STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Spartanburg
Honorable Roger L. Couch, Circuit Court Judge

Op. No. 4965 (S.C.Ct. App. Filed April 25, 2012)
Appellate Case No. 2012-212350
On Certiorari

THE STATE,

Petitioner,

V.

SHAWN ANTONIO MILLER,

Respondent.

BRIEF OF PETITIONER STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED ON CERTIORARI

I. Where the Court of Appeals relied upon this Court's decision in State v. Belcher (2009), was its reliance misplaced because the specific common law issue was not preserved for appellate review when the limited objection in the trial court to the malice instruction was solely on a state constitutional "charge on the facts" basis and, where Belcher was not decided on a "Charge of the Facts" objection, but expressly on a State Common Law violation, a claim not presented by Miller in the trial court? Does this require the Court to affirm the judgment of conviction?

II. Where there was no evidence that would "reduce, mitigate, excuse or justify the killing," did the Court of Appeals err in granting a new trial based upon the submission of an implied malice by the use of a deadly weapon instruction when the Court of Appeals mistakenly concluded that there was evidence that "mitigates" the charge of murder even if Miller was acting unlawfully?

THE STATEMENT OF THE CASE

The Appellant, the Respondent herein, Shawn Antonio Miller, *aka* LaShawn Antonio Miller, was indicted on November 21, 2008 at the December 1, 2008 term of the Court of General Sessions for murder and possession of a firearm during the commission of a violent crime. State v. Miller, 08-GS-42-7006(A). ROA 318-319. The charges concerned the October 28, 2007 death of Christopher Blount. On April 15-17, 2009, Miller entered a not guilty plea and was tried by a jury before the Honorable Roger L. Couch, Presiding Judge. Miller was present and represented by Assistant Public Defender Kathleen Hodges of the Spartanburg Public Defenders Office. The prosecution was handled by Assistant Solicitors Ryan McCarty and Lauren Barnwell of the Seventh Circuit Solicitor's Office. The jury convicted Miller of both charges. R. 306-308. Judge Couch sentenced Appellant to forty (40) years for murder and five (5) years for use of a weapon in the commission of a violent crime, concurrent. R. 314.

Miller filed a timely notice of appeal. In the appeal, Miller was initially represented by Joseph L. Savitz, then Chief Appellate Defender. On October 9, 2009, counsel made an Initial Anders Brief of Appellant and Petition to be Relieved as Counsel raising as the sole arguable ground: "The trial judge committed reversible error by failing to instruct the jury on the law of accident." *Initial Anders Brief of Appellant*, p. 3. On January 21, 2010, Appellant made an "Initial Pro Se Brief of Appellant," asserting that "[T]he trial judge committed reversible error by failing to grant motion of directed verdict."

On April 20, 2011, the South Carolina Court of Appeals entered an Order after review pursuant to Anders v. California, 386 U.S. 738 (1967) denying the Petition to be

Relieved and directing the parties to brief "whether the circuit court improperly instructed the jury regarding inferred malice." State v. Shawn Antonio Miller, Order (S.C. Ct. App. April 20, 2011)(on denying petition to be relieved). The Brief of Appellant, by Appellate Defender Breen Richard Stevens, was filed May 20, 2011.

On April 25, 2012 in State v. Shawn Antonio Miller, *Opinion No. 4965*, 397 S.C. 630, 725 S.E.2d 724 (S.C. App. April 25, 2012). The State of South Carolina made a timely petition of rehearing on May 11, 2012. The Court of Appeals denied the petition for rehearing on May 25, 2012.

On November 20, 2013, the South Carolina Supreme Court entered its order granting certiorari. This briefing follows.

ARGUMENT ON CERTIORARI

I. Where a defense objection to the implied malice instruction was only on state constitutional grounds and not on state common law grounds, the different issue briefed by Miller and decided by the Court of Appeals in reliance on State v. Belcher was not preserved for appellate review.

At trial, Miller did not make a "common law" challenge to the jury instruction on implied malice by the use of a deadly weapon. ROA 295-296. Miller only raised a claim that the implied malice instruction was a "charge on the facts," a state constitutional violation. Id. The Court of Appeals and Appellant did not address the actual "charge of facts" state constitutional claim raised at trial. Rather, the Court of Appeals and Appellant mistakenly transposed the state constitutional "charge on the facts" issue actually raised at trial to the Belcher common law claim - an entirely different legal claim. The State of South Carolina asserted this procedural bar in its *Brief of Respondent*, p. 13-14 and re-asserted it in the petition for rehearing because the Belcher "state common law" violation claim was not the same claim presented to the trial judge in Miller's case.

