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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
R. Markley Dennis, Circuit Court Judge

The State,

Respondent,

v.

Ahshaad Mykiel Ownens,

Petitioner.

Appellate Case No. 2019-001601

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Circuit
101 Meeting Street, Suite 400
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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I.

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PETITIONER'S QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by finding the error of the trial judge in admitting a photograph of the decedent with "his arm around his friend" during happy times was harmless since the photograph was an "emotional pull" on the jury in a close, complex legal case where the application of the defense of accident was critical and the impermissible appeal to the sympathy of the jury cannot be underestimated?

2.

Whether the Court of Appeals erred by finding the trial judge's accident instruction "sufficient" where it acknowledged the problematic nature of the charge as it instructed the jury that the defendant must have been "acting lawfully" to be entitled to an acquittal based on accident since a reasonable juror could have concluded that because the drug deal was illegal that petitioner could not be acquitted based on an accidental shooting, and the trial court could have clarified the matter by merely instructing that any unlawfully activity had to be the "proximate cause of death" to disqualify petitioner from invoking accident as a defense?

(Cert. Petition, p. 2).

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in finding harmless error in the trial court's admission of a photograph of the victim indicating his size when the State's theory of the case turned on the size and position of the three men in the back seat of a car in addressing the claim of accident, where other more specific evidence was submitted in support of that fact that would not carry the heightened concern of a possible sympathetic response as a photograph.

2.

Whether the Court of Appeals erred in finding the trial court did not abuse its discretion in refusing to amend his jury instruction on the defense of accident when the charge correctly stated the law, Petitioner only asked for clarification after the jury was charged, and the court found an amendment would constitute an impermissible comment on the facts of the case.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Petitioner, Ahshaad Mykiel Owens, in March of 2015 for murder, armed robbery, criminal conspiracy, and possession of a weapon during the commission of a violent crime involving the death of Jarrod Howard on October 14, 2014. (R. pp. 328-33). On February 8, 2016, the case was called to trial before the Honorable R. Markley Dennis. (R. p. 1). Jason T. King, Esquire and John J. Kozelski, III, Esquire, represented Petitioner. (R. p. 1). Assistant Solicitor Stephanie Linder represented the State. (R. p. 1). At the conclusion of the three-day trial, the trial court directed a verdict on the criminal conspiracy charge and the jury returned a verdict of guilty on the remaining charges. (R. p. 1; p. 257, lines 5-9; p. 326, lines 1-23). Judge Dennis sentenced Petitioner to concurrent terms of thirty years for the murder and armed robbery charges and a concurrent term of five years for the weapons charge. (R. p. 327, lines 8-13). Petitioner appealed.

After briefing, the South Carolina Court of Appeals heard oral argument on October 9, 2018. The Court of Appeals subsequently issued an unpublished opinion on January 23, 2019, that affirmed the convictions and sentence. (App. pp. 1-5). Petitioner sought rehearing on February 7, 2019. (App. pp. 6-21). The State made its return to the petition on February 21, 2019. (App. pp. 22-25). On July 10, 2019, the Court of Appeals granted the petition, and, without further briefing or argument, issued a substituted opinion, again affirming. (App. pp. 26-34). Petitioner sought rehearing, (App. pp. 35-41), which the Court of Appeals denied on August 22, 2019, (App. p. 42).

On October 14, 2019, Petitioner filed a petition for certiorari review in this Court. This return follows.

RESPONDENT'S STATEMENT OF FACTS

On the afternoon of October 10, 2014, police responded to a call of shots fired in downtown Charleston. (R. p. 8, lines 4-20.) Jarrod Howard was lying on the sidewalk and had a gunshot wound to his lower back. (R. p. 11, lines 14-25.) Approximately ten to fifteen bystanders were gathered around the victim. (R. p. 16, lines 9-16.) When the police asked whether anyone gathered there had any information about the shooting, Hunter Bessinger came forward as a witness to the murder. (R. pp. 16-18.)

