STATE OF SOUTH CAROLINA
In the Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Diane Schafer Goodstein, Circuit Court Judge

The State, Respondent,

v.

Don-Survi Chisolm, Petitioner.

Appellate Case No. 2011-200186

Unpublished Opinion No: 2015-UP-501

RETURN TO PETITION FOR REHEARING

This Court issued an unpublished opinion in the captioned case on October 28, 2015, affirming Petitioner's murder conviction. *State v. Chisolm,* Unpublished Opinion No. 2015-UP-501 (S.C.Ct.App. filed October 28, 2015). On November 12, 2015, Petitioner filed a petition for rehearing. By letter dated November 13, 2015, this Court requested Respondent file a return to the petition. Pursuant to Rules 221 and 240, SCACR, and at the request of the Court, Respondent now makes a return to the petition. Respondent submits the petition for rehearing should be denied. Essentially, Petitioner has simply presented again his five (5) issues from the brief. These issues were thoroughly briefed and the Court heard argument on September 15, 2015. The Court

simply rejected Petitioner's arguments on Issues, 1, 3, 4 and 5, and found Issue 2 procedurally barred from review on the merits. (Opinion, p. 2-3). Petitioner has shown no cause for rehearing. See Rule 221 (a), SCACR ("petition for rehearing ... shall state with particularity the points supposed to have been overlooked or misapprehended by the court." *See also Kennedy v. S.C. Retirement Sys.,* 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not ... to have the case tried in the appellate court a second time.") (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)). At any rate, his argument fails.

1. Petitioner first argues the Court erred in finding no error as to admission of Mr. Simonelli's testimony that Petitioner had previously sold him drugs and complains the Court overlooked the factually "[*t*]*he connection was simply not there.*" (Petition, p. 3) (emphasis in original). He claims "the state's farfetched theory of motive" wherein there was evidence which would support an inference that the motive dealt with drug territory, was unsupported by the record as there was not direct testimony on same; and, that the evidence was not otherwise necessary for a "full presentation of the case." (Petition, p. 4). Finally, he argues the evidence was unfairly prejudicial as Petitioner's credibility was at issue and the evidence "was destructive to his character and hence his credibility." (Petition, p. 4). Petitioner argues in addition to overlooking these factual issues, the Court also overlooked Supreme Court precedent, specifically the cases of *State v. Coleman; State v. Bolden;* and, *State v. Smith.* (Petition, p. 5). The record, briefing and argument in this case does not support Petitioner's assertions.

In the referenced opinion, this Court concluded the trial judge did not abuse her discretion in admitting the evidence of prior knowledge of the defendant through drug

dealing as it furnished context for the presentation of the case, and was not more prejudicial than probative. (Opinion, p. 2, para. 1). The record supports that decision.

The reference to Petitioner selling drugs to Mr. Simonelli explained the details of the request Petitioner made to him in an effort to quickly obtain a replacement seat for this SUV where the murder occurred. Essentially, Petitioner held out a significant carrot to obtain the replacement seat quickly, enticing Mr. Simonelli with more drugs to buy the replacement seat immediately. The trial judge reasonably found the testimony relevant as to the purchase and payment by cocaine, and ruled she would allow the argument on motive, "though motive is not an element of the offense...." (R. p. 388, line 25 - p. 389, line 15). The trial judge considered the prejudicial effect compared to the probative value. She found cocaine to be a major part of the testimony already given, "what brought them together," and reasoned the case was not a similar drug offense which may increase the prejudicial value but does not in this case. (R. p. 390, lines 3-16). Thus, the prior drug transactions – which were referenced only briefly and without collateral details, see R. p. 411, lines 24 – were part and parcel of Petitioner's request to Mr. Simonelli and were properly admitted.

Moreover, Mr. Simonelli explained part of the deal was to forgive the past debt and "trade some more cocaine or something like that." (R. p. 412, line 17 – p. 413, line 4). Petitioner does not complain that contemporaneous offer to "trade some more cocaine" was improperly admitted.[1] Not only does this show a lack of prejudice, this fact weaves an even stronger connection to the possible drug turf war theory than the past

[1] Additionally, Mr. Scully White's testimony that Petitioner also suggested they commit an armed robbery was admitted without objection, and would also bear negatively on character. (See R. p. 280, lines 1-13).

