gave all of her attention to Chaplin. (R. p. 94; R. pp. 128-129.) Appellant called Chaplin a "wolverine" and a "faggot." (R. p. 263; R. p. 97; R. p. 128.) However, Chaplin did not respond. (R. p. 95.) Appellant repeatedly said, "I should go to my truck and get my gun and shoot him." (R. p. 97-98; R. p. 129.) Sick and tired of Appellant's comments, Mozenko and Smith left the bar and went home. (R. p. 98.)

At trial, Lee Buchanan testified Appellant kept calling him gay. (R. pp. 264-265.) Buchanan told Appellant to leave him alone. (R. p. 177.) Appellant asked Buchanan if he wanted Appellant "to kiss his ass." (R. p. 177.) Throughout the night, Appellant made comments to Buchanan about Buchanan's sexuality. (R. p. 178.)

Eventually, Appellant and Chaplin got into a physical altercation. (R. p. 180.) Buchanan tried to stop the fight. (R. pp. 180-181; R. pp. 199-200; R. p. 226; R. p. 252; R.

p. 376.) After the fight was over, Buchanan helped Appellant find his glasses. Thereafter, Buchanan told Appellant, “[I]et’s all go home. It’s over and done with.” (R. p. 181.) Buchanan escorted Appellant out of the bar. (R. p. 182; R. p. 213.) After Appellant left, everyone settled down. (R. p. 226.)

However, a few minutes later, Appellant knocked on the bar door and asked to come inside. Appellant reentered the bar with a gun in his hand. Appellant told Buchanan, “this has nothing to do with you, this doesn’t involve you . . . .” (R. p. 183.) Buchanan could not escape. (R. p. 184.) At that point, Chaplin threw a barstool at Appellant. (R. p. 189.) Buchanan heard two gun shots, which sounded like “bam (pause) bam.” (R. p. 184.) Another witness testified that the gun shots were approximately twenty seconds apart. (R. p. 214.)

In his defense, Appellant testified at trial. Appellant admitted he called Buchanan “gay.” (R. p. 373.) Appellant claimed that when he went to apologize to Buchanan, Chaplin assaulted Appellant. (R. p. 376.) After the fight was over, Appellant continued to make comments. (R. p. 377.)

Thereafter, Appellant went to his truck and grabbed his gun. (R. pp. 377-380.) According to Appellant, he went back into the bar in order to detain Chaplin and Buchanan for the earlier assault. (R. p. 378-379.) Appellant ordered Buchanan to put his hands on the bar. (R. p. 381.) While Appellant searched Buchanan for weapons, Chaplin threw a barstool at Appellant. (R. pp. 381-382.) Appellant went into a defensive position. According to Appellant, when Chaplin came towards Appellant, he got scared and shot Chaplin twice. (R. pp. 382-386.) One bullet struck Chaplin in the right arm, and the other bullet struck Chaplin behind the right ear.

According to Dr. Janice Edwards Ross, Chaplin was either in a bent over position or on the ground when Appellant fired the second shot. (R. p. 59.) The bullet that struck Chaplin behind his right ear injured his spinal cord and paralyzed him from the chest down. (R. p. 60.) On November 12, 2008, Chaplin died from complications of his paralysis. (R. p. 49; R. pp. 60-63.)

Before closing arguments, the trial judge held a charge conference. (R. p. 511.) The State brought up Appellant's request to charge accident. (R. p. 513.) The following discussion occurred:

THE COURT: All right. I will deny that request. I do not intend to charge accident or involuntary manslaughter.

I do not think he was acting lawfully in unlawfully arming himself in that regard.

Yes, sir, Solicitor?

SOLICITOR: You are not giving a charge on involuntary manslaughter?

THE COURT: I am not.  
(R. p. 513.)

Appellant's trial counsel did not comment. After discussing numerous charges, Appellant's trial counsel asked the trial judge to charge involuntary manslaughter. (R. p. 526.) The following discussion occurred:

THE COURT: I deny that. I thought I denied that earlier.

MR. FLOYD: I'm sorry. I may be in error but I did want to make sure I put it on the record.

