STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2020-UP-020 (S.C. Ct. App. Filed January 29, 2020)

THE STATE,

RESPONDENT

V.

TIMIYA RASHAD MASSEY,

PETITIONER

APPELLATE CASE NO. 2017-002348

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

The Court of Appeals erred in finding the trial court properly exercised its discretion by refusing to allow the defense to cross-examine state's witness and alleged accomplice Williams about the fact he faced a life sentence if convicted of murder since petitioner was entitled to probe Williams for his bias in this situation, and the trial court therefore erred in sustaining the state's unspecified objection to this cross-examination 4

Relevant facts 4
Sentencing exposure cross-examination 9
Court of Appeals 10
Rehearing 10
Discussion 11

CONCLUSION 17

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 23, 2020.

QUESTION PRESENTED

Whether the Court of Appeals erred in finding the trial court properly exercised its discretion by refusing to allow the defense to cross-examine state's witness and alleged accomplice Williams about the fact he faced a life sentence if convicted of murder since petitioner was entitled to probe Williams for his bias in this situation, and the trial court therefore erred in sustaining the state's unspecified objection to this cross-examination?

STATEMENT OF THE CASE

Procedural history

Petitioner was indicted at the August 2017 term of the Greenville County Grand Jury for the offenses of murder, attempted murder, burglary in the first degree, kidnapping, attempted armed robbery, and possession of a weapon during a violent crime. R. 375 – 386. His case came on for trial on November 6, 2017, before the Honorable Robin B. Stilwell, and a jury. Carlyle Steele represented petitioner. Doug Richardson was the assistant solicitor. R. 1.

On November 8, 2017, the jury found petitioner guilty on each count. R. 371, l. 14 – 372, l. 14. Judge Stilwell sentenced petitioner to forty years imprisonment for murder, thirty years imprisonment for burglary in the first degree, thirty years imprisonment for kidnapping, thirty years imprisonment for attempted murder, twenty years imprisonment for attempted armed robbery, and five years imprisonment for possession of a weapon during the commission of a violent crime. All sentences were concurrent. R. 373, ll. 2-22.

The Court of Appeals affirmed petitioner's convictions in State v. Timiya Rashad Massey, 2002-UP-020 (filed January 29, 2020) (Thomas, Geathers, and Hewitt, JJ.). App. 1. Petitioner sought rehearing which was denied in an order dated April 23, 2020. App. 3-7; app. 8.

This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in finding the trial court properly exercised its discretion by refusing to allow the defense to cross-examine state's witness and alleged accomplice Williams about the fact he faced a life sentence if convicted of murder since petitioner was entitled to probe Williams for his bias in this situation, and the trial court therefore erred in sustaining the state's unspecified objection to this cross-examination

Relevant facts

Greenville County sheriff's deputy Robert Whatley testified that on September 30, 2015, at approximately 8:30 pm, he was dispatched to the Dolphin apartment complex on North Franklin Road.[1] R. 13, ll. 3-22. The dispatch noted there was a gunshot victim involved so the police responded with blue lights on and sirens blaring. R. 13, l. 24 – 14, l. 2. Whatley was the fourth or fifth patrol car to arrive at the Dolphin apartment complex. R. 14, ll. 6-9.

A deceased man was located at the bottom of a stairwell. R. 14, ll. 21-23. The police entered Apartment 24 searching for more victims or suspects. Instead, they found a lot of shell casings on the floor. R. 15, l. 21 – 17, l. 10.

Whatley remembered that petitioner was later found lying in a thicket on the side of the apartment complex, "and he was later identified as Timiya Massey." Petitioner had been shot in the leg. R. 20, l. 13 – 21, l. 8.

Investigator Wayne Campbell also responded to the Dolphin apartment complex that evening. Campbell learned that "the victim was deceased." R. 23, l. 13 – 27, l. 4. Campbell identified a ski mask and a firearm that were found at the apartment complex. R. 29, ll. 2-7.

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[1] This case presents a straightforward legal issue. The Court of Appeals did not conduct a harmless error analysis because it respectfully erroneously found no error. However, to the extent a harmless error analysis may play a role in this case the underlying facts are included without – hopefully – unnecessary repetition.

Campbell remembered seeing an individual "lying in what I call the thicket, meaning briars, underbrush and all. And you could see from . . . his waist down there lying in that thicket." Campbell went to see if petitioner was breathing and still alive. R. 35, ll. 8-23. Petitioner had shallow breathing and his eyes were closed. However, he was still alive. R. 41, ll. 2-11.

