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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Brian M. Gibbons, Circuit Court Judge

ALLEN CHARRON WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000547

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX.....i

ISSUES PRESENTED1

STATEMENT.....2

ARGUMENT

 1. The PCR judge erred in refusing to find trial counsel ineffective for failing to argue that Petitioner was entitled to a directed verdict of acquittal because the State failed to present any direct evidence of guilt and failed to present substantial circumstantial evidence of guilt and instead arguing that Petitioner lacked the specific intent to kill required for attempted murder.....4

 Relevant Facts4

 Argument.....7

 2. The PCR judge erred in refusing to find trial counsel ineffective for failing to argue to the jury in closing argument that Petitioner was not guilty and instead arguing that Petitioner lacked the specific intent to kill required for attempted murder when Petitioner denied shooting the gun.10

 Relevant Facts10

 Argument.....12

CONCLUSION.....16

ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to argue that Petitioner was entitled to a directed verdict of acquittal because the State failed to present any direct evidence of guilt and failed to present substantial circumstantial evidence of guilt and instead arguing that Petitioner lacked the specific intent to kill required for attempted murder?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to argue to the jury in closing argument that Petitioner was not guilty and instead arguing that Petitioner lacked the specific intent to kill required for attempted murder when Petitioner denied shooting the gun?

STATEMENT

On November 16, 2017, the Cherokee County Grand Jury indicted Petitioner, Allen Charron Williams, Jr., for three counts of attempted murder (count one) and three counts of possession of a weapon during the commission of a violent crime (count two), indictments #17-GS-11-1483, 1484, 1485. (App. pp. 252-257). On January 15, 2019, Petitioner proceeded to jury trial before the Honorable R. Keith Kelly. Travis Moore represented Petitioner at trial. George Matthew Kendall and Kimberly Lewis Leskanic prosecuted the case. The jury found Petitioner guilty of the lesser included offense of assault and battery of a high and aggravated nature [ABHAN] and the accompanying weapons charge for indictment #17-GS-11-1483. The jury found Petitioner guilty of the lesser included offense of assault and battery first degree [A&B 1st] for the other two indictments. As this lesser included offense is not considered a violent crime, there was no finding on the accompanying weapons charges. Judge Kelly sentenced Petitioner to twenty (20) years for ABHAN and five (5) years concurrent for the weapons charge. Judge Kelly sentenced Petitioner to five (5) years consecutive for each of the A&B 1st charges.

A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Williams, 2021-UP-204 (S.C. Ct.App. filed June 9, 2021). (App. pp. 290-291). A timely petition for rehearing was filed and then denied on June 29, 2021. A timely petition for writ of certiorari was filed and then denied on January 13, 2022.

On November 15, 2022, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 292-298). On January 11, 2023, the State filed a return and motion for more definite statement. (App. pp. 299-309). On February 13, 2023, an evidentiary hearing was held before

the Honorable Brian M. Gibbons. Rodney W. Richey represented Petitioner at the PCR hearing. Chelsea Marto represented the State. In a written order signed March 21, 2023, Judge Gibbons denied relief and dismissed the application. (App. pp. 348-356). A timely notice of intent to appeal was filed on April 6, 2023. This petition for writ of certiorari follows.

ARGUMENT

1. **The PCR judge erred in refusing to find trial counsel ineffective for failing to argue that Petitioner was entitled to a directed verdict of acquittal because the State failed to present any direct evidence of guilt and failed to present substantial circumstantial evidence of guilt and instead arguing that Petitioner lacked the specific intent to kill required for attempted murder.**

Relevant Facts

The jury found Petitioner guilty of two counts of assault and battery first degree and one count of assault and battery of a high and aggravated nature for shooting at a truck that had been driving around the neighborhood. A young man riding in the bed of the truck was injured by what appeared to be birdshot. (App. p. 130, line 5 – p. 131, lines 1-12). The driver and passenger inside the cab of the truck were not injured. A gun shot residue test [GSR], collected after Petitioner was detained (App. p. 122, lines 2-9; p. 124, lines 3-8), revealed a single particle on Petitioner’s left palm. (App. p. 174, lines 6-15). The GSR expert testified that the GSR result in this case could have been the result of transfer. (App. p. 168, lines 1-7). Law enforcement did not find a gun, shells, or any other physical evidence of the shooting during their search of Petitioner’s house and surrounding area. (App. p. 132, line 18 – p. 133, lines 1-22).