The Court of Appeals rejected the State's preservation claim. The State respectfully submits that the this conclusion misapprehended the State's claim of a lack of preservation and the basis of the Supreme Court decision on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). In rejecting the State's position, the Miller panel held:

> Initially, we note the State argues unpersuasively that this issue is unpreserved for appellate review. "For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented ... and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). Here, Miller acknowledged the challenged language was "probably in the standard charge" but objected that the jury might construe the inferred malice

instruction as a judicial commentary on the facts of the case. The trial judge indicated he understood the objection, and Miller did not elaborate further. The State argues Miller objected purely on a constitutional basis. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). **The record does not support this argument: the trial court clearly charged the law, only, and Miller's objection addressed the likelihood that this charge would prejudice the jury**. Accordingly, we find this issue is preserved. Ft.6.

> Ft. 6. Similarly, the Belcher court recalled that the trial court had "expressed 'concern about [the charge] rising to a charge on the facts.' " 385 S.C. at 602, 685 S.E.2d at 804. **Nonetheless, the Belcher court elected to decide the matter based on common law. Id.**

Miller, supra. (Emphasis added).

Belcher Was Not Decided On A "Charge of the Facts" Objection But On A State Common Law Issue - thus the Belcher decision is not on the same claim raised at trial in Miller.

The Court of Appeals overlooked the expressed issue limitation in Belcher that the Supreme Court was not deciding a state constitutional "charge on the facts" issue - *the sole objection raised at trial in Miller's case*. In Belcher, the Supreme Court found that Belcher asserted in his argument and his objection that the permissive inference charge violated both our common law and our constitutional prohibition against charging juries on the facts. However, the Court in Belcher elected to decide the appeal only under the common law objection rather than upon S.C. Constitution Art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). State v. Belcher, 385 S.C. 597, 602, 685 S.E.2d 802, 804 (2009).[1] Relying on Belcher's common law challenge, the Supreme Court

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[1] In Belcher, the Court stated:

> Where a jury is asked to consider a lesser included offense of murder or a defense, Belcher asserts the permissive inference charge violates our common law and our constitutional prohibition against charging juries on the

concluded "that our modern day usage of this jury charge has strayed from this Court's original jurisprudence." In Belcher, the Court found that "because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved." However, the State submits that this proper reservation to pending cases did not exclude the requirement that a proper objection be made to the same "common law" claim.

Miller's Limited Objection At Trial

Miller's ***only*** trial objection was based upon the implied malice charge being a "charge on the facts" - the state constitutional claim - not the "common law" error actually addressed in Belcher:

> "there is a, a portion of the Court's charge, which I understand is probably in the standard charge, but it deals with malice being able to be inferred from the use of a deadly weapon. Respectfully, Your Honor, we would argue **that that is, can be construed as a comment on the facts of the case and invade the province of the jury** and we would object to that as well.

ROA 295-296.

Analysis

In his brief before the Court of Appeals after direction by the court under Anders review, Miller did not argue that the common law matter was preserved by this objection - he merely stated that there was an objection to the charge - without identifying its particular basis. *Brief of Appellant*, p. 4-5. The State raised this preservation claim in its Initial Brief of

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> facts. [FN1] **We elect to decide this appeal solely under the common law.** Relying on Belcher's common law challenge, we conclude that our modern day usage of this jury charge has strayed from this Court's original jurisprudence.

State v. Belcher, 385 S.C. 597, 602, 685 S.E.2d 802, 804 (2009).

Respondent, p. 13. The Court of Appeals rejected the State's preservation position stating: "[T]he record does not support this [preservation] argument: the trial court clearly charged the law, only, and Miller's objection addressed the likelihood that this charge would prejudice the jury."

The State submits that reversal of the Court of Appeals opinion is warranted based upon this Court's own language in Belcher that an objection on a violation of the common law is not the same claim or argument as an objection to an instruction as a "charge on the facts" in violation of South Carolina Constitution, Article V, § 21. The Supreme Court recognized the particular difference by its holding that the Court was not deciding Belcher under a state constitutional claim. Two separate legal claims require two different objections.

Since Miller only objected to the challenged instruction as a "charge on the facts," the so-called Belcher common law issue was not preserved in this appeal. An 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. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005)(objection should be addressed to trial court in sufficiently specific manner that brings attention to exact error); State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003)(party need not use exact name of legal doctrine in order to preserve issue for appeal, but it must be clear that the argument has been presented on that ground). See State v. Bailey, 298 S.C. 1, 5–6, 377 S.E.2d 581, 584 (1989) (holding that an issue is not preserved for review when a party argues one ground in the trial and then an alternative ground on appeal); State v. Holland, 385 S.C. 159, 172, 682 S.E.2d 898, 905 (S.C.App. 2009) (same). For this threshold reason, the order of the Court of Appeals should be vacated where the matter which was briefed and decided was not preserved because it was not the same claim raised in the trial court. Miller limited his

objection to a state constitutional claim.

II. Where there was no evidence that would reduce, mitigate, excuse, or justify the killing, the Court of Appeals mistakenly concluded that there was evidence that "mitigates the charge of murder, even if Miller was acting unlawfully."