Hunter Bessinger testified Jarrod Howard was his best friend and the men had known each other since high school. (R. p. 40, lines 9-15.) Hunter described Jarrod as "one of the nicest kids I've ever met" and small in build. (R. p. 40, lines 17-23.) Hunter described how the men were celebrating Hunter's new job at Boeing, so they agreed to meet at Jarrod's house on that Friday afternoon. (R. p. 42, lines 6-14.) Jarrod received a phone call from someone he did not appear to know very well, and he stepped into a back bedroom to take the phone call. (R. p. 42, lines 17-24.) Hunter testified Jarrod sold drugs to a small group of friends, and following the phone call, Jarrod asked Hunter to accompany him to a drug deal. (R. p. 43, lines 5-14.) Hunter had not accompanied Jarrod on these deals before, so the request was unusual, but Jarrod seemed nervous. (R. p. 43, lines 17-24.) Jarrod gave Hunter a pocket knife for protection, which Hunter said was also unusual, and took his book bag. (R. p. 44, lines 2-20.) The men walked a few blocks down the street to the corner of Bogard and Percy. (R. p. 45, lines 4-8.) The men spotted a red car at the corner with two unfamiliar men inside. (R. p. 45, lines 10-18.) One man was in the driver's seat and the second man sat in the backseat of the passenger's side. (R. p. 45, lines 20-21.)

When they approached the car, Hunter got into the backseat in the middle position, then

Jarrod climbed in beside him. (R. p. 45, line 24 – p. 46, line 1.) Petitioner, who was the man in the backseat, had a book bag between his legs, and the three of them were squeezed together in the small backseat of the car. (R. p. 46, lines 12-15.) Hunter said they tried to start a conversation, but as soon as the men were seated in the car, Petitioner pulled a gun from his book bag and pointed it at them. (R .p. 46, lines 19-24.) Petitioner waived his gun and yelled at the men to "give him the shit," but Jarrod and Hunter were frozen in fear. (R. p. 47, lines 10-17.) Jarrod attempted to get out of the car, and Petitioner shot him in the back as he tried to step out. (R. p. 47, lines 14-20.) Hunter could smell the burning gunpowder and his ears were ringing from the shot, but he heard Petitioner tell him to "get out," and he jumped from the car and ran. (R. p. 48, lines 4-20.) Hunter heard the tires screeching as the car sped away. (R. p. 49, lines 2-3.) He tried to call 911 as he returned to his friend, but the call would not go through. (R. p. 49, lines 2-10.) A bystander was with Jarrod, lying on the ground, and she told Hunter she had called 911. (R. p. 49, 11-12.) Hunter tried to keep Jarrod awake as they waited for an ambulance. (R. p. 49, 15-20.) When the police arrived on the scene, Hunter told them he saw the crime and cooperated with the police in their efforts to find the perpetrators. (R. p. 49, line 23 – p. 51, line 9.) Eventually, Hunter identified Petitioner in a police lineup as the shooter. (R. p. 51, lines 5-9.)

Anna Faenza, who owned the business across from the crime scene, was cleaning paintbrushes when she saw the red car waiting outside her business. (R. p. 80, lines 2-7.) Faenza heard voices arguing, then heard the gunshot. She saw Jarrod fall to the ground, clutching his book bag, and then she saw Petitioner run to where Jarrod had fallen and grab the book bag. (R. p. 80, lines 8-25.) When she noticed the gun in Petitioner's hand, she ran to lock the doors of her business and called 911. (R. p. 81, lines 1-9.) Faenza noticed Petitioner's distinctive shoes, and saw him

take a few steps down the street before she ducked down. (R. p. 83, line 18 – p. 84, line 7.) She then heard the car speed away. (R. p. 84, line 10.)

Another witness saw Jarrod and Hunter approach and then get into the car. The witness heard a gunshot, and then saw the victim struggle to get out of the car. (R. pp. 21-23.)

Other witnesses saw two men exit the vehicle, one described as a "light skinned black male" "followed by a white male." (R. p. 34, lines 2-6.) One of the men who ran from the car returned a few minutes later to the scene where the victim lay on the ground. (R. p. 29, line 8 – p. 30, line 21.)

Shortly after the shooting, a witness saw the passenger of the red Mazda throw the gun from the passenger's side window on Highway 26. (R. p. 97, line 14 – p. 98, line 22; p. 99, line 21 – p. 100, line 3.) The car pulled over to the side of the road, and the passenger got out of the car. The witness drove onward and did not see if the passenger picked up the gun. The witness obtained the license plate number of the car and reported what she saw to the police. (R. pp. 101-105.) The responding officer was not able to locate the gun. (R. p. 110, lines 1-11.) The red 2005 Mazda 6 was registered to a man named Phillip Jewel. (R. p. 117, lines 2-11.) Police put out a BOLO for the red vehicle, which was located at approximately 10:00 pm that evening. (R. p. 117, line 15 –p. 118, line 3.) Mr. Jewell's brother contacted the police to inform them his brother wanted to come in to talk to investigators about the crime. (R. p. 119, lines 4-9.)