The State’s evidence consisted primarily of the testimony of two sisters, Sierra McKinney and Christa Woodie Hall. McKinney was Petitioner’s neighbor and had previously been in a romantic relationship with Petitioner. (App. p. 96, line 9 - p. 97, lines 1-5). Hall and her husband to be, Blake Hall, were visiting McKinney and the three were sitting outside on the porch on the night of the shooting. (App. p. 81, line 18 – p. 82, lines 1-7). Both women testified that a truck kept driving around the block. (App. p. 82, lines 8-13; p. 105, lines 15-18).

McKinney admitted yelling at the truck. (App. p. 90, line 25 – p. 91, lines 1-8). Christa Hall, however, denied that anyone yelled at the truck. (App. p. 112, lines 3-14).

McKinney testified that she saw Petitioner that night and they were all worried about the truck that kept driving by. (App. p. 82, line 22 – p. 83, lines 1-11). McKinney testified that she saw Petitioner with a long gun. (App. p. 83, lines 12-25). According to McKinney, a short time later she heard a gunshot. (App. p. 85, line 14 – p. 86, lines 1-15). McKinney admitted that she did not see who shot the gun. (App. p. 94, lines 6-7).

Both women testified that Petitioner placed bricks in the road to try and stop the truck. (App. p. 84, lines 4-17; p. 106, lines 11-17). McKinney testified that her brother-in-law, Blake Hall, could have also placed bricks in the road. (App. p. 93, line 19 – p. 94, lines 1-5). McKinney admitted that her husband owned a big black gun and two handguns but claimed that the big black gun was stolen. (App. p. 95, line 20 – p. 96, lines 1-4; p. 102, lines 9-15). Petitioner was the only person tested for GSR. (App. p. 133, lines 20-22).

Christa Hall testified that Petitioner seemed nervous and worried about the truck. (App. p. 106, lines 1-13). Hall testified that she saw Petitioner with a gun with a long barrel. (App. p. 107, lines 9-14). Hall testified that when the truck came back around Appellant ran off with the gun. (App. p. 108, line 22 – p. 109, lines 1-17). According to Hall, seconds later she heard a gunshot. (App. p. 109, lines 7-11). Hall admitted that she did not see who shot the gun. (App. p. 109, line 23 – p. 110, lines 1-6).

The young man who was shot testified that he heard a woman yell, “why y’all keep driving around,” but he did not see anybody with a gun. (App. p. 64, line 18 – p. 65, lines 1-3). His brother, the passenger in the cab of the truck, also testified that he heard a woman yell from her porch. (App. p. 71, lines 15-18; p. 72, lines 20-25). The brother testified that he saw a man

walking down the road but did not see a gun. (App. p. 74, lines 1-10). The driver of the truck did not testify at trial.

At the close of the State's case defense counsel moved for a directed verdict. (App. p. 184, lines 1-20). Defense counsel argued that the State failed to present evidence of a specific intent as required for attempted murder. The judge denied the motion stating, "The court does not weigh the evidence. The court considers whether there is any evidence, and the court denies the motion for directed verdict on all three of the attempted murders. There is a question of fact as to what his criminal his criminal intent was. That, as we know, is a question for the finders of fact." (App. p. 186, lines 2-7).

On direct appeal Petitioner argued that the trial judge erred in denying the motion for directed verdict where there was insubstantial circumstantial evidence that Petitioner was the shooter. (App. pp. 261-274). The Court of Appeals affirmed writing, "On appeal, Williams argues the circuit court erred by denying his directed verdict motion when the State failed to introduce substantial circumstantial evidence showing he was the shooter. We find this issue is not preserved for appellate review because Williams raises a different argument on appeal than the argument he raised to the circuit court." State v. Williams, 2021-UP-204 (S.C. Ct.App. filed June 9, 2021).