THE COURT: I do not think you can reach the elements of involuntary manslaughter, in regard to the circumstances of this case.

Anything further?

MR. FLOYD:        Nothing further, Your Honor.  
(R. p. 526.)

After the jury began deliberations, the jury sent a note to the judge asking whether or not they could consider the crime of involuntary manslaughter. (R. p. 650; R. p. 620.) Appellant argued that the jury's request indicated that there was no proximate cause between the incident and the victim's death. (R. p. 621.) The judge told the jury that they could not consider involuntary manslaughter. (R. p. 650; R. p. 622.)

**ARGUMENT**

I.

Appellant waived his right to appeal the trial judge's ruling denying the involuntary manslaughter charge because Appellant never objected with specificity to the ruling. Furthermore, Appellant was not entitled to an involuntary manslaughter charge because he admitted he intentionally shot the victim.

Standard of Review

"If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given." State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006).

"In order to amount to reversible error, the failure to give a requested charge must be both erroneous and prejudicial." State v. Gibson, 390 S.C. 347, 356, 701 S.E.2d 766, 770-71 (Ct. App. 2010) (certiorari granted March 22, 2012).

**A. Appellant failed to properly preserve the jury charge issue.**

Appellant argues the trial judge erred in not charging the jury on involuntary manslaughter. Moreover, Appellant urges this Court to overrule South Carolina precedent and adopt North Carolina law. However, at trial, Appellant never made that argument to the trial judge. Before the jury retired for deliberations, Appellant asked the trial judge to charge involuntary manslaughter but never stated why the charge was appropriate. (R. p. 526.) After the jury retired to deliberations and sent a note to the judge asking if they could consider involuntary manslaughter, Appellant argued the trial judge should have charged involuntary manslaughter because it was clear the jury did not think there was proximate cause between Appellant's actions and the victim's death. (R. p. 621.) However, Appellant never argued to the trial court that he should apply North Carolina law. Thus, Appellant failed to properly preserve the involuntary manslaughter issue.

Rule 20 of the South Carolina Rules of Criminal Procedure provides the following:

**(a) Time for Request.** All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such time as the trial judge shall reasonably direct. All requests must include accurate citation to authorities relied upon.

**(b) Objections to Charge.** Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state *distinctly* the matter objected to and the *grounds for objection*. Failure to object in accordance with this rule shall constitute a waiver of objection.

Rule 20, S.C.R. Crim. Pro. (emphasis added).

Moreover, an argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) Furthermore, “a specific objection to the admission of evidence must be made to preserve the issue for appeal.” McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). In other words, “[t]he objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge.” Id. “The same ground argued on appeal must have been argued to the trial judge.” Id.

Thus, when requesting a jury charge, a trial attorney must specifically state his or her grounds for requesting the charge. Rule 20 (b), S.C.R. Crim. Pro.; see Bellamy v. Payne, 304 S.C. 179, 182-84, 403 S.E.2d 326, 328 (Ct.App.1991) (the trial court refused to instruct the jury with the appellant's requested jury instructions, and this Court held the appellant's failure to distinctly state the grounds for her objections to the trial court

precluded appellate review); see also 15 S.C. Juris. *Appeal and Error* § 81 (1992) (noting a party objecting to the trial court's refusal to give their requested jury instruction must distinctly state the grounds for the objection).

Here, the record is clear: Appellant never argued why involuntary manslaughter charge should have been charged to the jury until after the jury retired for deliberations. Even then, Appellant's argument for why the jury should be able to consider involuntary manslaughter was based upon proximate cause. Appellant never made any arguments regarding North Carolina law.

Thus, Appellant waived his right to challenge the trial judge's refusal to charge the jury on involuntary manslaughter.

**B. The trial judge properly denied Appellant's request for a jury charge on involuntary manslaughter because Appellant intentionally shot the victim.**

At trial, Appellant admitted he intentionally fired his gun and shot Chaplin two times. (R. p. 393.) Therefore, the trial judge did not err when he refused to charge the jury on involuntary manslaughter.

