STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

The Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT

Appellate Case No. 2016-000298
Opinion No. 2019-UP-042

RETURN TO PETITION FOR REHEARING

Comes now Respondent, above named, by and through the South Carolina Attorney General, hereby makes its Return to the Petition for Rehearing filed by Appellant on February 7, 2019. Respondent submits the Court of Appeals reached the correct result in affirming Appellant's convictions. As a result, the Petition for Rehearing should be denied and dismissed.

1. Appellant first contends this Court applied the wrong analysis of the accident instruction in concluding Owen's clarification would have had no effect on the jury because the jury determined Owens intentionally shot the victim. Specifically, Appellant cites *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) for the holding that a trial court's refusal to charge a lesser included offense of involuntary manslaughter was error when the jury convicted the defendant of murder. Respondent submits this argument was not overlooked or misapprehended by this Court.

Casey concerned a jury instruction on a lesser included offense of murder. In the instant case, the disputed charge is one of defense of accident. This Court correctly found the jury's conclusion Appellant intentionally shot the victim meant the jury did not reach the causation element of accident. Significantly, and distinguishable from *Casey*, the trial court **did** instruct the jury on accident. The instruction was a correct and comprehensive statement of law. Moreover, because Appellant only asked for the clarification after the charge was given to the jury, any clarification by the court that drug dealing would not preclude a charge of accident would constitute an impermissible comment on the facts.

Thus, even if this Court were persuaded by Appellant's argument that *Casey* requires the court to instruct on accident to prevent reversible error, the trial court here did, in fact, do so. The standard of review when considering an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The testimony was undisputed the men were involved in an unlawful drug purchase, and the jury was extensively instructed on the defense of accident (R. p. 309) and proximate cause (R. p. 305). Read in its entirety, the charge clearly communicated to the jury the required nexus between the unlawful activity and the act. The jury was told numerous times in the proximate cause charge that the defendant's act must be the direct cause of the victim's death. The jury was also reminded of the State's burden to prove the victim's death was not an accident but caused by the defendant's unlawful activity. There is no reasonable likelihood the jury applied the instruction in a way that violated the constitution.

Respondent also respectfully notes that defense counsel did not make a specific request to re-charge the jury, nor did he offer the specific language for a re-charge on accident. (R. p. 317.) Thus, Appellant's argument on appeal was not made to the trial court below. Given the

posture of this issue before the trial court, this Court reached the correct result in finding no reversible error in the trial court's instruction.

2. Appellant argues that because this Court should grant rehearing "on the failure to clarify the 'unlawful activity' portion of the accident instruction," the harmless error holding concerning the admission of the photograph should also be re-evaluated. To the contrary, because there was no error in this Court's assessment of the accident instruction, Respondent contends there is no need to re-evaluate the harmless error analysis of the admission of the photograph. The photograph appears to be a cropped or narrowly focused image of the victim and his brother in an outdoor setting. Unlike in *State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), where a photograph of the victim and her husband was introduced during the husband's testimony, and *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), where the photograph depicted a much younger victim during a celebratory period, here the photograph is fairly unremarkable. Appellant argues *Livingston* and *Langley* required reversal even without a jury instruction issue, but that is because the pictures submitted in those cases were substantially more prejudicial than in the instant case. In a Rule 403, SCRE, analysis, the courts must always weigh the prejudicial impact of any piece of evidence on a case by case basis. Significantly, the State presented testimony that the victim was a drug dealer. Clearly, the State's theory of the case did not include portraying the victim as an innocent bystander. Thus, as this Court correctly concluded, the photograph of him "in life" had limited, if any, prejudicial value.

WHEREFORE, premises considered, for the reasons stated herein, Respondent respectfully requests this Court deny the Petition for Rehearing.

Respectfully submitted,

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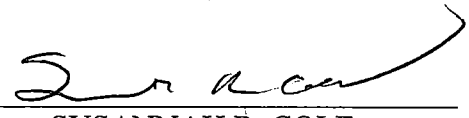
BY: 
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ATTORNEY(S) FOR RESPONDENT

February 21, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

The Honorable Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AHSHAAD MYKIEL OWENS,

APPELLANT.

Appellate Case No. 2016-000142

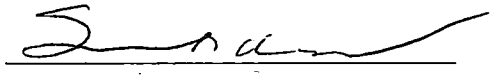
CERTIFICATE OF SERVICE

I, Susannah Cole, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing by depositing copies of the same in the United states mail, postage paid, first class, addressed to Appellant's attorney of record:

Robert M. Dudek, Chief Appellate Defender
SCCID/Div. of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 21th day of February, 2019.



Susannah R. Cole
Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

February 21, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Ahshaad Mykiel Owens
Appeal from Charleston County
Appellate Case No. 2016-000298
Opinion No. 2019-UP-042

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of the Return to Petition for Rehearing, together with Certificate of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Susannah Cole
Assistant Attorney General

SC/dmd
Enclosures
cc: Robert M. Dudek, Esq. (w/two copies of encls.)
The Honorable Scarlett Wilson, Solicitor 9th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)