In the order of dismissal the PCR judge wrote:

Applicant claims Counsel was ineffective for failure to argue that the State did not have any direct evidence tying Applicant to the crime. Applicant also claims Counsel was ineffective for failure to make this argument on direct verdict. However, Counsel credibly testified that he thought he raised the best defense he could, given the evidence. Specifically, Counsel reasonably concluded there was substantial circumstantial evidence tying Applicant to the crime and that he could not reasonably circumvent at trial. Additionally, even if Counsel was not reasonable, no prejudice was established. The jury was instructed that circumstantial evidence alone is sufficient to convict and this Court finds that, even if Counsel's chosen defense was different, the jury would have concluded

there was enough evidence to convict. This Court also finds that this argument on directed verdict would not succeed for the reasons outlined above and, accordingly, there was no prejudice. Accordingly, relief is denied on this ground.

(App. pp. 355-356).

Argument

The PCR judge erred in refusing to find trial counsel ineffective for failing to argue that Petitioner was entitled to a directed verdict of acquittal because the State failed to present any direct evidence of guilt and failed to present substantial circumstantial evidence of guilt and instead arguing that Petitioner lacked the specific intent to kill required for attempted murder. Under the facts of this case, the determination of specific intent should not have been a question for the judge or the jury when the State failed to present substantial evidence that Petitioner was the shooter. At the directed verdict stage the trial judge should have been given the opportunity to rule on whether the State had presented substantial circumstantial evidence that Petitioner was the shooter. There is a reasonable probability that if trial counsel had moved for a directed verdict of acquittal based on the State's failure to present substantial circumstantial evidence of guilt, the result of the proceeding would have been different.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Under the facts of this case, it was objectively unreasonable for counsel to argue at the directed verdict stage that Petitioner lacked a specific intent to kill when the State failed to prove that Petitioner was the shooter. Instead, counsel should have argued that Petitioner was entitled to a directed verdict of acquittal because the State failed to present any direct evidence of guilt and failed to present substantial circumstantial evidence of guilt. As correctly argued on direct appeal but found unpreserved by the Court of Appeals, there was insubstantial evidence presented by the State that Petitioner was the shooter. (App. pp. 261-274).

In State v. Lollis, 343 S.C. 580, 583–84, 541 S.E.2d 254, 256 (2001), the South Carolina Supreme Court wrote:

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999); State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). Accordingly, a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Martin, *supra*; see also State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct.App.1999). “Suspicion” implies a belief or opinion as to guilt based upon facts or circumstances which do not

amount to proof. State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

If trial counsel had argued that Petitioner was entitled to a directed verdict of acquittal based on the State's failure to present substantial circumstantial evidence that Petitioner was the shooter, the trial judge would have erred in refusing to direct a verdict. There was no direct evidence establishing Petitioner as the shooter. Trial counsel agreed that the State's case against Petitioner was circumstantial. At the hearing PCR counsel asked trial counsel, "And so, this case was a case that they put the circumstance together saying we saw him earlier with a gun and then gun powder residue, so those were the circumstances that got him convicted or could have gotten him convicted?" (App. p. 340, lines 1-5). Trial counsel answered, "I agree. I think you said earlier, we're talking minutes. One testified seconds, but, yes." (App. p. 340, lines 6-7). The State's case was based exclusively on circumstantial evidence.

"When a motion for a directed verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, '[t]he trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.' State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000); . . ." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001)(internal citations omitted).

The circumstantial evidence presented by the State consisted of the testimony of the two sisters who said they saw Petitioner with a long gun prior to the shooting, said Petitioner was upset by the truck, and the one particle of GSR found on Petitioner's left palm after he was detained by law enforcement that the expert confirmed could have been the result of transfer. Viewing the evidence in the light most favorable to the State, the circumstantial evidence merely raises a suspicion that Petitioner was the shooter. There is a reasonable probability if trial

counsel had made a directed verdict motion based on the State's failure to present substantial circumstantial evidence that Petitioner was the shooter, the outcome of the proceeding would have been different. Trial counsel was ineffective in failing to argue the lack of substantial evidence at the directed verdict stage and Petitioner was prejudiced by the deficient performance.