The opinion of the Court of Appeals erroneously granted a new trial when it concluded that there was no assertion of self-defense by Miller at trial. The Court of Appeals failed to address the State's argument that the trial court improperly charged "involuntary manslaughter" because Miller was acting unlawfully at the time he was pointing and waving a gun. In granting a new trial in reliance on State v. Belcher, supra, the Court of Appeals committed error in the misapprehension of the Supreme Court's earlier actions by their interpretation of the meaning of evidence that "reduce, mitigate, excuse, or justify the killing," particularly "mitigate" and the impact of the Court's overruling of State v. Byrd, 72 S.C. 104, 51 S.E. 542 (1905). In the Miller opinion, the Court of Appeals declared that there was no way to distinguish the reported events in State v. Byrd from the events in Miller. This is a mistake of both fact and law.

The State concedes that in State v. Belcher, the Supreme Court addressed Byrd in two declarations in the opinion. First, when addressing the history of the malice instruction in the 1905 opinion in Byrd, the Belcher opinion stated in pertinent part:

> Relying on Levelle and Jackson, the Byrd Court found no error associated with the jury charge: " This was in exact accordance with the law...." Id. at 110, 51 S.E. at 544. **Byrd references Levelle and Jackson, yet approved of the charge *even with evidence of mitigation.***

Belcher, 385 S.C. at 606. 685 S.E.2d at 806.[2] In the second reference to Byrd, this Court

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2 In Byrd, the Supreme Court addressed the presumption of malice concept in the following manner:

stated:

> We overrule all cases involving a homicide or a charge of assault and battery with intent to kill where two factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; **and (2) evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide or the charged ABWIK**. We overrule all such cases only insofar as they meet these criteria. The following represents our best efforts to catalogue the cases that are overruled: . . . State v. Byrd, 72 S.C. 104, 51 S.E. 542 (1905) . . .

Belcher, 385 S.C. at 612, n. 10. 685 S.E.2d at 810, n. 10.[3] Thus, from Belcher, it is would

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> The circuit court charged: The use of a deadly weapon presumes malice, but the presumption may be rebutted. So, after all, it is left for the jury to say, from all the facts and circumstances, whether the killing was done with malice or not." This is in exact accordance with the law as laid down in State v. Levelle, 34 S.C. 120, 13 S.E. 319, 27 Am. St. Rep. 799; State v. Jackson, 36 S.C. 487, 15 S.E. 559, 31 Am. St. Rep. 890; and a number of other cases."

[3] From the Byrd opinion, the facts were set forth as follows:

> The state offered evidence tending to prove these facts: William J. Cox, the deceased, was a magistrate. The defendants on the day of the homicide drove by his store in a buggy. B. M. Austin, at one time a dispensary constable, was at the store, and, seeing there was some article in the buggy covered with oilcloth, reached the conclusion it was contraband liquor. Thereupon he and Cox followed the defendants, and, after passing them in the road, turned back, intending to arrest them. They then discovered that the defendants had gotten out of the buggy and were standing behind it, each with a pistol in his hand. Austin drew his gun and ordered the defendants to throw up their hands. They complied with the demand, but Palmer Chriswell retreated about 30 yards, and then fired on Austin, who was following him. Austin, the only eyewitness examined, testified that while he was thus engaged with Chriswell he heard firing from the direction of the point where Cox had approached Fletcher Byrd, the other defendant, and there Cox was found shot to death. At the time of the attempted arrest the defendants were not told that Cox was an officer, but the defendant Fletcher Byrd subsequently stated to the witnesses Hughes and Gertrude Gillion that the shooting was with "spies," or dispensary constables. The evidence tended to show further that the defendants lived just across the Greenville line, in Laurens County, and were not unfamiliar with the country and its inhabitants. The defendants offered no testimony.

State v. Byrd, 51 S.E. 542, 542 -543.

initially appear that the Supreme Court has determined that "evidence of mitigation" or evidence that "mitigated" exists in Byrd as defined in Belcher. What the Court of Appeals in Miller failed to reconcile was that in Byrd, although the Supreme Court found that there was no right to any charge on self-defense nor evidence of justification or excuse shown by any asserted right to resist arrest that would authorize any similar instructions, there was a charge on manslaughter (which also could "reduce" the crime from murder). In the 1905 opinion, the Court did not address any particular issue of mitigation *nor even mention the word "mitigate,"* however the Court did address the issues of "excuse" and "extenuation" related to a malice instruction and its relationship with the manslaughter charge. The Byrd court stated:

> The defendants next complain of this sentence in the charge: "Malice is the intentional killing of a person, knowing it to be wrong, intending to do it, knowing it to be wrong, without just legal excuse." This is substantially the same language used by the circuit judge in State v. McDaniel, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661. **As in that case, the word "excuse," as here used, embraced the idea of extenuation, which would reduce the crime from murder to manslaughter,** for immediately after this portion of the charge as to malice follows a full statement of the law as to manslaughter, which was so clear that the jury could not fail to understand, if the "excuse" of sudden heat and passion on sufficient legal provocation existed, the offense would be manslaughter, and not murder.

State v. Byrd , 51 S.E. 542, 544 (S.C. 1905) (emphasis added).