Petitioner had on light grey sweatpants[2] and he was wearing a white t-shirt. He had been shot in the leg. R. 41, l. 12 – 42, l. 24. Campbell testified that he thought petitioner was attempting to hide from the police. R. 36, ll. 5-14.

The police found a gun laying in the long grass and another ski mask outside the apartment complex. R. 49, l. 2 – 50, l. 4. A variety of shell casings from a "PMC 9-millimeter Luger" were also located. R. 66, l. 17 – 71, l. 21.

Kenneth Leach was visiting a girlfriend at the Dolphin apartments that September 30, 2015, evening. Leach remembered as he was walking down the stairs, "four guys came out with guns and had masks on. Held me hostage. Tried to rob me, but I didn't have nothing to take. So they told me to go up the steps and knock on this guy's door. And it was the guy's door that lived right across from the girl I was visiting. I knocked on the door, they shoved me off to the side and knocked the guy in the head. They went in there. The guy was laying on the floor." Leach recalled that one of the men hit the victim in the head with the barrel of a gun. R. 110, l. 9 – 112, l. 16.

Leach was shoved onto a recliner inside the apartment and he saw the decedent's brother come around the corner from the bedroom. A shootout occurred between the decedent's brother and the men in the ski masks. As will be seen infra, two of the alleged masked accomplices

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2 Alleged accomplice Terry Harris testified that the four men allegedly involved all had "jeans on." R. 265, l. 17 – 266, l. 8.

testified they ran, and did not see what happened. As to the third man, the alleged driver, the police were never even given a full name for him, and he was never found -- if he in fact – even existed. R. 112, l. 10 – 113, l. 25.

When the shooting stopped, apparently because the men were out of bullets, Leach ran to safety where he hid. He later spoke with the police although he could not identify anyone. R. 113, l. 20 – 114, l. 24.

The decedent's brother, Haskell Nutridge, was forty-three years old. He was married, and he had four children. However, he was living with the decedent, at the Dolphin apartments at the time of the shooting because he was separated from his wife. R. 229, l. 12 – 230, l. 25.

Nutridge remembered he was sitting on the couch in the decedent's apartment eating and drinking beer. He later admitted he was also smoking a "blunt." R. 231, l. 11 – 232, l. 15. Nutridge went into the back bedroom to lie down when he later "heard a commotion." "I heard the knock on the door. My brother opened the door and someone hit him in his face. But it was the commotion he recalled vividly: "'Where it is at, where is the shit at?'" R. 232, l. 9 – 233, l. 9.

"I got up off the bed, got my .38 and headed towards the living room." R. 233, ll. 18-21. "I seen a guy on top of my brother with a ski mask with a pistol in his hand." The gun was pointed at the decedent and Nutridge opened fire. Nutridge said the person hitting his brother "he turned to me and started firing their weapon. So, I backed back around the corner into my bedroom." Nutridge never saw the shooter, or any of the other men, and he therefore was unable to identify anyone. R. 234, l. 7 – 236, l. 23. Nutridge said he tried to tell his wounded brother to hold on and that help was coming but the decedent died at the scene. R. 238, l. 18 – 242, l. 19.

Terry Harris was known as "T-Black." Harris had a criminal record for crack cocaine and failure to stop for a blue light. He had been charged in this case with the same charges as petitioner. R. 246, l. 2 – 247, l. 21. Harris testified he had known petitioner for about ten years as "Bam." R. 247, ll. 18-25.

Harris remembered that petitioner and a man named Cornelius picked him up at his house. Cornelius was allegedly the driver and petitioner was allegedly in the front seat. It was never identified during the trial who Cornelius was or where he allegedly went following the shooting. Harris claimed he had no idea what the men were going to do when they picked him up that evening. "He asked me to ride with them." R. 248, l. 18 – 250, l. 2. When the men arrived at the apartment complex, Harris said that they all put on masks, and he said petitioner had a gun that he kept in a holster. R. 250, l. 5 – 251, l. 21.

Harris claimed that petitioner "grabbed a white dude and carried him upstairs." Harris said as soon as the decedent answered the door, it was his claim that petitioner "started pistol whipping the dude." R. 251, l. 18 – 254, l. 12. Harris maintained petitioner was the man yelling, "Where the shit at?" Harris testified that they were looking for drugs. R. 254, l. 8 – 255, l. 9.