- 2. The PCR judge erred in refusing to find trial counsel ineffective for failing to argue to the jury in closing argument that Petitioner was not guilty and instead arguing that Petitioner lacked the specific intent to kill required for attempted murder when Petitioner denied shooting the gun.**

Relevant Facts

During the PCR hearing Petitioner maintained his innocence. (App. p. 325, lines 3-4). Petitioner testified at the PCR hearing that the defense strategy discussed with trial counsel was the State's lack of evidence that Petitioner was the shooter. (App. p. 316, line 23 – p. 317, lines 1-17). Petitioner testified that the strategy changed at the end when counsel argued that Petitioner lacked the intent to murder. (App. p. 320, lines 6-19). Petitioner testified, "If we're gonna try for my innocence, it's no way that -- I was -- see, I'm not an attorney, but there's no way that I would go to trial, and then at the end of the trial say that my client didn't intend to murder somebody. Just my opinion of it." (App. p. 320, line 22 – p. 321, line 1). Petitioner believed the argument should have been that Petitioner was innocent and did not shoot because that is what the evidence showed. (App. p. 321, lines 2-5).

In closing argument trial counsel never told the jury that Petitioner did not shoot the gun. Instead, trial counsel told the jury "All twelve of you, unanimously, have to agree or are firmly convinced that what they said he did he did. Now, whether that's the attempted murder, whether that's the lesser-included offenses they are asking be charged to you now, the presumption of innocence and beyond a reasonable doubt applies to all of them the same." (App. p. 206, lines

12-17). Trial counsel never discussed a finding of not guilty while discussing attempted murder, the lesser included offenses, and the presumption of innocence.

Focusing on the lack of a specific intent instead of a not guilty trial, counsel told the jury, “And they have to prove that his specific intent that night, if you believe their witnesses, his specific intent was to kill those three individuals and he just failed. That’s what they want you to believe.” (App. p. 206, lines 21-25). Trial counsel then discussed the witnesses called by the State, highlighted the inconsistencies in the testimony from the two sisters, discussed the lack of physical evidence, and stressed that the GSR collection was done after Petitioner was detained and the GSR was subject to transfer. (App. pp. 207-213). Trial counsel then went back to intent to kill and discussed birdshot as being nonlethal telling the jury, “You don’t shoot birdshot at people and kill them.” (App. p. 213, line 14). Trial counsel discussed the injuries of the young man as being nonlethal and told the jury, “There was no lifesaving intervention. That doesn’t make it any more less tragic, but we are talking about the importance of making a distinction on whether or not someone intended to kill somebody, and that’s just one person. They are saying he intended to kill three different people by firing one shot of birdshot.” (App. p. 213, lines 17-22). Trial counsel did not tell the jury that Petitioner did not shoot the gun. Trial counsel did not tell the jury that Petitioner was not guilty.

In the order of dismissal the PCR judge wrote:

Applicant claims Counsel was ineffective for failure to argue that the State did not have any direct evidence tying Applicant to the crime. Applicant also claims Counsel was ineffective for failure to make this argument on direct verdict. However, Counsel credibly testified that he thought he raised the best defense he could, given the evidence. Specifically, Counsel reasonably concluded there was substantial circumstantial evidence tying Applicant to the crime and that he could not reasonably circumvent at trial. Additionally, even if Counsel was not reasonable, no prejudice was established. The jury was instructed that circumstantial evidence alone is sufficient to convict and this Court finds that, even if Counsel’s chosen defense was different, the jury would have concluded

there was enough evidence to convict. This Court also finds that this argument on directed verdict would not succeed for the reasons outlined above and, accordingly, there was no prejudice. Accordingly, relief is denied on this ground.

(App. pp. 355-356).

Argument

The PCR judge erred in refusing to find trial counsel ineffective for failing to argue to the jury in closing argument that Petitioner was not guilty and instead arguing that Petitioner lacked the specific intent to kill required for attempted murder when Petitioner denied shooting the gun. Trial counsel admitted that Petitioner always maintained that he did not fire a gun and was totally innocent. (App. p. 331, line 21- p. 332, line 1). Trial counsel, however, testified that he felt the strongest defense to the attempted murder was the lack of specific intent. (App. p. 334, line 25 – p. 335, lines 1-6). The lack of specific intent, however, was not in line with Petitioner’s defense that he never fired a gun. The lack of specific intent was not a defense to the lesser included charges for which the jury found Petitioner guilty.