What is confusing about the Court of Appeals' retrospective assessment of Byrd is its attempt to find any evidence that may satisfy an unstated definition of "evidence of mitigation," yet fails to describe what "evidence of mitigation" it actually found in Byrd. Although saying it exists, the Court of Appeals did not declare what the evidence was that was "mitigating" in Byrd's case. Admittedly, this confusion does not rest solely with the Court of Appeals, but finds its origins in the conclusory statements within Belcher.

The Court of Appeals appeared to focus on two factors - that the defendants in Byrd

were acting illegally at the time of the shooting and that an arresting officer had an independent duty to identify himself at the time of an arrest which was not done before the shooting took place. However, it is difficult to see how the second matter is "mitigating" since the Supreme Court expressly refused to authorize an instruction on that point as lessening or justifying the shooting. "Mitigate" has been defined as 1) "to cause to become less harsh or hostile;" 2) "(a) to make less severe ... (b) **extenuate** [to lessen or to try to lessen the seriousness or extent of by trying to make partial excuses]." *Merriam-Webster Online Dictionary, m-w.com* . "Mitigation" is a noun. In Byrd, the concept of extenuation was expressly related to the issue of voluntary manslaughter. If the concept of extenuation equals mitigation as the common definition suggests, and from Byrd suggests the existence of evidence of a lesser offense, the Court of Appeals plainly misread Byrd. This imprecise variation on the same theme within Belcher provided an inadequate vehicle for the Court of Appeals to apply in seeking to treat each term in the Belcher mandate as a completely different theme. Trying to suggest that "reduce, mitigate, excuse or justify" are entirely separate concepts in incorrect where they unfortunately appear to not have that strict separation in their common meanings. The evidence that the Court of Appeals seems to rely upon is not making it "less harsh" "less severe" or to extenuate the crime. Apparently unable to find anything truly extenuating (and thereby "mitigating"), the Court of Appeals instead focuses on the undisputable commonality in Byrd and Miller - the fact that there were both involved in independent criminal activity at the time of the shooting. In making this erroneous equation, the Court of Appeals then declared: "We find no way to distinguish Byrd and Belcher." Miller, supra.

Under their faulty assessment this was incorrect because the Court of Appeals failed to

find any evidence in Miller that was truly extenuating, lessening and/or making less severe the crime. The record is devoid of such evidence. Critically important to the assessment, unlike Byrd, in Miller, there was no instruction of voluntary manslaughter which could reduce murder to voluntary manslaughter. Unlike Byrd, there was no properly given instruction that would have authorized a lesser sentence. Like Byrd, there was no evidence to support a self-defense instruction. Like Byrd, there was no evidence that would support any defenses of justification to be charged. Unlike Byrd, the evidence was not challenged as supporting a possibility of a different verdict. In Miller, where there was no voluntary manslaughter instruction charged, the circumstances of the crime were in a much different - i.e. distinguishable setting. The Court of Appeals misapprehended Belcher in its quest to give meaning to the comments about Byrd.

RELIEF WAS IMPROPERLY GRANTED

The jury was instructed "inferred malice may also arise when the deed is done with a deadly weapon." The State submits that the malice instruction in Miller's case did not violate Belcher because there was no "evidence is presented that would reduce, mitigate, excuse or justify the killing." Unlike Belcher, there was no evidence of self-defense in the case which raised the dichotomy that Belcher was seeking to address. To the contrary, the evidence was that the victim was sitting when he was shot and was unarmed, made no threatening gesture or words - when in fact under the theory of Miller, the victim was shot while he was merely sitting there - likely because he remained sitting there rather than following the demands of Miller. As Belcher stated: "In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption.... Obviously[,] when a defendant walks into the store [and] shoots and robs the clerk, a charge

that the jury may infer malice is not prejudicial to the defendant."

HOW THE ISSUE WAS RAISED BELOW

As stated above, evidence was presented that the act of shooting the victim was done with malice. At the charge conference, the defense requested a charge of involuntary manslaughter as a lesser included offense and accident. Tr. 235. The defense based these requests on the testimony of Tammy Hunter that Miller had made a statement that he did not mean to shoot anyone and testimony from Joseph Hopkins about how Miller was moving and that there was not an actual pointing of the weapon at the victim, more like he was waving the gun about and acting recklessly. Tr. p. 235, ll. 1-15. He also pointed out the reduced amount of pressure on a single action weapon could lead to a discharge. Tr. p. 235, ll. 16-25. The judge noted that there was no evidence of self-defense in this case. Tr. 238-39.

Judge Couch agreed to charge involuntary manslaughter, but denied the request for an accident instruction. Tr. p. 239, ll. 4-25.

During the instructions, Judge Couch instructed the jury in the following manner concerning murder and involuntary manslaughter:

> Now, in this case, Count One of the indictment is for the offense of murder, and in that particular case the State must prove, beyond a reasonable doubt, that the defendant killed another person with malice aforethought. Malice is hatred, ill will, or hostility toward another person. It's the intentional doing of a wrongful act without just cause or excuse and with the intent, there's that word intent, to inflict an injury or under circumstances that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exist for any particular time before the act is committed. But malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination between the previous evil intent and the act that was committed.
>
> **Malice aforethought can, again, be expressed or implied. The**

terms expressed or implied don't refer to different kinds of malice. Again, it refers to the way that you go about proving that malice. That is, it can be proven either by direct evidence or by inference from the facts and circumstances which have been proved.

Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was in, within the defendant's mind, those would be expressed malice.

Now, inferred malice can be inferred from conduct showing a total disregard for human life. **Inferred malice may also arise when the deed is done with a deadly weapon.**

Now, a deadly weapon is any article or instrument or substance which is likely to cause death or great bodily harm. Now, whether an instrument has been used in any particular case as a deadly weapon will depend upon the facts and circumstances of each case. I will tell you that such things have been determined to be deadly weapons in our state such as a pistol, shotguns, rifles, dirk, daggers, knives, slingshot, metal knuckles, razor, gasoline, fire bombs, Molotov cocktails, lighter fluid, things of that nature have all been determined to be deadly weapons. **And a gun can even be a deadly weapon, even if it's not operating, if it's used in a certain fashion.**

Now, that's the charge of murder. Now, under our law, let me explain something to you. When you have a charge such as murder, there are what we call lesser included offenses. You may have heard that phrase before. And that means that, within that charge, there are other charges that a defendant could be found guilty lf or other crimes, which are lesser crimes, but included within that same larger offense.

One of those is the, is the crime or offense in the case of murder, it's the crime or offense known as involuntary manslaughter. That is a lesser included offense. And let me explain to you what that means. If you find that the State has failed, beyond a, beyond a reasonable doubt to prove that the defendant committed murder, you may consider whether the State has proven beyond a reasonable doubt that the defendant committed involuntary manslaughter.

To prove involuntary manslaughter, the State must prove, beyond a reasonable doubt, that the defendant unintentionally killed the victim without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or that the defendant unintentionally killed the victim without malice while engaged in a lawful activity, but with reckless

disregard for the safety of others.

Unintentional means that the defendant did not intend for anyone to be killed or seriously injured. Reckless disregard for the safety of others is more than mere negligence or careless, carelessness. Mere negligence or carelessness is the failure to use care that an ordinary or reasonable person would use under the same circumstances.

Recklessness, however, is a conscious failure to use ordinary care. Reckless disregard for the safety of others means that you are not interested in the consequences of your acts or the rights or the safety of others. If a person knows or should know that ordinary care requires certain precautions to be taken for the safety of others when using a dangerous instrumentality such as a gun or a car, but that person fails to use those precautions without concern, the person's actions are considered to be reckless.

Tr. p. 287, l. 1 - p. 290, l. 8.

After the conclusion of the instructions, the defense made the following objection:

MRS HODGES: Yes, Your Honor. We would renew our objection to this Court's decision to not give the charge of accident. **In addition, Your Honor, there is a, a portion of the Court's charge, which I understand is probably in the standard charge, but it deals with malice being able to be inferred from the use of a deadly weapon.**

Respectfully, Your Honor, we would argue that that is, can be construed as a comment on the facts of the case, and invade the province of the jury and we would object to that as well.

THE COURT: Well, I understand your objection. It's noted. Of course, I'll leave the charge as it is.

Tr. p. 295, l. 19 - p. 296, l. 5.

During the deliberations, the jury made a request for re-instruction on murder, possession of a weapon during a violent crime and involuntary manslaughter. Tr. 304. The court gave the jury a written copy of the particular instructions. Tr. p. 304, ll. 1-15. After the written instructions were provided, defense counsel Hodges renewed the instruction:

> HODGES: . . . The only objection we had would be to renew our objection regarding the inferences being made from the use of a deadly weapon that we previously made. . .

Tr. p. 305, ll. 9-12. The judge noted the continuing objection. Tr. p. 305, l. 13.

HOW THE FACTS WERE PRESENTED

During the trial, two witnesses of the shooting of Christopher Blount testified. Tammy Hunter described hanging out on October 26, 2007 at Rookard Court, having used crack cocaine earlier in the day. Tr. 148-49. The Appellant arrived with a heavy-set white male. Tr. p. 129, ll. 3-14. Hunter thought the white male was the driver for Miller. Tr. 129. Miller had some crack and marijuana with him when he arrived. Tr. 130-31. Miller came in with the bag of crack. He pulled out the big pieces of rock. He then placed the crumbs and put them on a newspaper gathering them together from the white male (Blount). However, Miller ended up giving it to "Poppie Woppie" (Richard Young) who owned the house. Miller told Blount that he would take care of him later and to let him roll up his blunt. Tr. 132. Blount was sitting on the couch. Tr. 138.