Harris said when the gunfight started he "took off . . . back to the car." R. 256, l. 13 – 257, l. 9. Harris maintained that Cornelius, the unknown man, dropped him off near his house and took his gun. Harris claimed he had been cooperative with the police since that time. R. 258, l. 11 – 259, l. 12.

On cross-examination, Harris admitted he had pled to a weapons charge in federal court. He was given a hundred- and twenty-month sentence. Harris openly admitted he later pled guilty in this case because he wanted his state court prison sentence to run "concurrent with my federal time." Harris readily admitted "that means you would serve no extra time at all." Harris

acknowledged this was an ideal situation, and one he was hoping to dispose of the charges with in this case. R. 260, l. 4 – 262, l. 2. Harris acknowledged the concurrent time he wanted was the reason he was testifying for the state at petitioner's trial. Harris further acknowledged he was telling the jurors that petitioner "set this thing up." R. 261, l. 12 – 262, l. 23.

Thirty-seven-year-old Nyerere Williams admitted he had been charged in this case also, that the charges were pending, and he "confirmed" to the solicitor that no promises allegedly had been made for him at sentencing in exchange for his testimony against petitioner. R. 269, l. 24 – 270, l. 23. Williams admitted he had a prior record for distribution of crack cocaine. R. 270, l. 24 – 271, l. 9.

Williams testified on September 30, 2015, that petitioner picked him up with T-Black, which was Terry Harris. Williams remembered that the four men then went to the Dolphin apartment complex. R. 271, l. 17 – 272, l. 21.

The men then put on their ski masks and Williams testified that the men grabbed a man coming down the steps and "took him up the steps." They knocked at the door, and they rushed in when the door was opened. "Seconds after that, the shooting starts." R. 272, l. 13 – 274, l. 25. Williams recalled hearing arguing before the shooting started and he said he ran back to the car where he found Harris. Williams remembered he was dropped off on "Hampton Avenue" after he threw his ski mask away. R. 275, l. 11 – 276, l. 22.

Williams said he heard in the neighborhood that he was wanted by the police, and he told the solicitor that is why he turned himself in. R. 276, ll. 16-25. Williams said he turned himself in because "it was the right thing to do." R. 276, ll. 16-18. Williams admitted he had lied to the police when he first talked to them. This admission came on cross-examination. Williams also admitted on cross-examination that Harris asked him if he wanted "to go get some weed" before

they went to the Dolphin apartments. Williams now said that was "part true." R. 278, l. 21 – 279, l. 23.

Williams said he did not know the man who was driving that day, and he never saw him again after this incident. Williams admitted he did not know "who shot who" but he did know that Terry Harris had a gun. R. 282, l. 20 – 283, l. 21.

On cross-examination, Williams also said the men were supposed to break into the apartment to get marijuana but that no one was supposed to get hurt. R. 283, l. 22 – 286, l. 6. Williams claimed he did not have a gun that day and he said that his orders came from Terry Harris. R. 286, l. 22 – 287, l. 15.

Sentencing exposure cross-examination

Williams admitted he was facing the same charges as petitioner, which included murder, kidnapping, and attempted robbery. R. 287, ll. 16-21. Williams claimed he did not expect any sentencing assistance from the solicitor in exchange for his testimony. Williams refused to admit he hoped for a shorter sentence in return for his testimony. R. 288, l. 19 – 289, l. 23.

Williams maintained that no one had talked him into "changing his story." Williams claimed he did not know the maximum possible sentence that he could receive. Williams admitted he was charged with murder, and defense counsel then asked him: "You are aware you could get a life sentence?" The solicitor's immediate objection, stating no grounds for it, was immediately sustained. R. 290, ll. 14-20.

After cross-examination, the judge instructed the jury that he was not trying to keep secrets from them, but that a potential sentence of a witness was not relevant in the case. R. 294, ll. 6-25.

The remaining witness, pathologist Dr. Michael Ward, testified the decedent died of a gunshot wound to the abdomen and the right leg. R. 303, ll. 4-7.

Court of Appeals

On direct appeal, petitioner relied, inter alia, on State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012); State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976), and State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006) in support of his argument that the trial court abused its discretion by refusing to allow him to cross-examine Williams about the fact he faced a life sentence for murder. This cross-examination went directly to probing Williams for his strong bias to testify for the state.