sales alone. As the trial judge noted, the evidence demonstrated "an undeniable connection" in the precise area (in and round Haven Oaks), and testimony the victim had only just recently begun selling drugs in that area. This allows a reasonable inference of motive. (See R. p. 389, lines 16-24). Even so, the past sales show an existing relationship which strengthens and gives context to the request to purchase the replacement seat. In short, the testimony was admissible to establish material facts – 1) possible motive; and 2), the fact the seat was replaced due to the victim's blood being in the seat, not mere cosmetic reasons as Petitioner offered. Respondent agrees with Petitioner that to avoid being merely improper character evidence, "the drug use must have some relevant connection to the crime charged." *State v. Dickerson*, 341 S.C. 391, 397, 535 S.E.2d 119, 122 (2000) (*citing State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999) ("The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused.")). However, contrary to Petitioner's argument in the petition for rehearing, the logical connection exists and arises from Petitioner's own statements to Mr. Simonelli. Because the past drug transactions explain the attempt to pay a current drug debt by helping Petitioner to purchase the seat, the evidence is admissible as *res gestae*. *Dickerson*, 341 S.C. at 400-401, 535 S.E.2d at 124. *See also State v. King*, 334 S.C. at 512, 514 S.E.2d at 582 ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred.").[2]

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[2] This theory requires "the temporal proximity of the prior bad act ... be closely related to the charged crime." *State v. McGee*, 408 S.C. 278, 288, 758 S.E.2d 730, 736 (Ct. App. 2014). Mr. Simonelli testified that he had an existing relationship with Petitioner as his drug dealer at the time of the request. (R. p. 413, lines 20-25). This would satisfy the temporal requirement.

Further, as the trial judge properly reasoned, the possibility of unfair prejudice did not outweigh the great probative force of the evidence. Cocaine use was already a part of the narrative – Mr. White testified that he and Petitioner used cocaine, and they were searching for cocaine the night of the murder. (See R. p. 273, lines 10-15; p. 277, lines 2-9). In fact, Mr. White testified that the cover story was to be that they "rode around, got high." (R. p. 289, lines 5-17). Further still, the trial judge reasoned that this was a crime with violence not a similarly situated drug charge, which tended to reduce the danger of unfair prejudice. *See, e.g., State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) ("When ... the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."). This Court correctly found no exceptional circumstance which would support reversal in light of these facts. (Opinion, p. 2, para. 1).

Petitioner's further argument that this Court failed to consider *State v. Coleman, State v. Bolden,* and *State v. Smith,* (Petition, p. 5), lacks merit for several reasons. First, Petitioner presented this cases and offered similarities in his brief. (FBOA, pp. 9-10). Second, these cases were referenced in oral argument to this Court. Third, the cases simply do not apply. The reference to prior drug dealing was specifically a part of this case by virtue of Petitioner's own offer. These cases do not support Petitioner's position.

Finally, even if this Court had found error, such an error could only be harmless for two distinct reasons. First, the connection to drug use was already a part of the record with Mr. White's testimony. In this sense, the additional drug testimony was harmlessly cumulative. *See State v. Price*, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006) (appellant unable to show prejudice where inadmissible hearsay merely cumulative).

Second, the record shows overwhelming evidence of guilt, not the least of which is the eyewitness account of the shooting and dumping of the body and gun – testimony that was systematically corroborated by the forensic and investigative evidence. (See R. p. 282, line 14-295, line 15; p. 430, line 2-p. 431, line 4). There is also the fact Petitioner replaced the passenger seat, cut out the passenger side seatbelt, and blood was found on the center console despite the clean-up efforts. (R. p. 392, line 8 – p. 395, line 21; p. 401, line 1 – p. 402, line 9; p. 502, line 11- p. 504, line 25; p. 533, lines 8-18). The evidence is solid, and supportive of guilt; thus, if there is any error in admitting the instant testimony, it could only be harmless.

However, this Court reasonably found the trial judge did not abuse her discretion in admitting the evidence in these discrete circumstances. Rehearing is not warranted.

2. Petitioner next contends the Court erred in concluding the admission of the weapon issue was not preserved for appeal. (Petition, p. 6). (See Opinion, p. 2, para. 2). The record, though, well-supports the Court's finding.

It is well-settled that to preserve an issue for review, the issue must be raised to and ruled upon by the trial judge. *See, e.g., State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003). Here, Petitioner argued lack of foundation, specifically chain of custody:

> Your Honor, there's nothing particularly unique about this weapon. How can she be so sure that that's the same weapon we're talking about. I object. No foundation.

(R. p. 434, lines 1-4).

The trial judge considered lack of foundation, specifically chain of custody:

> ... I would have no concern if there was a serial number identified at the scene where it was found ... I'm a little bit concerned about that. Of course, there hadn't been any kind of chain of custody. I don't even know where it's been kept.