Under South Carolina law, involuntary manslaughter is defined as the following: "[T]he killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others." Reese, 370 S.C. at 36, 633 S.E.2d at 900 (emphasis added).

Furthermore, South Carolina case law is very clear: If a defendant admits he or she intentionally fired a gun, he or she is not entitled to a jury charge on involuntary manslaughter. See State v. Morris, 307 S.C. 480, 484, 415 S.E.2d 819, 822 (Ct. App. 1991) (holding the defendant was not entitled to a charge of involuntary manslaughter

because the defendant admitted he intentionally shot the victim in self-defense); see also State v. Pickens, 320 S.C. 528, 532, 466 S.E.2d 364, 367 (1996) (holding the defendant was not entitled to a jury charge of involuntary manslaughter because the defendant admitted he shot the gun); see also State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (holding the defendant was not entitled to a jury charge of involuntary manslaughter because he admitted he intentionally fired his shotgun but claimed he only meant to shoot over the victim's head).

In the case at hand, Appellant admitted he intentionally fired his gun and shot Chaplin. However, Appellant claimed he only shot Chaplin because he was afraid Chaplin was going to get the gun from him and shoot him. (R. p. 391.)

This case is very similar to the Morris case. This Court in Morris noted the following: "Whether the shooting was excusable in the circumstances (self defense) or was committed in the heat of passion upon sufficient provocation (voluntary manslaughter) was for the jury to determine, and the judge so charged them." 307 S.C. at 484, 415 S.E.2d at 822. The case at hand was clearly a case of imperfect self-defense; therefore, voluntary manslaughter was the proper charge.<sup>1</sup>

Moreover, the fact that Appellant claimed he did not intend to harm Chaplin when Appellant reentered the bar is irrelevant. See State v. Smith, 315 S.C. 547, 550, 446 S.E.2d 411, 413 (1994) (holding whether the defendant intended to harm the victim was irrelevant because the defendant intentionally stabbed the victim with a knife, i.e., a dangerous instrumentality).

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<sup>1</sup> See Douglas v. State, 322 S.C. 67, 504 S.E.2d 307, FN4 (1998) ("A claim of imperfect self-defense would also be unavailing because it has no application to involuntary manslaughter.").

In summary, because Appellant admitted he intentionally fired his gun and shot the victim, the trial judge did not err in precluding the involuntary manslaughter charge.

**C. The facts of Appellant's case do not warrant a jury charge of involuntary manslaughter under South Carolina law.**

Even if Appellant had not testified that he intentionally shot Chaplin, involuntary manslaughter would still have been an improper jury charge under South Carolina law.

As mentioned earlier, involuntary manslaughter is defined as “the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others.” Reese, 370 S.C. at 36, 633 S.E.2d at 900.

First, shooting someone is likely to cause death or great bodily harm. Therefore, the first section of the involuntary manslaughter definition clearly does not fit the facts of this case.

Secondly, Appellant was not acting lawfully when he brought his gun into the bar and presented it to the patrons of the bar.<sup>2</sup> Therefore, the second section of the involuntary manslaughter definition is not applicable in this case.

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<sup>2</sup> See S.C. Code Ann. § 16-23-410 (presenting or pointing a loaded or unloaded firearm at another person); see also In re Spencer R., 387 S.C. 517, 692 S.E.2d 569 (Ct. App. 2010) (holding the phrase “to present” under § 16-23-410 means to offer to view in a threatening manner, or to show in a threatening manner); see also S.C. Code Ann. § 16-23-465 (carrying a firearm onto the premises of a building selling alcoholic liquors); see also S.C. Code Ann. § 16-23-490 (possession of a weapon during a violent crime).

Finally, Appellant claims he acted "recklessly" when he brought his gun into the bar. However, Appellant did not act recklessly: Appellant acted intentionally. He brought the gun into the bar so that he could get command of the room and scare the patrons. Furthermore, Appellant acted intentionally when he fired his gun at the victim. Thus, this is clearly not a "reckless disregard for the safety of others" case. Therefore, once again, the second section of the involuntary manslaughter definition is not applicable in this case.