Hunter stated that she saw Shawn with a gun. Tr. 135. She stated: "He pointed it at the white guy, told him to get his bitch ass up." Tr. p. 135, ll. 17-20. Blount was sitting on the couch at the time. Blount did not have a gun, weapon, knife nor did he make any threatening gestures. Tr. 136. What happened next was the gun went off. Hunter described Appellant

screaming that "y'all know I didn't mean to shoot him, y'all know I didn't mean to." Tr. p. 137, ll. 1-2. After the shooting, Appellant stayed for a minute and then left with another person. Tr. p. 137, ll. 6-16. Hunter then woke up Perry Parks who was sleeping on another couch and they left, running through the woods. Tr. p. 137, ll. 17-19. She later identified Appellant as the person she saw and knew him by the nickname "Nephew." Tr. p. 138, ll. 1-18.

She said Appellant and the victim were at the place for 40 minutes. Tr. 141-42. She said that Appellant had come in, rolled a marijuana blunt and then smoked it with her and the victim. Tr. 142. She stated that there had been no argument, altercation, or showing of hard feelings between anyone of the seven people at the home. Tr. 146-47.

She denied that she saw Appellant playing the gun. She said that Appellant pulled the gun out, made his comment "get your bitch ass up" and shot.[4] She confirmed that Appellant never stated that he was going to shoot or kill the victim. She described that the Appellant and victim had been acting friendly toward each other. Tr. 147.

Hunter stated she was scared after the shooting. Tr. 149. Appellant had the gun in his hand saying he did not mean to do it and she told Appellant that she knew he didn't mean to do it. Tr. p. 149, ll. 5-11, p. 150, l. 20 - p. 151, l. 2. She described looking at the victim with blood on his shirt. She left at that time and Poppie Woppie went and called 911. Tr. 149.

On re-direct, Hunter described that Appellant was through smoking the blunt and getting ready to go and was grinning and laughing when the victim indicated that he wanted

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[4] In her statement, it was reported she used the term "punk ass" rather than "bitch ass." Tr. 146. Hunter stated she did not see a difference in the terms.

Appellant to give him something. Tr. 151-52. The victim remained on the couch and stayed still. Miller said "get your bitch ass up", pulled a gun out, pointed the gun at the victim (Tr. p. 153, ll. 13-14), and fired a shot. Tr. p. 153, ll. 2-24.

The next witness, Joseph "Chick" Hopkins described being at house on October 26 when the Appellant and victim arrived together. Tr. 157. Hopkins said he was already at the house about 40 minutes. He said that he later saw Appellant show the gun 3 or 4 times and told him to put it up before something happens. Tr. p. 159, ll. 16-24. Also, Tr. p. 169, ll. 19-23. He stated that everything was all right and it was like a social gathering. Tr. 160. He said the Appellant was sitting there smoking weed. He stated that Appellant stood up and said he was fixing to go, but that he would be back. He said that while he had the gun in his hand he told the victim that he needed "to bring your little punk self on or something and the gun fired." Tr. p. 161, ll. 18-23.

Contrary to Hunter, Hopkins stated that Appellant did "not really" point at him. Tr. p. 162, ll. 1-5. He stated that it was "just a wave" and it was not like putting the gun in his face and telling him to come on. Tr. p. 162, ll. 3-13.

He confirmed that in his statement he said: "light skin dude Shawn then pointed the gun at the white dude. He told the white dude again let's go, bring your punk ass on. The gun then fired. The white dude fell over the couch." Tr. p. 164, ll. 9-12. in describing the use of the weapon, he said he did not hold it steady on him. Tr. 164-65, 170-71. He confirmed the comments were not mean sounding. Tr. 171. He stated that Miller did not pull the gun out and point it directly at the victim, and stated it was more of a gesture. Tr. p. 173, l. 1. He stated Appellant looked stunned after the shot and stated he didn't mean to do it. Tr. 173. He said it was used in a careless manner. Tr. 173.

On re-direct, he confirmed he said in his statement that Appellant pointed at the victim. Tr. p. 175, l. 17 - p. 176.

At the arrest, a Smith and Wesson revolver was found on the Appellant. Tr. 185. Finally, Appellant gave a statement claiming that he was not at the house and did not shoot anyone. Tr. p. 199, ll. 12-14.

The pathologist testified that there was no evidence of a close-up or contact wound. Tr. 213. The incident occurred on October 26 and he died on November 13. Tr. 213.

SLED forensic scientist testified that he could not confirm or rule out that the bullet recovered from the victim (State Exhibit 16) was fired from the revolver seized from the Appellant. (State Exhibit 17). Tr. 220-22. However, Agent Parnell testified that the recovered weapon would require the trigger being fully squeezed to make contact with a cartridge. Tr. 223.

Evidence to Support Accident or Involuntary Manslaughter Was Not Presented.

In his brief, Miller sought to focus assertions that the homicide was an accident[5] or that it was involuntary manslaughter.[6] While Respondent conceded that an instruction on

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[5] Clearly, accident cannot apply and the instruction at trial was properly denied. It was not an issue for the jury. For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon. State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999). Because Miller was acting unlawfully, he was not entitled to an accident charge - he was involved in the distribution of crack cocaine and marijuana at the time of the incident. He was also pointing and presenting a firearm.