(R. p. 435, lines 9-16).

Petitioner argued a failure in the chain of custody. He also argued the evidence from Mr. White was insufficient as "he was high on cocaine, freaked out, he was in a dark car" and added the divers had "found another gun inside the lake as well" which was not connected to the case. (R. p. 436, lines 1-12). (See also R. p. 430, lines 17-24). Detective Greer confirmed her testimony was it appeared to be the gun recovered on the second dive. (R. p. 436, lines 22-23). The trial judge ruled, "I need more foundation." (R. p. 436, line 24).

Thus, both the objection and the ruling were based upon sufficiency of the evidence in proof of the chain of custody as to the gun recovered on the second dive. There was no argument or objection to relevance. (See also R. p. 475, lines 18-23, trial judge admitted the gun over the same objection to foundation). Consequently, the argument on connection to the murder is procedurally barred.

Petitioner also argues merits of the issue; however, an alternative merits analysis is unnecessary. Even so, the record shows there was no error. Mr. White, the witness to the murder, testified Petitioner shot the victim with a twenty-two long gun and subsequently threw the murder weapon into the river from Bacon Bridge. The weapon admitted was recovered from that site and shared the same caliber – the caliber having been determined from the bullet retrieved at autopsy. (See R. p. 282, line 14 – p. 289, line 23; p. 430, line 2 – p. 431, line 4)..[3]

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[3] Further, evidence that Petitioner had a similar gun to that used to kill the victim would be admissible regardless of whether the actual gun used in the murder is recovered. *See State v. Gillian*, 373 S.C. 601, 610, 646 S.E.2d 872, 877 (2007) ("The burglary evidence was presented in an effort to show the identity of the perpetrator by

Lastly, for all the reasons listed above, the record demonstrates the evidence of guilt was solid and overwhelming. Thus, if there was any error in admitting the instant testimony, it could only be harmless.

However, the record fully and fairly supports that the issue presented is different than the issue raised below and is procedurally barred from review. *Dunbar, supra.* Rehearing is not warranted.

3. Petitioner next contends the Court erred in not finding that the search warrant contained "deliberately false information or an extremely reckless statement." (Petition, p. 11). This Court found no error in the trial judge's denial of the motion to suppress, citing cases where suppression was not warranted if probable cause was shown when the incorrect statements are omitted from the analysis. (Opinion, pp. 2-3, para. 3). The Court's decision is well-supported by precedent and the facts of this case.

It has long been established that "[m]ere error in the facts relied upon does not offend the protection sought to be achieved by the warrant requirement." *State v. Sachs*, 264 S.C. 541, 556, 216 S.E.2d 501, 509 (1975). The Court eschewed the notion to the contrary reasoning "[h]indsight invalidation of the warrant would be incompatible with the legitmate demands of law enforcement." *Id.*

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showing that petitioner was in possession of a stolen gun that was consistent with the type of weapon used to kill the victim."); *State v. Pruitt*, 260 S.C. 396, 401, 196 S.E.2d 107, 109 (1973) ("The murder weapon was never discovered but there was evidence to the effect that appellant had upon him the night of the murder a pistol other than the one he gave the law enforcement officers; that on the afternoon before the murder he had obtained by purchase a package of bullets, which did not fit the gun he gave to the officers, but which were similar to the one offered in evidence, and scientific tests showed that the composition of the bullet offered in evidence was similar to the composition of the slugs found in the bodies of the two victims."). Further, the gun could still be admitted as a demonstrative aid. Thus, the danger of any unfair prejudice was minimal.

Detective Giglio in the pre-trial hearing reviewed the statements supporting the affidavit in detail. In particular, he reviewed the statement of Mr. Johns who indicated an attempt was made on the 14th when a card was decline, and "customer came back the next day and paid cash." (R. p. 151, lines 6-16). The second statement indicated that nothing was actually purchased. (R. p. 151, lines 17-20). However, Detective Giglio did not know there was a "clerical" error concerning the dates 9/14 and 9/15, (R. p. 157, lines 8-24; 165, line 24 – p. 166, line 4); and had confirmation from a photograph from the first search that the seat – whether purchased or obtained otherwise – was in Petitioner's vehicle, (R. p. 166, lines 21 – p. 167, line 16). The fact the first statement by Mr. Johns was factually inaccurate as to actual purchase falls specifically in line with the caution in *Sachs* that the eventual disproof of the facts does not invalidate the warrant. The facts neither show an intentional assertion of a known false fact nor recklessness in making such assertion. At any rate, the probable cause was not the purchase (or theft) of the seat but possession of the seat. The actual method of possession was never fully uncovered, but, the actual possession was firmly established..[4] Thus, probable cause is shown. *See*

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[4] The evidence certainly supports the trial judge's ruling that the officers acted in good faith. They depended on statements from LKQ personnel, the pulled parts from the junk Durango, and cell phone records to confirm contact between Petitioner and LKQ. (See R. p. 143, line 23 – p. 145, line 23; p. 151, lines 6-16; p. 547, line 10- p. 548, line 10). *See Davis v. United States,* ___ U.S. ___, 131 S.Ct. 2419, 2427 -2428 (2011) (affirming continued application of "good faith exception," reasoning: "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs ... But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, ... or when their conduct involves only simple, 'isolated' negligence, ..., the ' " deterrence rationale loses much of its force," ' and exclusion cannot 'pay its way.'"). This Court has also underscored: "the court may not order suppression simply because the officer made a false statement in, or omitted key facts from, an affidavit supporting a search warrant" rather, the appellant must show the statements were material and affected the finding of probable cause. *State v. Robinson*, 408 S.C. 268, 274, 758

generally State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976) ("Search warrants are constitutionally preferred and in determining whether they should issue, magistrates are concerned with probabilities and not certainties. .... specific [information] by a reliable citizen viewed in a common sense fashion establishes probable cause for the issuance of the warrant."). Rehearing is not warranted.

4. Petitioner next contends the Court erred in limiting the cross-examination of Detective Zenson on an unrelated matter. (Petition, p. 14). He claims it was proper impeachment that should have been allowed. (Petition, p. 17). Additionally, he claims the evidence was "relevant to the thoroughness and accuracy of the investigation into the death of Craig Michael Canady." (Petition, p. 18). Petitioner's arguments fails.

As a first matter, Petitioner fails to show a false statement to correct. Detective Zensen testified concerning the weapon that was recovered and was tested in regard to the bullet recovered from autopsy, but not that it was "sent in" for some type of DNA testing to the victim. (R. p. 516, lines 13-17). Her focus was rightfully on the instant case. (See also R. p. 515, lines 12-25). As the trial judge found, the separate gun Petitioner wanted to question the detective about was not submitted with the same SLED case number, could not have involved in the murder as it was a different caliber, and Petitioner failed to show any connection in investigation or personal knowledge for the request. (R. p. 521, line 8 – p. 522, line 24; p. 523, line 21 – p. 524, line 25; p. 527, line 24-p. 529, line 4). The trial judge reasonably found on these facts that Petitioner's offered

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S.E.2d 725, 728 (Ct.App. 2014). Again, the officers relied on information received from the auto parts personnel which support probable cause. Further, the key fact is Petitioner looking for and obtaining, by whatever means, the replacement seat shortly after the murder. The date of purchase, if any, is less important than the fact of looking for and obtaining the replacement seat. If anything, Petitioner points to an incorrect fact of no consequence. Again, he is not entitled to any relief.

inquiry simply did not reflect fair impeachment. (R. p. 523, line 21-p. 524, line 16). Thus, there was neither an incorrect fact nor a basis to show bias or impartial – the general points to impeach a witness upon. *See Gillian*, 360 S.C. at 450, 602 S.E.2d at 71 ("On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness.").

As to the argument there is a defense to be offered because investigators continued to investigate matters related to the victim, that does not show some fact of bias or dishonesty necessitating cross-examination on same. *See State v. Saltz*, 346 S.C. 114, 132, 551 S.E.2d 240, 250 (2001) ("Appellant sought to ask Mengedoht what she would do 'if she had to make a choice between being loyal to her friend and protecting her son.' This question did not seek to elicit a fact tending to show bias.") (emphasis in original). The testing of an unrelated gun, that could not have been the murder weapon, in a separate submission with a separate SLED number is too tenuous to constitute necessary cross-examination. The trial judge correctly found inquiry of same should not be allowed in cross-examination.

Thus, the trial judge did not abuse her discretion in limiting cross-examination on this irrelevant subject. Rehearing is not warranted.

5. Lastly, Petitioner claims the Court erred in finding the trial judge's colloquy with Petitioner about the dangers of self-representation was sufficient under *Farretta*.[5] (Petition, pp. 18-21). This Court essentially found the trial judge's advice, along with Petitioner's responses and background, was sufficient to allow waiver of the right to counsel. (See Opinion, para. 5). The record well-supports that conclusion.

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[5] *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525 (1975).

As this Court correctly found, (Opinion, p. 3, para. 5, citing *State v. Bryant*), "it is the trial judge's responsibility to determine whether there is or is not an intelligent and competent waiver." *State v. Dixon,* 269 S.C. 107, 236 S.E.2d 419 (1977) (*citing Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019 (1938)). Further, it is well-settled that no particular set of questions must be asked. See Am.Jur. Crim.Law § 1153 ("Where advice or admonition from the court to the defendant is undertaken to establish a valid waiver by the defendant of the right to the assistance of counsel, no particular cautionary instruction or form is required to ensure the validity of the waiver.").

Here, the record reflects continuing and lengthy discussions between Judge Goodstein and Petitioner, referencing not only the right to counsel, but specifically its value. Judge Goodstein cautioned Petitioner about the need for experience and training to grasp the art of representation and to present relevant defenses. (See R. p. 7, line 11 – p. 35, line 18). In particular, the judge underscored the significant risk he ran in choosing self-representation; advised the danger was increased because of the second murder charge; and took extra effort to explain the dangers and disadvantages of self-representation in such a manner that Petitioner would understand, relating his decision to his prior work history and experience in the military. (R. p. 22, line 12- p. 23, line 15; p. 30, lines 2-13). Further, she encouraged Petitioner to file a motion for counsel if he should change his mind any time before trial. (R. p. 36, lines 16-22). In short, Judge Goodstein fully and fairly advised Petitioner on the dangers and disadvantages of self-representation. The judge more than fulfilled her responsibility to determine whether the waiver was intelligent and competent. The record well-supports this Court's finding of same.

Further, the Court apparently accepted the State's argument in the alternative, that, should the waiver process be held insufficient, the record otherwise supports understanding. (See Opinion, p. 3, para. 5, citing *State v. Cash*). The State argued as to Petitioner: 1) he was in his thirties with college education and military experience and no evidence of mental or physical ill health; 2) he had been previously involved in the trial that resulted in a mistrial and had also been involved to some extent with representing himself in his other murder charge; 3) he certainly understood he was being tried for murder and knew he faced on this first charge a sentence of thirty years to life; 4) he was represented by Mr. Loy prior to his decision to represent himself and requested Mr. Loy remain as standby counsel (and there appeared to be no difficulties evident in record between the two, with Petitioner often consulting with Mr. Loy, see for example, R. p. 231, line 23; p. 232, line 25; p. 233, line 8; p. 234, line 19); 5) he did not appear to be delaying the proceedings; 6) he not only was appointed standby counsel, but, as noted, he also consulted with standby counsel; 7) the judge advised him he would have to abide by the rules of court and he confirmed he understood; 8) he did not discuss legal or factual defenses but was advised that counsel would be charged with presenting defenses, and defense would be important in the representation; 9) the conversation was tailored specifically to him; and 10) there was no evidence of "coercion or mistreatment" prompting the waiver. (See FBOR, pp. 42-43). *See also State v. Cash*, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App.1992) (listing such factors in reviewing record for evidence of sufficient understanding). Thus, should the Court review the record under these facts, the record well and fully supports a knowing and intelligent waiver. However, such review is not necessary in light of the trial judge's thorough advice.

In sum, the trial judge carefully reviewed the dangers and disadvantages and the advice was sufficient. There is no error. Rehearing is not warranted.

CONCLUSION

Based on the forgoing, Respondent submits Petitioner has failed to show that rehearing is warranted. The petition should be denied.

Respectfully submitted,

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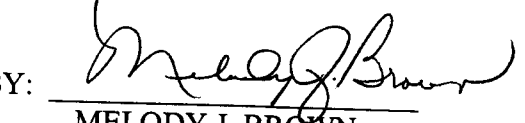
BY: 
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November 23, 2015.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
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APPEAL FROM DORCHESTER COUNTY
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The State, Respondent,

v.

Don-Survi Chisolm, Petitioner.

Appellate Case No. 2011-200186

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served Respondent's Return to Petition for Rehearing on counsel for Appellant, by depositing one copy of same in the United States mail, postage prepaid, to counsel for appellant, addressed as follows:

Robert M. Dudek, Chief Appellant Defender
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This 23rd day of November, 2015

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November 23, 2015

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
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Re: The State v. Don Survi-Chisolm
Appeal from Dorchester County
Appellate Case No. 2011-200186

Dear Ms. Kitchings,

Enclosed please find an original and (6) copies of the ***Return to Petition for Rehearing***, dated November 23, 2015, in the above-referenced case.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/pcm

cc: Robert M. Dudek, Esq., Chief Appellate Defender
Lara Caudy, Esq., Appellate Defender
David M. Pascoe, Jr., First Circuit Solicitor
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