As noted by PCR counsel, by arguing that Petitioner lacked the specific intent to kill trial counsel essentially conceded that Petitioner was the shooter but lacked a specific intent to kill. (App. p. 344, line 16 – p. 345, lines 1-24). While trial counsel’s concession resulted in conviction on the lesser included offenses, Petitioner did not agree to the concession made by trial counsel in closing and never conceded that he was guilty of the lesser included offenses. Under the facts of this case, it was objectively unreasonable for trial counsel to fail to argue that Petitioner was not guilty and instead argue that he lacked a specific intent to kill.

Petitioner was prejudiced by the deficient performance. As noted above, in the order of dismissal the PCR judge wrote, “Additionally, even if Counsel was not reasonable, no prejudice was established. The jury was instructed that circumstantial evidence alone is sufficient to

convict and this Court finds that, even if Counsel's chosen defense was different, the jury would have concluded there was enough evidence to convict. This Court also finds that this argument on directed verdict would not succeed for the reasons outlined above and, accordingly, there was no prejudice." (App. pp. 355-356). First, as to the jury instruction, the PCR judge noted that the circumstantial evidence charge given was not a Logan charge. (App. p. 337, line 23). The trial judge instructed the jury:

Now, there are two types of evidence which are generally presented during trial; that is, direct evidence and circumstantial evidence. Ladies and gentlemen, direct evidence is testimony of a person who claims to have actual knowledge, such as an eyewitness. It is evidence which immediately establishes the fact to be proved.

Circumstantial evidence is a proof of a chain of facts of circumstances indicating the existence of a fact. It immediately establishes collateral facts from which the main fact may be inferred. It is based on inference and not on personal knowledge or personal observation.

The law in South Carolina makes no distinction between the weight or value to be given either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence.

You should weigh all evidence. And after doing so, if you are not convinced of his guilty beyond a reasonable doubt, you must find him not guilty.

(App. p. 220, line 25 – p. 221, lines 1-18).

In State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013), the South Carolina

Supreme Court wrote:

Thus, we hold that trial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when so requested by a defendant:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Trial counsel did not recall requesting a Logan charge. (App. p. 337, lines 8-19). The PCR judge asked, "So, although the application doesn't mention the Logan charge. I mean, I mentioned that at the outset of the hearing. I guess that's where I'm kind of nailing it on and on the issue in front of the Court today is, the failure to object to the circumstantial evidence charge given by the judge not being a Logan charge, does not rise to the level under Strickland to entitle them to a new trial. Is that the issue?" (App. p. 341, line 21 – p. 342, lines 1-4). While the failure to request a Logan charge, under the facts of the present case, would result in prejudice entitling Petitioner to a new trial, the failure to request a Logan charge was not addressed in the order of dismissal. The circumstantial evidence instruction given did not cure the prejudice from trial counsel's concession in closing argument that Petitioner was the shooter. The lack of a Logan charge made the error more prejudicial.

Second, the PCR judge's finding that the jury would have concluded that there was enough evidence to convict without the concession is not supported by the record. As argued above, the State failed to present substantial circumstantial in order to survive directed verdict. In State v. Guderyon, 438 S.C. 476, 485–86, 884 S.E.2d 202, 207 (Ct. App. 2022), the South Carolina Court of Appeals wrote, " '[T]he lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the

jury.’ State v. Bennett, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). ‘The ‘jury’s focus is on determining whether every circumstance relied on by the State is proven beyond a reasonable doubt, and that all of the circumstances be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.’ Phillips, 416 S.C. at 193, 785 S.E.2d at 452.” Petitioner was prejudiced by trial counsel’s concession that Petitioner was the shooter but lacked a specific intent to kill because it removed the jury’s determination of whether every circumstance relied on by the State to try and prove that Petitioner was the shooter was proven beyond a reasonable doubt, and whether all of the circumstances are consistent with each other and, taken together, point conclusively to the guilt of Petitioner.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of October, 2023.