According to the pathologist, Jarrod was nineteen years old, one hundred fifty-six pounds, and five feet, eight and one-half inches tall. (R. p. 208, line 24, p. 209, line 6.) He had scrapes on his face, and a gunshot wound in the middle of his lower back. (R. p. 209, lines 7-23.) The bullet had passed through the spinal cord and travelled upward through Jarrod's body and stopped in the

right front rib in the front of his chest. (R. p. 210, lines 1-16.) Blood samples revealed traces of marijuana, Xanax, and amphetamines in Jarrod's system at his death. (R. p. 213, lines 16-21).

Ahshaad Owens testified Jarrod was his drug supplier of approximately three months. (R. p. 226, lines 3-18.) Owens said he called Jarrod that day to try to buy some Xanax before he left for Columbia for the weekend. (R. p. 227, lines 3-8.) Owens claimed Jarrod told him to meet him downtown, so Owens' friend Phillip Jewel drove him to the location. (R. p. 227, lines 14-22.) Owens said he noticed Jarrod and another larger man walking down the street, so he called him and told Jarrod to make sure his friend stayed outside the car. (R. p. 228, line 10-18.) Owens said he did not understand why Hunter got into the car first, after Jarrod had just agreed he would stay outside. (R. p. 229, lines 1-8.) Owens said the men had some conversation, and then Hunter interrupted the men and asked Owens how many Xanax he wanted. Owens claimed he reached down into his book bag for the money, and when he looked up, Hunter is pointing a gun at him. (R. p. 230, lines 1-14.) Owens claimed Hunter grabbed his bag, but then he knocked the gun out of Hunter's hand, and the gun fell to passenger's side rear floorboard. (R. p. 231, lines 5-10.) The men began fighting for the gun, and Owens accidentally fired the gun in the tussle. (R. p. 231, lines 12-14.) Owens said he told Hunter to get out of the car, and then he grabbed his book bag from Jarrod. (R. p. 232, lines 16-23.) Owens told Jewell to drive away. (R. p. 232, lines 22-23.) On cross examination, Owens acknowledged he lied to police in his initial interview. (R. p. 238, lines 16-20.) Owens admitted he told police they could not find the gun, and on the stand he denied stopping on Interstate 26 to dispose of the gun. (R. p. 241, lines 12-17; p. 242, lines 17-25.) However, Owens told the police he threw the gun out of the window on the interstate. (R. p. 250, lines 18-23.)

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242 (b), SCACR. General reasons for granting a petition include to review a Court of Appeals decision that: (1) reflects a novel question of law; (2) included a dissent; (3) conflicts with this Court's precedent; (4) addressed a substantial constitutional right; or (5) decided a matter of federal law in a way that conflicts with federal precedent. *Id.* The foregoing list is not exclusive, and this Court may exercise its discretion in the absence of these facts.

Appellate Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001).

Evidence Rulings: Photographs

'"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.'" *State v. Hawes*, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018), *reh'g denied* (May 24, 2018) (quoting *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)). Even where a reviewing court finds an abuse of discretion, "reversal is not required unless appellant was prejudiced by the error." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Error is harmless when it 'could not reasonably have affected the result of the trial.'" *Id.*, (quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Jury Instructions

The law to be charged must be determined from the evidence presented at trial. *State v.*

Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The substance of the law must be charged to the jury, not any particular verbiage. *State v. Adkins*, 353 S.C. 312, 318–19, 577 S.E.2d 460, 464 (Ct. App. 2003). If, in its entirety, the instructions are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). 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. *Id.* at 27, 538 S.E.2d at 251 (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)).

ARGUMENT

The Court of Appeals correctly applied established law to the facts of this case. Therefore, Petitioner does not show a case reflecting "special or important reasons" to grant certiorari review, and the petition should be denied.

I.

> The Court of Appeals did not err in finding harmless error in the trial court's admission of a photograph of the victim offered to indicate the victim's size. Though finding the photograph's "little relevance" was "vastly outweighed by its danger of unfair prejudice" under the balancing required by Rule 403, SCRE, the Court of Appeals correctly concluded there was no reversible error because the admitted evidence could not have reasonably affected the decision at trial.