**D. The facts of Appellant's case do not warrant a jury charge of involuntary manslaughter under North Carolina law.**

Even if this Court applied North Carolina law to the facts of this case, Appellant would not have been entitled to an involuntary manslaughter jury charge.

In the case at hand, Appellant testified he shot Chaplin because Chaplin was advancing towards him, and he was scared Chaplin would take his gun and shoot him. However, North Carolina law does not permit an involuntary manslaughter under these circumstances. See State v. Brooks, 266 S.E.2d 3, 4 (N.C. Ct. App. 1980) (holding that the jury should not have been charged on involuntary manslaughter when the defendant's testimony indicated that the defendant pointed the gun at the deceased and shot him while he was advancing toward the defendant).

In addition, Appellant would not be entitled to an involuntary manslaughter charge in North Carolina because he admitted he intentionally shot Chaplin, although he claimed he only shot in self-defense. See State v. Cason, 275 S.E.2d 221 (N.C. Ct. App. 1981) (holding the involuntary manslaughter charge was improper because the defendant relied on self-defense for an acquittal and there was no evidence the defendant accidentally shot the victim).

Furthermore, this is not a case where the gun discharged while Appellant and Chaplin struggled for control of the gun. See State v. McConnaughey, 311 S.E.2d 26, 29-30 (N.C. Ct. App. 1984) (holding the defendant was entitled to a jury charge of involuntary manslaughter because there was evidence that the gun discharged while the defendant and the victim were wrestling); see also State v. Buck, 313 S.E.2d 550, 553 (N.C. 1984) (holding the defendant was entitled to a jury charge of involuntary manslaughter because there was evidence that the victim was stabbed during a struggle in which both the defendant and the victim were armed with knives).

In addition, Appellant admitted he intentionally shot Chaplin. See State v. Young, 675 S.E.2d 704, 709 (N.C. Ct. App. 2009) (holding that the defendant was not entitled to a jury charge of involuntary manslaughter because all of the evidence indicated that defendant intentionally fired the shot that killed the victim and no evidence indicated that the victim's death resulted from unintentional conduct).

Moreover, this is not a case where the gun accidentally discharged and a bullet hit someone. See State v. Graham, 247 S.E.2d 300, 302-303 (N.C. Ct. App. 1978) (holding the defendant was entitled to a jury charge of involuntary manslaughter where defendant claimed he fired the first shot as a warning shot and the second shot accidentally occurred when he threw the gun up in the air).

In summary, even if this Court was inclined to apply North Carolina law, the facts of this case do not warrant an involuntary manslaughter charge.

**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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November 2, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of General Sessions

Knox R. McMahon, Circuit Court Judge

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Case Nos. 2010-GS-32-2318, and 2011-GS-32-1440 & -1444

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The State of South Carolina, ..... Respondent,

v.

Andrew E. Torrence, Jr., ..... Appellant.

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**REPLY BRIEF**

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## ARGUMENT

### I. **Consistent with His Request to the Trial Court, Mr. Torrence Asks this Court to Apply the Law of South Carolina, Not North Carolina, on Involuntary Manslaughter.**

According to the State's brief, Mr. Torrence is asking the court to "adopt North Carolina law" or to "apply North Carolina law." The State uses that description to suggest that Mr. Torrence's argument was not raised to the trial court and is not preserved for review. This argument should not be persuasive for two reasons.

First, Mr. Torrence is not asking this Court to "adopt" foreign law. As far as the doctrine of involuntary manslaughter is concerned, North Carolina law and South Carolina law are the same. South Carolina defines involuntary manslaughter as the unintentional killing of another person, without malice, while (a) engaged in an unlawful activity that is not a felony and that does not naturally tend to cause death or great bodily harm, or (b) engaged in a lawful activity with reckless disregard for the safety of others. *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). North Carolina defines involuntary manslaughter as the unintentional killing of a human being, without malice, caused by (a) an unlawful act that is not a felony nor naturally dangerous to human life, or (b) an act evidencing disregard for human rights and safety. *State v. Brewer*, 386 S.E.2d 569, 583 (N.C. 1989). There is no meaningful difference between these definitions. Mr. Torrence's argument here is that when the facts are viewed in the light most favorable to him, they support a charge of involuntary manslaughter as that doctrine is defined in South Carolina. Mr. Torrence's principal brief cited North Carolina cases only because the doctrine is identical in both states and because North Carolina courts have spoken directly to this point.

Second, the only requirements for preserving an objection to a jury charge are that the defendant requested the charge from the trial court and that the defendant renewed that objection after the charges were given to the jury. These requirements are embodied in the judicial decisions instructing that the law to be charged is determined from the evidence, that the trial court must give a requested charge if there is any evidence supporting it, and that the trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence. See, e.g., *Smith*, 391 S.C. at 412, 706 S.E.2d at 14 (citing *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989) and *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001)).

Mr. Torrence's theory of the case has consistently been that he re-entered the bar to detain the man who had assaulted him. He explained that he fired his weapon only after this man charged at him. Even then, he fired only instinctively and at the last moment, as the man reached for Mr. Torrence's gun. When arguing the case to the trial judge while the attorneys and the judge discussed jury charges, Mr. Torrence's lawyer offered that the jury could view the evidence as showing that Mr. Torrence had not "intended to kill [Mr. Chaplin] and the killing was unintentional." (R.p.512, lines 18-19). He explained, "[Mr. Torrence] believed he was acting lawfully to effect a citizen's arrest . . . [and] [i]n the care and exercise of having the weapon[,] he did not point it at anyone until he perceived that there was a threat of the weapon being taken from him." (R.p.512, ll. 20-25).

These circumstances either encompass involuntary manslaughter or they do not. The trial judge thought they did not; he responded to this narrative by saying that he would not charge involuntary manslaughter. See (R.p.513, lines 1-5). Later, when Mr. Torrence

specifically requested an involuntary manslaughter charge, the judge responded that he “thought [he] had denied that earlier.” (R.p.526, lines 6-7). And, of course, after the jury had been charged, Mr. Torrence objected to the failure to charge involuntary manslaughter. (R.p.610, lines 19-21). Although Mr. Torrence certainly could have continued repeating his version of the facts during each of these discussions, that is not required to preserve an issue for review. Error preservation requires only that an argument be raised to the lower court and ruled upon by the lower court. See *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

**II. Rather Than Viewing the Facts in the Light Most Favorable to the State, the Court must View the Facts in the Light Most Favorable to Mr. Torrence.**

In determining the law to be charged, the version of the facts that counts is the version that is most favorable to the defendant. E.g. *State v. Cottrell*, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). The State’s brief does not honor that requirement. Instead, it frames the facts in a light favorable to the prosecution. To take one example, consider the off-color remarks Mr. Torrence made to other patrons seated at the bar. Some of those remarks were admitted, but others were denied.<sup>1</sup> While the State’s brief alleges that the deceased, Mr. Chaplin, “did not respond” to Mr. Torrence’s comments, (Brief of Respondent, p.3), Mr. Torrence testified that the deceased responded by asking Mr. Torrence “how much money do you have in your pocket . . . because I’m going to beat your ass and take it.” (R.p.374, lines 12-21).

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<sup>1</sup>Mr. Torrence denied asking Mr. Buchanan to “kiss his ass,” see (R.p.424, lines 21-25), but he admitted making comments referencing Mr. Buchanan’s sexual orientation. (R.p.373, lines 17-25; p.530, lines 7-25).

Of course, viewing the evidence in the light most favorable to the State, it would be possible for a jury to find that Mr. Torrence acted with malice and to convict Mr. Torrence of murder, but this appeal does not concern the version of the facts that is most favorable to the State. For the purpose of this appeal, the facts show that Mr. Torrence went to sit by Mr. Buchanan in order to apologize for his earlier remarks. This happened at about 6:30 a.m. on a Sunday morning, after everyone involved had been in a bar drinking alcohol for several hours. While Mr. Torrence was talking to Mr. Buchanan, the deceased got up from his seat at the bar, walked directly to Mr. Torrence, and — without any warning whatsoever — began punching Mr. Torrence in the face. A test performed by the hospital on the decedent's blood returned positive results for the presence of amphetamines and cocaine. (R.p.324, line 23 - p.325, line 1).<sup>2</sup> Mr. Buchanan tried to stop the fight, but his intervention served only to restrain Mr. Torrence while the deceased kept punching. The deceased resumed his aggressive actions after Mr. Torrence re-entered the bar, throwing a bar stool at Mr. Torrence, then charging Mr. Torrence and reaching for his gun.