[6] The essence of involuntary manslaughter is the involuntary nature of the killing. See Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (finding no involuntary manslaughter charge warranted where defendant admitted he intentionally fired a gun into a crowd in self-defense despite testimony that the defendant had been rushed by a group of people during a fight); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) (holding where a defendant admitted he intentionally shot his gun, contending he was acting recklessly but

"involuntary manslaughter" was given - it was inappropriately given because it was not authorized under South Carolina law.[7] Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Cabrera–Pena, 361 S.C. 372, 380–81, 605 S.E.2d 522, 526 (2004); State v. Smith (David Dwight), 391 S.C. 408, 414, 706 S.E.2d 12, 15 - 16 (2011). To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others. Recklessness is 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. A person can be acting lawfully, even if he is in unlawful

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lawfully in self-defense, involuntary manslaughter charge was not warranted); State v. Morris, 307 S.C. 480, 483–84, 415 S.E.2d 819, 821–22 (Ct.App.1991) (noting that under involuntary manslaughter, the act must be unintentional and defendant intentionally shot his gun though he claimed self-defense); accord State v. Light, 378 S.C.641, at 648–49, 664 S.E.2d 465, at 468–69(2008) (finding the defendant had lawfully armed himself in self-defense and was entitled to an instruction on involuntary manslaughter, in a case in which there existed evidence the gun unintentionally discharged); State v. Brayboy, 387 S.C. 174, at 181–82, 691 S.E.2d 482, at 486 9S.C. App. 2010) (holding that although unlawful to point and present a firearm, when a defendant lawfully armed himself in self-defense his failure to immediately disarm himself when the threat subsided did not amount to unlawful pointing and presenting a firearm and evidence suggesting the gun accidentally discharged was sufficient to warrant instruction on involuntary manslaughter); State v. Gibson, 390 S.C. 347, 357-358, 701 S.E.2d 766, 771 - 772 (S.C.App. 2010) (no involuntary manslaughter where defendant voluntarily and intentionally fired weapon).

[7] The concurring opining in Miller suggests that involuntary manslaughter was properly given. Judge Pieper concluded that the admitted evidence that Miller was pointing his weapon was not truly evidence that he was pointing the weapon, but was explained as a "wave" or "waving" the gun in the air. As addressed within, this question does not alone resolve the issue because his additional illegal drug activity still precludes consideration of involuntary manslaughter.

possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. The negligent handling of a loaded gun will support a charge of involuntary manslaughter. State v. Gibson, 390 S.C. 347, 357-358, 701 S.E.2d 766, 771– 772 (S.C.App. 2010). See State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 901 (2006) (finding that, in the absence of self-defense, pointing and presenting a firearm precludes an involuntary manslaughter charge); State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (S.C. 2010) (defendant was not entitled to a jury instruction on involuntary manslaughter, in prosecution for murder; defendant admitted that he was not in imminent fear of death or bodily injury during fight with victim, and thus defendant was not acting in self-defense when he shot the victim).

Miller could not satisfy either of those threshold showings upon the evidence presented.

Pointing and Presenting the Weapon Presents Harmless Error.

The decision in State v. Smith (David Dwight), 391 S.C. 408, 414, 706 S.E.2d 12, 15 - 16 (S.C. 2011) is particularly telling about the weakness of Miller's present position. In Smith, he attempted, unlike Appellant, to assert that he was lawfully armed in self-defense. Smith entered the trailer to unlawfully sell crack cocaine, a felony, to Victim. Smith pursued the drug deal while armed with a loaded gun, knowing Victim owed him $40 from a previous drug transaction. During the confrontation, Smith brandished the gun and used it to pistol-whip the victim. According to Smith, he pistol-whipped Victim because Victim was approaching him in a "real serious demeanor." Victim was unarmed, the door to Victim's trailer was unlocked, and there is no evidence Smith was unable to retreat from the dangerous situation he created. Based on these facts, the Court found no evidence to support Smith's assertion that he was acting lawfully by arming himself in self-defense. Specifically, there is

no evidence to suggest that Smith was without fault in bringing on the difficulty, that he believed or actually was in imminent danger of losing his life or sustaining serious bodily injury, or that he "had no other probable means of avoiding the danger" other than drawing the loaded weapon. The trial court properly refused the involuntary manslaughter instruction.

In State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006), the Supreme Court held Reese was not entitled to an involuntary manslaughter instruction because he "presented a firearm" when he took out a gun and waved it in the victim's face. 370 S.C. 31, 36, 633 S.E.2d 898, 900-01 (2006), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).[8] Likewise, in State v. Cabrera-Pena,361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004), the court found the defendant's conduct in showing the victim his pistol as a means of intimidation and forcing her to walk towards a pickup truck constituted a felony of either pointing or presenting a firearm or kidnapping, and thereby precluded an involuntary manslaughter charge.