The Court of Appeals found "[w]hat little relevance the photograph had was vastly outweighed by its danger of unfair prejudice." (App. p. 33). However, it also found the error in admission was harmless, reasoning, "it is unlikely the emotional pull of the photograph was enough to distract a rational juror from the main issues at trial or otherwise influence the verdict." (App. p. 33). The facts and law support this conclusion.

Prior to the return of the jury after a break in proceedings, the solicitor notified the trial

judge that she would offer a photograph of the victim, and the admissibility of the photograph was discussed and considered. (R. pp. 36-37). The solicitor stated the purpose of offering the photograph was to show the victim and his relative size when the small back seat area of the car would be discussed. (R. p. 37, line 24 – p. 38, line 3.) The trial court ruled the photograph was admissible, finding the jury would know there was a victim, and that the photograph additionally had probative value in demonstrating the size of the victim. The trial court reasoned:

> We are talking about a small car. We are talking about all sorts of things that a jury has got to assess, so it further goes … to not just identifying the victim but it goes to showing other issues that may become important in deciding the credibility.

(R. p. 38, lines 6-18.)

Thereafter, the State called Hunter Bessinger who testified, when asked to describe the victim, that the victim was "one of the nicest kids I've ever met," that "he was awesome," and "would anything for anyone," in sum, a "[g]ood guy." (R. p. 40, lines 16-20). There was no objection to this testimony. Immediately following this testimony, Bessinger was asked to describe what the victim looked like and to identify the victim in the picture to be admitted. (R. p. 40, line 21 – p. 41, line 7). Once identified, the State moved to introduce the picture, State's Exhibit 49, into evidence. (R. p. 41, line 18.) Counsel renewed his objection to the photo for the record, claiming again the picture was irrelevant and unfairly prejudicial. (R. p. 41, lines 10-12). Throughout a large part of his testimony, Bessinger testified not only that the victim sold drugs, but specifically the victim was going to a drug deal that day. (R. p. 43, lines 8-16).

It is not an abuse of discretion to admit photographs that corroborate testimony. *State v. Hambright*, 310 S.C. 382, 388, 426 S.E.2d 806, 809 (Ct. App. 1992). However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant

or not necessary to substantiate material facts or conditions." *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997).

The Court of Appeals found error in the admission, most specifically noting "one reason" the photograph should not have been admitted was because the danger of unfair prejudice outweighed the small probative value. (App. p. 33). Rule 403, SCRE provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." The Court of Appeals reasoned: "What little relevance the photograph had was vastly outweighed by its danger of unfair prejudice." (App. p. 33). In the return to the petition for rehearing, the State argued the photograph had limited, if any, prejudicial value. (App. p. 24).

Petitioner maintains that this Court's decisions *in State v. Livingston*, 327 S.C. 17, 488 S.E.2d 313 (1997), and *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), establish the admission of the photograph was improper and constitutes reversible error. (Petition, p. 9-11). Yet, both cases actually demonstrate why this matter is different and why finding the error harmless here is not inconsistent with precedent.

In *Langley*, the Court rejected the State's argument a photograph of the victim in his high school graduation regalia offered for identity was irrelevant because identity was not at issue. 334 S.C. at 648, 515 S.E.2d at 100 n. 3. Further, testimony about the family history of the victim and how he received a particular nickname in high school was irrelevant to proving the identity of the perpetrator of a drug-related shooting years later. The Court said that because the evidence of the guilt was not overwhelming, it could not find the rather lengthy, improperly admitted evidence did not affect the outcome of the trial. 334 S.C. at 648, 515 S.E.2d at 100.

In *Livingston,* this Court reversed a conviction for felony driving under the influence (DUI) of marijuana where the appellant had caused a car accident, killing a woman in the other car. The woman's husband testified at trial, and a photograph of the two was offered and admitted to show identity. 327 S.C. at 20, 488 S.E.2d at 314. However, the victim's identity was not in question. *Id.* This Court held that the photograph was not relevant as it was "of no consequence to the determination of the action." 327 S.C. at 20, 488 S.E.2d at 314.