The purpose of this narrative is not to portray Mr. Torrence as the “victim,” and the argument on appeal is not that Mr. Torrence was entitled to an acquittal. Those are factual questions. However, the law does not permit the use of the State's version of the facts to determine whether the trial court erred in refusing to charge involuntary manslaughter. Nothing in the State's narrative views the facts in the light most favorable to Mr. Torrence.

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<sup>2</sup>To be fair, there was testimony at trial indicating that a person's blood could return a positive test for these substances up to 72 hours after ingestion. (R.p.329, lines 6-18). The positive drug test thus does not conclusively prove that the decedent was under the influence of illegal drugs during this encounter.

**III. Through a Proper Consideration and Application of the Principles of Law, Mr. Torrence Was Entitled to a Charge on Involuntary Manslaughter.**

The argument in this appeal is not complex. Mr. Torrence argues simply that the proper construction of South Carolina's definition of involuntary manslaughter includes *some* killings that involve the intentional use of a deadly weapon; specifically, killings where the circumstances indicate that the defendant did not intend the use of the deadly weapon to inflict serious injury or death. That construction does not apply when a defendant deliberately engages in an act likely to result in death or serious injury but casually claims that he or she did not mean to kill anyone. The test ought to be whether a reasonable jury could view the circumstances as suggesting that the infliction of the fatal wound was unintentional, despite the fact that the defendant intentionally carried a deadly instrument during the incident.

For a number of reasons, common sense supports that test. For one thing, although many people might consider the intentional discharge of a gun to be an inherently dangerous activity that is likely to cause death or serious injury, the same consideration could apply to driving an automobile in a reckless manner, which is a classic example of an act that can justify an involuntary manslaughter instruction. See *State v. Caldwell*, 231 S.C. 184, 98 S.E.2d 259 (1957). The analysis must evaluate more than just whether the act that led to the death was "intentional" and "dangerous." Otherwise, the rule is internally inconsistent: it always removes the dangerous shooter, but it admits the dangerous driver.

The conduct of the defendants and the results in *State v. Crosby* and *State v. Burriss* are also instructive. In *Crosby*, the defendant grabbed a gun while trying to stop a fight and

claimed “I closed my eyes and pulled the trigger. I didn’t even know I pulled the trigger.” 355 S.C. 47, 50, 584 S.E.2d 110, 111 (2003). In *Burriss*, the defendant claimed that in preparing to defend himself, he intentionally grabbed his gun and “it fired.” 334 S.C. 256, 263, 513 S.E.2d 104, 108 (1999). Then consider the defendant, like Mr. Torrence, who is honest enough to admit that he fired the gun—guns do not shoot themselves—but claims that he did so as an instinctive reaction. There is no meaningful difference between Mr. Torrence’s situation and the circumstances in *Burriss* or *Crosby*. While it is fair to say that even a defendant who shot based on instinct should foresee that an injury might result, it is also fair to make the same observation about the *Crosby* and *Burriss* defendants. Those defendants intentionally grabbed firearms and pointed those firearms at other people.

Now consider the circumstances of Mr. Torrence’s case. If Mr. Torrence did not commit this killing with malice, the killing cannot be murder. If he did not have an uncontrollable impulse to do violence, it cannot be voluntary manslaughter. See *State v. Starnes*, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). A reasonable jury could make the findings necessary to disqualify murder and voluntary manslaughter, and that same jury could also find that Mr. Torrence “brought on the difficulty” and thereby disqualify his defense of self-defense. See *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007). Without a defense to the killing, there must be *some* criminal liability. With murder and voluntary manslaughter inapplicable, only involuntary manslaughter remains.

Finally, consider that appellate courts in North Carolina — which have applied an involuntary manslaughter doctrine that is identical to the doctrine in South Carolina — have relied on the same principles Mr. Torrence is advancing and have reinforced those principles

on a number of occasions. The Supreme Court of North Carolina has rejected the idea that involuntary manslaughter requires an unintentional discharge of a weapon, calling that argument an “invalid premise.” *Brewer*, 386 S.E.2d at 583. Using the language of an opinion of the Supreme Court, the North Carolina Court of Appeals described that an involuntary manslaughter conviction can be based on “an ‘unintentional homicide resulting from the reckless use of a deadly weapon under circumstances not evidencing a heart devoid of a sense of social duty.’” *State v. Debiase*, 711 S.E.2d 436, 442 (N.C. Ct. App. 2011). That same opinion also stated that involuntary manslaughter is not appropriate if (a) the defendant deliberately engages in an act likely to result in serious injury and (b) there is no evidence that the killing was accidental other than the defendant’s self-serving testimony that he or she did not mean to kill. *Id.* at 443-444. It also described that if the defendant “(1) intended to strike at [the victim] to keep him away, but did not intend to kill or seriously injure him; or (2) simply reacted instinctively without any intent to strike [the victim] at all[,] [e]ither scenario would support a verdict of involuntary manslaughter.” *Id.* at 443 (quoting *State v. Drew*, 592 S.E.2d 27, 30 (N.C. Ct. App. 2004)).

The State never directly responds to the argument that this should be the law. Instead, the State offers only that Mr. Torrence admitted intentionally firing at the deceased and that Mr. Torrence’s act of bringing a firearm into a bar was “intentional,” not “reckless.”

Taking these points in reverse, it ought to be obvious that Mr. Torrence’s act of bringing the firearm into the bar was “intentional.” Mr. Torrence admitted that point. But admitting that an act was “intentional” does not exclude the possibility it was also “reckless.” The Supreme Court has defined recklessness as “a state of mind in which the actor is aware

of his or her conduct, yet consciously disregards a risk which his or her conduct is creating.” *State v. Pittman*, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007). Describing Mr. Torrence’s conduct as intentional says nothing about whether he was aware of his conduct and consciously disregarded the risks of it, nor does it establish that person cannot fairly be characterized as consciously disregarding the risk his or her conduct is creating when that person knowingly takes a gun into a bar. Mr. Torrence admitted that he knew his conduct “had to be against some law[,]” (R.p.449, lines 7-11), and all involuntary manslaughter cases will always involve *some* intentional act. Without at least one intentional act in the chain of causation, the death would be excused as an accident. *State v. Wilkerson*, 247 S.E.2d 905, 918 (N.C. 1978).

The evidence itself answers the question whether Mr. Torrence deliberately fired at the deceased intending to kill him (in which case he would not be entitled to an involuntary manslaughter charge), or whether he shot to keep the deceased away or shot based on instinct (in which case he would be entitled to the involuntary manslaughter charge). Mr. Torrence entered the bar with the firearm pointed “down and out,” it was not pointed at anyone. (R.p.380, lines 8-13). On entering the bar, he had no intention of firing the weapon. (R.p.380, lines 6-7). Until the shooting, Mr. Torrence did not point the weapon at anyone inside the bar. (R.p.380, lines 17-18). The evidence shows that as the decedent charged Mr. Torrence, Mr. Torrence was “scared,” he “wasn’t thinking,” and he “knew that [he] was in danger.” (R.p.385, lines 11-13). He also described that he “had to make a very fast decision, and [] went with instinct.” (R.p.382, lines 22-24). When asked whether he pulled the trigger “intentionally,” Mr. Torrence responded “yes.” But the next question was whether there was

a struggle over the gun, to which Mr. Torrence replied “you’re talking about something that happened in a second. Yeah, there was a struggle.” (R.p.393, lines 5-12). Mr. Torrence explained, “I thought [the deceased] was reaching. I shot to stop him. I had to shoot to stop him.” (R.p.393, lines 17-18). When asked whether the deceased had ever touched the weapon, Mr. Torrence replied “I can’t really say because it happened so fast.” (R.p.394, lines 3-6).

As Mr. Torrence’s principal brief fully describes, the jury could have adopted the view that the shooting was driven by both fear and instinct. The jury also could have found that the shooting occurred the instant before a physical struggle for the gun began, and the jury could have concluded that the decedent’s wounds were inflicted in rapid succession as he dove towards the gun that Mr. Torrence reflexively fired. The Court should recognize that involuntary manslaughter does include *some* killings that involve the intentional use of a deadly weapon. Based on that recognition, the Court should hold that it was reversible error for the trial court to refuse an involuntary manslaughter charge in this case.

**IV. Because the Authorities upon Which the State Relies Are Distinguishable, the State’s Arguments Do Not Support the Trial Court’s Refusal to Charge Involuntary Manslaughter.**

The State argues that Mr. Torrence’s case is similar to *State v. Morris*. (Brief of Respondent, p.10). Like the situation here, *Morris* involved an argument that escalated and resulted in a killing, but the similarities end there. After the defendant in *Morris* and the victim “had words,” the victim asked the defendant to leave the premises. When Mr. Morris refused, the victim hit Mr. Morris, knocking him back two steps. Mr. Morris said “I’m leaving,” and then, after the victim turned *his* back and began walking away, Mr. Morris shot

the victim in the back. 307 S.C. 480, 482, 415 S.E.2d 819, 821 (Ct. App. 1991). Comparing *Morris* and Mr. Torrence's case in simple terms, the action of a person shooting someone in the back after verbally indicating that the confrontation is over is meaningfully different from a person reflexively shooting at someone who is charging at him and reaching for his gun.

The State also relies on *State v. Brooks*, which is similar to Mr. Torrence's case only in that the defendant in *Brooks* shot while the victim was advancing on her and that she testified that she "was scared and didn't mean to shoot [the victim]." 266 S.E.2d 3, 4 (N.C. Ct. App. 1980). There is nothing in *Brooks* which describes any evidence that the shooting was the result of "instinct" or the victim reaching for the firearm; nor is there any suggestion that the defendant was at-fault in bringing on the difficulty — rather, she ran to get a gun after her estranged ex-husband had been beating her. *Id.* *Brooks* also pre-dates the North Carolina decisions in *State v. Brewer*, *State v. Debiase*, and *State v. Drew* — the principal cases discussing the legal question at issue in this case. *Brooks* was decided in 1980. 266 S.E.2d at 3. *Brewer*, the earliest of the others, was decided in 1989. 386 S.E.2d at 569; see also *Debiase*, 711 S.E.2d at 436 and *Drew*, 592 S.E.2d at 27. The State does here what the Supreme Court said the defendant did in *State v. Starnes*; it is turning "primarily fact-driven holdings into broad statements of law." 388 S.C. at 597, 698 S.E.2d at 608.

The State also cites *State v. Cason*, but the only factual description given in the opinion there is that "[a]ll the evidence shows the defendant intentionally shot [the deceased]." 275 S.E.2d 221, 221 (N.C. Ct. App. 1981). The State also cites *State v. McConnaughey*, 311 S.E.2d 26 (N.C. Ct. App. 1984) and *State v. Buck*, 313 S.E.2d 550 (N.C. 1984), both of which are cases where an involuntary manslaughter charge was given

because there was evidence that the fatal injury occurred during the struggle for a deadly weapon. As the previous section of this brief described, the circumstances of Mr. Torrence's case are fairly comparable. Because there is some evidence that would support a finding that Mr. Torrence did not intend the use of the deadly weapon to inflict serious injury or death, the trial court should have charged the jury on the law of involuntary manslaughter.

### CONCLUSION

This Court should recognize that the intentional discharge of a firearm does not preclude a charge on involuntary manslaughter in all circumstances. The Court should hold that a charge on involuntary manslaughter is proper when there is evidence that the killing was the unintentional result of the use of a deadly weapon where the defendant did not intend to inflict serious injury or death. Because there is evidence that Andrew Torrence's case fits this description, the Court should reverse his conviction and remand this case for a new trial with instructions to use the proper charge on involuntary manslaughter.

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Respectfully submitted,



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