The Court of Appeals, in a summary one paragraph opinion, cited State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) and State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) but nonetheless affirmed petitioner's convictions in State v. Timiya Rashad Massey, 2002-UP-020 (filed January 29, 2020) (Thomas, Geathers, and Hewitt, JJ.). App. 1.

Rehearing

Petitioner argued on rehearing that the opinion of the Court of Appeals correctly cited State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) "for the proposition that the sentencing exposure of an alleged accomplice or co-defendant is legitimate fodder for cross-examination to expose bias or reason to misrepresent. However, this Court overlooked the fact that the correct application of that precedent to facts of this case dictates a different result, reversal." App. 1.

Petitioner argued that the opinion of the Court of Appeals ignored the clear precedent of this Court that "[i]t is well settled law in South Carolina that it is error to refuse to allow the defendant to cross-examine his co-defendant, co-conspirator, or co-accomplice on the possible sentences he faced, where that witness had not pled guilty or reached a plea agreement with the

state. See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006)." App. 3-4. The Court of Appeals denied rehearing. App. 8.

Discussion

It is indeed well settled law by the precedents of this Court that the sentencing exposure of a witness testifying for the state is permissible cross-examination to show the potential bias of the witness to the jury responsible for judging his or her credibility. It is error to refuse to allow the defendant to cross-examine his co-defendant, co-conspirator, or co-accomplice on the possible sentences he faced for his pending charges. See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002).

The opinion of the Court of Appeals in this case is in direct conflict with prior decisions of this Court, and certiorari should respectfully therefore be granted. See Rule 242(b)(3), SCACR,

In Mizzell, the limitation on cross-examination involved a co-conspirator witness's potential sentence if he was convicted of the same crimes as the defendants. This Court in Mizzell noted that the lack of a plea agreement, if anything, suggested the witness would testify more favorably to the state's position. State v. Mizzell, 349 S.C. 326, 332, 563 S.E.2d 315, 318 (2002).

In Mizzell, this Court held that a criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" State v. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 *citing* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986),

The elementary cross-examination limitation error, respectfully, by the trial court here was reversible error without the necessity of any Confrontation Clause or other Constitutional analysis. That was true because "on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976). The Court of Appeals erred by holding otherwise.

As seen, Williams claimed there was no deal or "wink and nod" leniency deal with the state. His motives were pure.

In this case, alleged accomplice, Terry Harris, a/k/a "T-Black" admitted he was in federal custody and serving a 120-month sentence for a firearms violation. Harris readily admitted that he expected to plead guilty to the charges in this case, and he openly coveted "concurrent time." Harris admitted, which he had to, that concurrent time meant he would not serve any more prison time for having committed or been involved in the murder, burglary, kidnapping, and other crimes involved in this case. R. 260 – 261.

However, alleged accomplice Nyerere Williams, the next witness, was a different story. The solicitor immediately upon calling him as a witness had Williams testify that he had pending charges, "the same charges that the defendant has." Importantly, he added, upon questioning by the solicitor, that Solicitor Jimmy Richardson had not made him "any promises regarding those charges." R. 270, ll. 12-23.

On cross-examination, Williams admitted he was charged "with exactly the same thing that Timiya Massey is charged with." Williams admitted those charges included murder, kidnapping, attempted armed robbery, "and all the others." R. 287, ll. 16-21.

Williams said the only reason he was testifying against petitioner was because it was **"the right thing"** to do. Williams boldly asserted he did not have any expectation that his testimony against petitioner would help him at all at sentencing. R. 288, ll. 3-24.

Again, Williams was aware he was charged with murder in this case. Defense counsel then asked Williams if he was also aware he could get a life sentence for murder. The solicitor immediately objected, *without stating a ground*, and that objection was immediately sustained. R. 290, ll. 9-20.

S.C. Code § 16-3-20 provides, where the state does not seek the death penalty for murder, that a person who is convicted of or pleads guilty to murder can receive a sentence of life imprisonment (which is life without parole) or a mandatory minimum term of thirty years. The defense cross-examination of Williams on the indictment for murder carrying a possible life sentence was factually and legally his true sentencing exposure. It was absolutely proper cross-examination for the well-articulated reasons in this Court's well settled precedents.

The trial court erred by refusing to allow it. The trial court also improperly reasoned, and erroneously told the jury, that the potential sentence a witness was facing was not relevant to the jury's deliberations, where jury deliberations obviously involve the jury being *the only entity ever allowed to judge the credibility of the witnesses.* The Court of Appeals erred in affirming the trial court in this case.