The Appellant relies upon In re Spencer R., 387 S.C. 517, 520-521, 692 S.E.2d 569, 571 (S.C.App. 2010) to suggest that there was no presenting of the firearm. In that case, the evidence was insufficient to support adjudication of delinquency for crime of presenting a firearm to a friend of the victim and the victim's mother. The court found that no testimony proved juvenile intended to specifically threaten victim's friend and mother when juvenile was sitting on his property near school bus stop with gun, and victim's mother admitted

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[8] The Appellant claimed before the Court of Appeals that Reese was completely overruled by Belcher. *Brief of Appellant*, p. 10-11. However, the decision in Belcher did not address whether involuntary manslaughter existed. It is clear that is a reference to the parenthetical citing Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005) (malice may be inferred from the use of a deadly weapon)." His assertions otherwise are incorrect.

juvenile did not even turn towards her or see her when she initially observed juvenile holding his assault rifle.

Here, the evidence was that Miller pointed and waved the gun toward the victim while demanding that they leave, prior to the shooting. The Spencer R. decision recognized that the implication from the court's discussion in Reese and Cabrera-Pena is that either "waving" or "showing" a gun at someone in a direct, actively aggressive, and threatening manner constitutes presenting a firearm. Additionally, in both cases the victims were in close proximity to the defendants. Similarly, Miller was in close proximity to Appellant and there was evidence that he *pointed* the gun at the victim. ROA. 135, 153 (Hunter), ROA 164, ll. 9-12 (Hopkins).[9] See, State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (S.C. 2009) (there is no evidence supporting an involuntary manslaughter charge where, even assuming Wharton did not intentionally fire the gun at victim, by pointing the gun and waiving it in the air, Wharton committed an unlawful act that would naturally tend to cause death or great bodily harm).

Felony Drug Activity Precluded Involuntary Manslaughter

The State further submits that the concurring opinion of Judge Pieper and Miller fail to take into account that Miller was acting unlawfully for a another reason in addition to the pointing and presenting of the weapon by distributing crack cocaine and marijuana.Tr.

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[9] Hunter stated that she saw Shawn with a gun. ROA 135. She stated:

> He pointed it at the white guy, told him to get his bitch ass up.

ROA p. 135, ll. 17-20. Also, ROA p. 158.

130-31,132, 142. See § 44-53-375 (B) (felony to distribute crack cocaine); §44-53-370 (distribution of marijuana). There was also evidence that he refused to sell crack to Hopkins because they did not have enough money to buy it from him. ROA. 134, l. 8-10. Like the defendant in Smith, the distribution and sale of drugs is a felony which precludes his ability to get the involuntary manslaughter instruction due to his unlawful acts. State v. Smith, supra. The unintentional killing of another without malice, but while engaged in an unlawful activity *not amounting to a felony* and not naturally tending to cause death or great bodily harm is involuntary manslaughter. However, the sale and distribution of crack is a felony, thus precluding this type of involuntary manslaughter. Because Appellant was engaged in unlawful activity, involuntary manslaughter was an improper charge.

Therefore under Belcher, the giving of the implied malice instruction was either not error or was harmless error. Miller argues that regardless of whether an involuntary manslaughter instruction was given, he was entitled to relief. This is erroneous because Appellant is not entitled to a windfall under a harmless error analysis - the jury must have considered the instructions given which would have excluded the ability of Appellant to be convicted of involuntary manslaughter because the unlawful activity of Appellant would have disqualified him either the pointing and presenting or the drug activity, as in Smith.

SUMMARY

Here, the manner and use of the weapon, his verbal comments in directing the victim to get up while he brandished the gun with the victim's failure to stand and the gun going off shooting the unarmed victim in the chest are supportive of the existence of malice in the case. Where no assertion of either self-defense or being armed in self-defense is made, or that he was legally entitled to an instruction on any lesser verdict of involuntary or accident, reversal

was not appropriate.

Miller pointed out that the prosecutor in his closing made reference to "malice can be inferred simply by the use of a deadly weapon." ROA. 254, l. 23-24. However, he further argued the existence of malice can be inferred by the facts as well as what was used. Id. However, he then described malice as a condition of the mind. He pointed out that when Miller was ready to leave, the victim challenged his authority, pointed the gun at the victim and pulled the trigger. ROA. 249. He noted that when the gun was pulled out and pointed at the victim that was a point of malice - a heart devoid of social duty as a challenge to Appellant's authority. ROA. 250. He asserted that malice was revealed by the direction and the reaction to the challenge of the authority by the brandishing and pointing of the firearm followed by the inaction of the victim and then being shot within close proximity. ROA. 250-251.

Belcher does not require a retrial because the conditions precedentfor reversalwere not met. Evidence was not presented that, if believed, would have reduced, mitigated, excused or justified the homicide. The Court of Appeals erred in its conclusion otherwise. His assertions are without merit.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to correct and reverse the opinion of the Court of Appeals and affirm the ruling of the trial court as well as Miller's convictions.

Respectfully Submitted,

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February 20, 2014

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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Brief of Petitioner State of South Carolina in the foregoing action by depositing copies in the InterAgency Mail to Benjamin J. Tripp, Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 20th day of February 2014.

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