Unlike in *Livingston* and *Langley*, here the State offered an explanation of the probative value of the photograph which did not rest on simple identity. How the men were crammed into the back seat of the car, how the men held the gun while sitting in such close proximity to each other, and how the men compared to each other in their various sizes were all relevant to determining whether Petitioner shot the victim accidentally or with malice aforethought. The State knew Hunter Bessinger's testimony would explain where the men were seated in the car and how the victim, Jarrod, was shot after he attempted to leave the vehicle. The State also knew a witness would testify to the width of the back seat of the Mazda, and the pathologist would testify about the path the bullet took through Jarrod's body before it stopped in his front chest wall. The State also had Petitioner's statements to police on the night of the murder, in which he claimed he did not pull the trigger when Jarrod was shot. (R. p. 239, lines 12-16.) In short, the State could reasonably predict Petitioner would claim he did not shoot the victim, or that there was some claim of self-defense or cause to excuse the criminal liability. The size and stature of each man in the back seat was going to be a factor.

The Court of Appeals, in fact, correctly noted "identity was not at issue" and went further to address the precise reason the photograph was offered. However, the Court of Appeals resolved

that "the photograph did not depict an objective measure of his size" and the jury heard otherwise heard the information in the autopsy report findings. (App. p. 33). Thus, Rule 403 should have prevented the admission. (App. p. 33). The Court of Appeals then, and also correctly, considered whether the error in admission was harmless. Again, the record supports the determination that any error was harmless.

The photograph appears to be a cropped or narrowly focused image of the victim and his brother in an outdoor setting. (State's Exhibit 49.) In the photo, Jarrod's build is slight which corroborated the testimony of Hunter Bessinger. (R. p. 40, lines 21-23.) Unlike in *Livingston,* where a photograph of the victim and her husband was introduced needlessly within the husband's "poignant" testimony, and unlike *Langley,* where the photograph depicted a much younger victim during a celebratory period, here the photograph is fairly unremarkable. Significantly, the State presented testimony from that same witness that Jarrod was a drug dealer. The photograph had limited, if any, prejudicial value by its simple admission. For all these reasons, the harmless error analysis is not flawed and there is no error to correct in the Court of Appeals opinion.

II.

The Court of Appeals did not err in finding no abuse of discretion when the trial court declined to amend the jury instruction on the defense of accident given the charge was a correct statement of the law, and the trial court correctly reasoned an amendment as suggested may constitute an impermissible comment on the facts of the case.

The Court of Appeals recognized this Court's precedent that "has stressed the need for clarity when charging accident" where theories of criminal responsibility or excuse are also presented. (App. p. 30). The Court also considered that Petitioner wanted a charge that simply being involved in a drug deal would not preclude the jury from finding accident. Yet, as this Court has recently set out, if the jury believed Petitioner brought a gun to the deal, he is not entitled to claim self-defense. (App. p. 31). The Court of Appeals also considered that the charge here instructed the jury the State had the burden of proving the shooting was caused by the unlawful activity, and shared the trial court's concern that further more specific instruction "approached a comment on the fact." (App. p. 31). The Court of Appeals resolved the law as charged was correct and rejected Petitioner's claim of error. (App. p. 31). The facts and law support this conclusion.

The record shows the trial court instructed the jury on murder, involuntary manslaughter, self-defense, and accident, and the elements of armed robbery. (R. p. 259, lines 16-25; p. 302, line 8 – p. 310, line 19). In his closing arguments to the jury, defense counsel told the jury, "Now I am not saying that he shot Jarrod in self-defense. What I am saying is when there is a gun in his face he has the right to grab that gun and defend himself. And when he does that he is acting lawfully. And the gun went off. And that is an accident." (R. p. 272, lines 14-18.)

During his charge to the jury, after the involuntary manslaughter instruction, the trial judge further instructed: "The State must also prove beyond a reasonable doubt that the defendant's act

was the proximate cause of the death," and explained proximate cause to the jury. (R. p. 305, line 13- p. 306, line 8). Then regarding accident, the trial court instructed: "The burden is on the State to prove beyond a reasonable doubt that that act was not an accident – **that the act was not an accident but was caused** by the negligence or carelessness on the part of the defendant in handling of a dangerous instrumentality or **by unlawful activity by the defendant himself**." (R. p. 309, lines 3-13(emphasis added).)

After the jury recessed following the charge, defense counsel told the court he was concerned about the "unlawful activity" language in the accident charge. He argued the jury could believe that if Petitioner was involved in a drug deal, then he may not be able to claim the defense of accident. (R. p. 317, lines 12-16.) He did not make a specific request to re-charge the jury, nor did he offer specific language for further instruction. (R. p. 317.) In response to his argument, however, the trial judge pointed out that he charged proximate cause. (R. p. 317, line 23.) When defense counsel expressed more concern about the unlawfulness of the drug deal, the court said it could not explain how the specific facts of the case are relevant to the defenses because it would be an improper comment on the facts. (R. p. 317, line 13 – p. 319, line 9.) The court found the charge as a whole addressed Petitioner's concerns. (R. p. 319, lines 8-9.)

In light of the totality of the charge given, and in light of the constitutional prohibition on a trial judge commenting on the facts, the Court of Appeals correctly resolved this issue. The testimony was undisputed the men were involved in an unlawful drug purchase and the jury was instructed on the defense of accident. There is no reasonable likelihood the jury applied the instruction in a way that violated the constitution. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). It is a reasonable belief that if the unlawfulness of the drug activity precluded a charge of accident

in the victim's shooting death, Judge Dennis would not have instructed the jury with that option. Critically, Petitioner does not contest what was said, but is requesting more. In considering the total charge, the trial court did not abuse its discretion in refusing to amend the charge on the defense of accident as (though somewhat vaguely) requested. The trial court instructed the jury thoroughly and correctly in his initial charge. Any further attempts to clarify the accident instruction would risk an impermissible comment on the facts.

For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of the weapon. *State v. Brown*, 205 S.C. 514, 32 S.E.2d 825 (1945). Homicide is excusable on the ground of accident when it appears that the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun. *State v. McCaskill*, 300 S.C. 256, 387 S.E.2d 268 (1990). In *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 107–08 (1999), this Court held "that the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide." (*citing State v. Goodson*, 312 S.C. 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1.5(1994)). S*ee also* 40 Am.Jur.2d Homicide § 75 (1968) ("The fact that one carries a concealed weapon in violation of the law does not render him criminally responsible ... where death is caused by the accidental discharge of the weapon, for in such case death cannot be said to be the natural or necessary result of carrying the weapon in violation of law"). "The charge is sufficient if, when considered as a whole, it covers the law applicable to the case." *State v. Burton*, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990).

As outlined above, the trial court instructed the jury on the concept of proximate cause directly after the court charged involuntary manslaughter, and charged something very similar in its instruction on the State's burden to prove the homicide was not an accident. The instruction specifically said the State must prove "that the act was ... caused by ... unlawful activity by the defendant himself." (R. p. 309, lines 10-13.) 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. These instructions, combined with the presence of the accident instruction in the wake of undisputed testimony of unlawful drug activity, would not have been confusing to the jury. And again, further instruction by the court, particularly calling the jury back to recharge them particularly on one point, could run afoul of the S.C. Constitution's prohibition against charging the facts. S.C. Const. Art. V, Section 21 (2009) ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.").

In sum, Judge Dennis appropriately charged the jury. Read as a whole, as it must be, *Burton, supra*, and in addition to the jury's exercise of logic, the instruction sufficiently informed the jury the unlawful activity must not cause the victim's death to be entitled to a charge on the defense of accident. Thus, there is no error in the Court of Appeals' opinion for this Court to correct.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

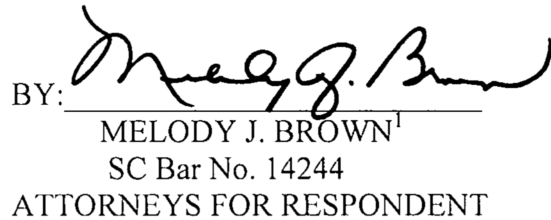
DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SUSANNAH R. COLE
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY: 
MELODY J. BROWN[1]
SC Bar No. 14244
ATTORNEYS FOR RESPONDENT

November 25, 2019.
Columbia, South Carolina.

[1] Respondent's counsel acknowledges a substantial portion of the foregoing is taken from the brief written by Assistant Attorney General Cole as submitted in the Court of Appeals.

RECEIVED

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
R. Markley Dennis, Circuit Court Judge

The State,

Respondent,

v.

Ahshaad Mykiel Ownens,

Petitioner.

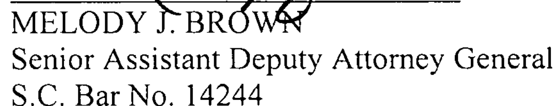
Appellate Case No. 2019-001601

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing two (2) copies in the United States mail, postage prepaid, to his attorney of record, addressed as follows:

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

This 25 th day of November, 2019.



MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244