Again, the scope of cross-examination in South Carolina for bias is broad. See State v. Brewington. In State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006), cited to the Court of Appeals in this case, that Court found error in the trial court prohibiting defense counsel from questioning co-defendants on the sentencing exposure they faced for murder and other charges in

the decedent's death. The trial judge in Curry stated he was not going to allow the defense to elicit whether the co-defendant knew what his potential sentences were in that case.

While finding error in the judge's cross-examination limitations in Curry, the Court of Appeals found the error harmless, reasoning error is harmless "where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

While the Court of Appeals did not engage in a harmless error analysis here, seemingly because it erroneously found no error, there were substantial differences between the harmless error analysis in Curry and any that would be conducted in this case. In Curry, Ronald Coursey, the other victim in the robbery, unequivocally identified Curry as the shooter. Here, the decedent's brother, who opened fire to protect the decedent, could *not* identify the masked shooter.

Further, Curry was overheard in a discussion with co-defendant Savage making inculpatory statements about the murder weapon. State v. Curry, 370 S.C. 674, 681-682, 636 S.E.2d 649, 653 (Ct. App. 2006). Here, there were no inculpatory statements attributed to petitioner in any fashion. Further, in this case, Terry Harris testified that he ran away when the shooting started, and he did not name a shooter. Harris openly admitted he hoped to receive great sentencing consideration for testifying during petitioner's trial, and he acknowledged he wanted concurrent time to his federal 120-month sentence.

Williams also admitted he did not see the shooting, and he essentially acknowledged that he was operating under the orders of **Harris**, not petitioner, which was relevant to jury's analysis of the issue of accomplice liability.

"The hand of one is the hand of all" was a jury issue in this case where the two alleged accomplices, Harris and Williams, claimed they were not around at the time of the shooting. Also strange, the third man involved, the alleged driver, "Cornelius," could not be found. No one allegedly even knew his last name.

Further, the defense properly attacked the evidence collection in this case, since Crime Scene Processor Josh Spurgeon had been reprimanded for his unprofessional evidence gathering and evidence preservation in the past. R. 98, l 7 – 108, l. 6. Lead investigator Chris Hammett admitted that the testing of evidence was only as good as the integrity of its collection. R. 157, l. 11 – 164, l. 8. Essentially, all the state could rely upon besides the assertions of Harris and Williams was petitioner's DNA being found on a mask that was allegedly properly collected by Spurgeon from the apartment grounds.

Once again, State v. Mizzell, on this legal issue was decided in 2002, fifteen years before the trial in this case. State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), was decided five years before the 2017 trial in this case.

In Gracely, this Court extended the logic on this issue by holding that the defense had the right to ask state's witnesses the mandatory minimum sentence they could have received where it was significantly longer than the sentence they received in exchange for their cooperation.

The defense in this case had the right – under clearly established case law -- to question Williams about whether he was aware he could receive a life sentence for murder, which he could have received pursuant to S.C. Code §16-3-20 (A). The jury understanding that Williams faced a life sentence, spending the rest of his life in prison, was powerful evidence as to his credibility, his bias, and his incentive to testify for the state and slant his testimony for favor.

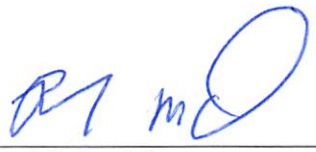
The facts of this case, as seen above are unusual. No victim or independent witness identified petitioner, and no inculpatory statements were attributed to petitioner. This accomplice liability case was strange because the testifying accomplices claimed what was to occur that night was unknown or at least that no one was expected to or supposed to get hurt. Two of the alleged participants said they ran when the "unexpected shooting" occurred, and the alleged driver, "Cornelius," was never located. His last name was allegedly not even known. Petitioner was respectfully left "drawing the short end of the stick" the way this case unfolded.

Respectfully, this Court should grant certiorari. See State v. Mizzell, State v. Gracely; See Rule 242(b)(3), SCACR, supra.

CONCLUSION

By reason of the foregoing arguments, this Court should grant certiorari to allow full briefing on this issue.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of June, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
Jun 24 2020
SC Court of Appeals

Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2020-UP-020 (S.C. Ct. App. filed January 29, 2020)

THE STATE,

RESPONDENT

V.

TIMIYA RASHAD MASSEY,

PETITIONER

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case has been e-filed with the Court of Appeals and served upon Samuel M. Bailey, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 24th day of June, 2020.

RMD

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER