No. _____

IN THE

# Supreme Court of the United States

TODD J. TIBBS,

*Petitioner,*

v.

RANDY GROUNDS,

*Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

HILARY POTASHNER
Federal Public Defender
JOHN S. CROUCHLEY*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-1743
Facsimile: (213) 894-1102
John_Crouchley@fd.org

Attorneys for Petitioner
TODD J. TIBBS
**Counsel of Record*

## QUESTIONS PRESENTED

Under AEDPA[1], the level of deference to be afforded to state court fact findings is undoubtedly great, but it is not absolute and unquestioning. This federal habeas case, with its uncomplicated facts and procedural history, provides a straightforward example of an increasingly-common overextension of "AEDPA deference" to state court factual determinations. Based only on "some evidence" supporting the state court's conclusion, and ignoring all uncontested evidence to the contrary, the federal court of appeal's decision here stretches AEDPA's deferential standard past its breaking point. Moreover, the court of appeal improperly applied the AEDPA standard for prejudice, denying relief because (as the panel stated) it was not left with grave doubt "about the verdict's correctness."

The issues presented are:

1. Does federal habeas law allow the application of a "some evidence" standard in upholding state court factual determinations?

2. Is it correct to measure AEDPA prejudice based on the reviewing judges' view of the verdict's correctness?

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[1] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *codified at* 28 U.S.C. §§ 2241 *et seq.*

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### MISCELLANEOUS

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Todd J. Tibbs ("Tibbs" or "Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the denial of his petition for post-conviction relief.

## I. OPINIONS BELOW

The memorandum disposition of the Ninth Circuit Court of Appeals is reproduced in the Appendix at Pet. App. 1-5. The decision of the U.S. District Court is reproduced at Pet. App. 6-27. The unreported final reasoned opinion of the state court, the California Court of Appeal, is reproduced at Pet. App. 28-38.

## II. JURISDICTION

The Court of Appeals entered judgment on April 24, 2019. Pet. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### A. Federal Constitutional Provisions

The Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed …."

The Fifth Amendment states in pertinent part: "No person shall … be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment states in pertinent part: "No state shall … deprive any person of life, liberty, or property, without due process of law …."

### B. Statutory Provisions

28 U.S.C. section 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. section 2254(e)(1) states:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

## IV. STATEMENT OF THE CASE

In a case in which there was ample room for doubt that Petitioner Todd Tibbs committed an attempted murder willfully, deliberately, and with premeditation, the jury was not provided with an instruction on that standard for the attempted murder charge. The Ninth Circuit, stating that there was "some evidence" showing that Tibbs had in fact acted with such a heightened mental state, and noting that the jury was instructed on the standard for an unrelated charge, held that Tibbs "cannot show that the omitted instruction had a substantial and injurious effect or influence that leaves us with grave doubt about the verdict's correctness." Pet. App. 3 (internal punctuation and citations omitted). As discussed below, the panel misapplied basic standards of federal habeas review. This case presents a straightforward, portable opportunity to not only correct these errors, but also to delineate the outer parameters of "AEDPA deference" to state court factual findings.

### A. The Incident and Trial

The charge arose from a brief encounter among a group of young people in San Bernardino, California on the evening of September 7, 2007. As described by the California Court of Appeal (the "state court"), an individual named Sequwan Lawrence was standing outside his residence with his girlfriend Kianna Thomas, along with his brother and a male cousin. Lawrence and Thomas later told police, who arrived after receiving a "shots fired" 911 call, that Tibbs and another individual, Brandon Parks-Burns, had confronted them; after an angry exchange of words, Parks-Burns (not Tibbs) produced a gun and pointed it at Lawrence. At some

point Parks-Burns allegedly said, "You're going to get killed now."[2] Lawrence told police he then scuffled with Parks-Burns and the gun fell to the ground. Lawrence told police that, while struggling with Parks-Burns, he heard a gunshot and turned to see Tibbs pointing the same gun at him. Having restrained Park-Burns in a headlock, Lawrence used him as a shield to protect himself. Lawrence told police that Tibbs at some point yelled, "18th Street," the name of a local street gang. Lawrence eventually released Parks-Burns and went into his residence. *See People v. Parks-Burns, et al.*, 2013 WL 140395 at *3-4 (2013) (unpublished direct appeal).

Police testified that Lawrence's girlfriend, Kianna Thomas, told them Parks-Burns had initially asked Lawrence and his cousin "where they're all from," and then pointed a gun to the cousin's head, but Tibbs told him to shoot Lawrence first. According to police, Thomas told them that Parks-Burns and Lawrence got into a "tussle," the gun fell, and then Tibbs "shot at" Lawrence. Parks-Burns and Tibbs were arrested that evening after they were identified by Lawrence and Thomas in a field show-up a short distance from where the incident occurred.

Lawrence admitted he disliked Tibbs because Tibbs had been dating his 15-year-old sister. Lawrence also testified Tibbs had confronted him with a gun about two weeks before the incident. *Id.* at *1; *In re Todd Jose Tibbs*, 2015 WL 6732270 at *2 (2015) (unpublished) Pet. App. 28-38.

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[2] In the police report and at the preliminary hearing, Parks-Burns was quoted as saying, "I *should* kill you right here." (Emphasis added). That was changed at trial by the same witness-officer to "You're going to get killed now," which was cited to and relied on by the state Court of Appeal.

Those are the facts upon which petitioner was convicted of first-degree attempted murder, as summarized by the state court. Additional relevant facts reflected in the trial record—none of which were seriously disputed, and all of which were highlighted in both the state and federal habeas proceedings—provide the full and necessary context. They include:

- No second shot was fired, even after the alleged first shot missed, and even after Lawrence released Parks-Burns.
- Despite Tibbs' allegedly deliberate and premeditated attempt to kill him, Lawrence was not even slightly injured.
- The confrontation ended before police arrived.
- After the confrontation ended, apparently while Lawrence watched, Tibbs and Parks-Burns went to an address "two houses over," where they were later found and arrested without incident.
- In the neighborhood where the incident occurred, police responded more rapidly to "shots fired" calls; here, such a call was made by Kianna Thomas during the incident and the police duly arrived within a short time.
- The police did not report the incident as an attempted murder, nor was that charge initially filed by the District Attorney; it was instead reported and charged initially as an assault with a deadly weapon. The record is devoid of any later-discovered evidence that might account for the subsequent refiling to instead allege first-degree attempted murder.

Tibbs and Parks-Burns were tried in the San Bernardino Superior Court. They were named as co-defendants in connection with an unrelated homicide that occurred at a different date and location than the confrontation with Lawrence. The attempted murder of Lawrence was belatedly joined as an additional count against Tibbs only. (Parks-Burns, a minor, was charged separately in juvenile court with regard to the Lawrence incident, where he entered a guilty plea to—notably—a mere assault with a deadly weapon.

The unrelated murder charge against Tibbs and Parks-Burns was the overwhelming focus of the trial; the testimony and argument relating to the attempted murder count against Tibbs amounted to a virtual sideshow. The relevant testimony occupies considerably less than one volume out of a six volume trial record. It consisted entirely of the statements of Lawrence and Thomas as described above, which were presented pursuant to *California v. Green*, 399 U.S. 149 (1970), in which a forgetful or recalcitrant witness's prior statements are introduced through the testimony of a law enforcement officer.

This testimony showed Lawrence was easily able to subdue Parks-Burns, and ultimately the three actors apparently ended the confrontation and simply walked away from each other. The jury was presented with no physical evidence indicating that a gun was even present, much less fired, during the altercation with Lawrence. No spent shell casing was found, although the gun that was described ejects shell casings automatically. There was no evidence that a bullet or bullet hole was found in any nearby structure, or that police did any testing for gunshot residue. Even the

officers who responded to the scene did not appear to believe a gun had actually been fired, given their decision to arrest Tibbs for assault rather than attempted murder.

In connection with the unrelated murder charge against Tibbs and Parks-Burns, the jury was given an instruction, relating to the terms "willfully," "deliberately" and "premeditation" as set forth in the model murder instruction of CALCRIM No. 521. The printed instruction was entitled "Murder: Degrees" and was located and read to the jury with the other separate murder count instructions. The instruction was not given with respect to the count alleging the attempted murder.

The jury was unable to reach a verdict on the unrelated murder charge, but convicted Tibbs of the attempted murder of Lawrence. Tibbs received an indeterminate term of 15 years to life for the attempted murder conviction, plus a term of 20 years for discharge of a firearm, to run consecutively for a total of 35 years. As for the mistried murder charge arising from the unrelated incident, Tibbs was later offered and accepted a plea deal under which he entered a guilty plea to voluntary manslaughter and was sentenced to a concurrent term of six years (in short, no additional time).

### B. The Case on Review

The Ninth Circuit Court of Appeal, like the state reviewing court before it, engaged in a narrowly-focused evaluation of the evidence and circumstances, cherry-picking as few facts as possible to serve as ostensible support for the denial of relief, while disregarding facts that contradicted or neutralized the evidence cited

in denying relief. Despite their recognition or at least assumption that the omission of the instruction was constitutional error, both the state and federal courts ultimately denied relief on a finding of insufficient prejudice. Like the state court, the Ninth Circuit reached its decision by omitting any recognition of the contrary facts and circumstances. As discussed herein, the Court of Appeal employed "AEDPA deference" to abdicate its role as a true reviewing court.

Preliminarily, to appreciate the significance of the omitted instruction, one must understand the import of the "willful, deliberate, and premeditated" element in this case. Even assuming the evidence showed that Tibbs acted with the specific intent to kill Lawrence, such evidence without more would not be sufficient to prove first-degree attempted murder. In California, there is a significant distinction between a "willful, deliberate, and premeditated"—or "WDP"—attempt to kill someone (first-degree attempted murder), as opposed to merely an intentional effort to kill someone (second-degree attempted murder). The latter finding would not have been adequate to convict Tibbs of first-degree attempted murder. *See People v. Banks*, 59 Cal. 4th 1113, 1152-53 (2014).

These are not academic distinctions. The WDP standard is designed to address significantly more reprehensible conduct than merely an act intended to kill, and as such exposes the accused to drastically longer prison sentences (no better illustrated than in this case). *See* Cal. Penal Code §§ 664/187 (indeterminate "to life" sentence for first-degree attempted murder; five, seven or nine years for

second-degree attempted murder). As the California Supreme Court has stated with regard to the first degree attempted murder,

> In order to find defendant guilty of that charge, the jury would have had to conclude that his acts were the result of careful thought and weighing of considerations rather than an unconsidered or rash impulse. That standard is not met by showing only that a defendant acted willfully and with specific intent to kill. By conjoining the words "willful, deliberate, *and* premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill.

*Banks*, 59 Cal. 4th at 1153 (internal punctuation and citations omitted; italics in original).

The full narrative of the attempted murder of Lawrence left room for a *properly*-instructed juror to have found that Tibbs acted on "rash impulse," and to have reasonable doubt whether Tibbs acted after "careful thought and weighing of considerations." But none of those facts were addressed by, or entered the calculus of, the Ninth Circuit panel. The court instead rested its decision on the existence of "some evidence" supporting such a finding, and the panel's own view of the correctness of the verdict, disconnected from the impact of the error on the jury.

Moreover, the Ninth Circuit panel disregarded the circumstances of the trial itself that further demonstrated the prejudice from the omitted instruction. The Ninth Circuit based its decision in large part on the giving of an instruction defining WDP in connection with the separate and unrelated murder count, and that jurors were advised to "consider [the instructions] together." Pet. App. 3. However, as was

pointed out in Tibbs's briefs, the jurors were clearly and accurately warned that certain jury instructions applied specifically and *solely* to certain individual counts. The trial court prefaced the reading of the instructions by stating:

> Also, I have to apologize ahead of time. Sometimes some of these become repetitive in nature. The reason for that is that we want to have all the information on each one of the instructions even though we may have mentioned it somewhere before.

Pet. App. 41. The trial judge also advised jurors that the required mental state was contained within the instructions for the specific crime:

> The crimes charged in this case require proof of the union or joint operation of act and wrongful intent. [¶] For you to find a person guilty of either of the crimes, that person must not only intentionally commit the prohibited act, but must do so with specific intent and mental state. The act and the specific intent and mental state required are explained in the instruction for that crime or allegation.

Pet. App. 42. Even the prosecutor, in her argument, cemented the separateness of the instructions vis-à-vis the two charged counts; in her comments on the unrelated murder charge, she advised jurors:

> The difference is one willful, deliberate and premeditated. [….] Did the defendant intend to kill? How do we know that, and you go through the evidence provided by testimony in this case. Was the act deliberate? Yes. If you think back, what did they do for the murder – *and this is only to the murder*.

Pet. App. 46. (emphasis added).) Thus, the reference to considering the instructions "together" was cabined by the other more specific and repeated indications that, certainly as to the elements of each charge, the jury was not entitled to swap instructions between different offenses. The generic statement to "consider the

instructions together" does not give jurors carte blanche to take an instruction specific to one particular charge and apply it to every other charge.

The Ninth Circuit's reliance on the instruction from the unrelated murder count is undermined by another important fact, which was also raised in the briefs and ignored in the court's analysis. The key question on the separate murder count was the issue of identity. Even the trial judge stated "the issue in this case is identity." Pet. App. 40. The jury was unable to agree on that threshold issue, and thus never even reached the WDP question. Indeed, the instructions on the murder charge directed jurors to first decide the identity question, and only then were they to deliberate on WDP. Pet. App. 43-45. The subsequent instructions—which contained the one and only definition of WDP—became relevant only if the jury first reached agreement on the identity issue, which never happened. The Ninth Circuit's determination makes no mention of this fact.

## V. REASONS FOR GRANTING THE WRIT

Petitioner is of course aware that if the AEDPA standard for relief "is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). However, as this Court has also stated, even under the restrictions of AEDPA, a habeas petitioner can raise evidence calling into question the validity of a factual determination:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

*Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

This Court has repeatedly demonstrated that, even under AEDPA, a state court factual determination is not immune to federal habeas review. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court engaged in a thorough factual analysis of whether trial counsels' decision to cease investigating demonstrated reasonable professional judgment. In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Court went through the details of Rompilla's prior conviction file, and painstakingly explained why it mattered to his claim of ineffective assistance of counsel. In *Porter v. McCollum*, 558 U.S. 30 (2009), the Court held the state court's finding that the petitioner could not establish prejudice from ineffective assistance of counsel was unreasonable because the state court "either did not consider or unreasonably discounted" the relevant facts. And in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), the Court questioned the specifics of a state court's factual determinations on an intellectual disability claim. In each case, the Court faulted the state court for disregarding one or more material facts and found those omissions to be unreasonable.

Here, by contrast, the Court of Appeals' analysis is an exemplar of the virtual immunity consistently granted by federal judges to state court factual findings,[3]

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[3] *See*, *e.g.*, Patrick J. Fuster, *Taming Cerberus: The Beast at AEDPA's Gates*, 84 U. Chi. L. Rev. 1325, 1375-76 (2017) ("Section 2254(d) does not demand willful blindness to unreasonable adjudications, nor does it require maximal deference on any ground imaginable."); Brian Fussell, Jr., *(I Can't Get No) Habeas Relief, Cause I Try, And I Try, and I Try*, 70 Mercer L. Rev.1135, 1151-52 (2019) (concluding that under current practices, "any sort of habeas relief in the federal courts is next to impossible."); Nathaniel Koslof, *Insurmountable Hill: How Undue*

which—as shown by the cases above—is contrary to law even after AEDPA. In so doing, the Ninth Circuit found refuge in at least two incorrect standards of AEDPA review.

First, the Ninth Circuit panel found the instructional error did not meet the prejudice standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), because the prosecution "presented some evidence that Tibbs acted with premeditation, deliberation, and willfulness, including that he had a dispute with the victim over the victim's sister, that there was a prior occasion where he showed the victim a gun, and that he picked up the gun and fired it at the victim." Pet. App. 2-3. Nowhere in the text of AEDPA, nor in this Court's cases construing it, is there any support for applying a "some evidence" standard in determining whether prejudice resulted from a constitutional error; instead, the "some evidence" standard is applied only in cases involving the minimal due process requirements for administrative decisions on parole, prison discipline, and conditions of confinement. *See Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 454 (1985), citing *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). The "some evidence" standard, by definition, does not require examination of the entire record to ascertain whether due process was satisfied. *Hill*, 472 U.S. at 455 ("Ascertaining whether this standard is satisfied does not require examination of the entire

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*AEDPA Deference Has Undermined the Atkins Ban on Executing the Intellectually Disabled*, 54 B.C. L. Rev. 189, 196 (2013) (criticizing "undue" AEDPA deference employed by federal appeals court); Jyoli Rani Jindal, *Process Matters: Specialization in Federal Appellate Review of Noncapital Section 2254 Cases*, 65 Duke L.J. 1055, 1060-61 (2016) (application of undue AEDPA deference has undermined "the very purpose of federal habeas review of state-court convictions.").

record…. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board."). However, as shown by cases like *Wiggins*, *Rompilla*, *Porter*, and *Brumfield* (discussed above), at least that much is still required under AEDPA.

Nor did the current appeal involve a "sufficiency of evidence" claim which might otherwise explain the court's reference to "some evidence" in support of the verdict. See Pet. App. 2. Indeed, the Ninth Circuit was briefed on how the state court improperly applied just such a "sufficiency of evidence" analysis in analyzing the instructional error, a conclusion with which the Ninth Circuit agreed, calling the state court's method of analysis "questionable." Pet. App. 4. The federal panel stated, however, that "just because these [state court] findings were more favorable to the government than Tibbs does not render them objectively unreasonable." *Id.* But this is precisely the same sort of factual cherry-picking and willful disregard of contradictory evidence that this Court has rejected. It simply underscores the panel's refusal to engage in a meaningful consideration of material facts, which no amount of AEDPA deference can excuse.

Second, the Ninth Circuit panel misapplied the AEDPA prejudice standard when it held that "Tibbs cannot show that the omitted instruction had a 'substantial and injurious effect or influence' that leaves us with 'grave doubt' *about the verdict's correctness*." Pet. App. 3. (emphasis added). In *O'Neal v. McAninch*, 513 U.S. 432 (1995), this Court explained the concept of "grave doubt" and its connection with the *Brecht* standard of "substantial and injurious influence or effect." In its discussion,

the *O'Neal* Court quoted and largely adopted the standard set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946):

> If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand.... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.* If so, or if one is left in grave doubt, the conviction cannot stand.

*Kotteakos*, 328 U.S. at 764-65, quoted in *O'Neal*, 513 U.S. at 437-38 (emphasis added).

Here, the Ninth Circuit panel did precisely what *O'Neal* and *Kotteakos* forbid, weighing in favor of the *verdict's correctness*, not in terms of the error's influence on the jury. In short, the panel did not measure the impact of the presumed error on the jury, and instead substituted its own view that the verdict was "correct."[4] This is the wrong standard. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (explaining that reviewing court must measure impact on jury and not "hypothesize a guilty verdict" no matter how certain it might be); *Rhodes v. Dittman*, 903 F.3d 646, 665 (7th Cir. 2018) (explaining that *Brecht* review "is not the same as a review for whether there was sufficient evidence at trial to support a verdict," citing *Kotteakos*); *see also* 2–31 Randy Hertz & James S. Liebman, *Federal*

[4] Significantly, the discussion leading up to that conclusion referred to the panel's assessment that "some evidence" supported it.

*Habeas Corpus Practice and Procedure* § 31.4(d) (2017) ("The determinative consideration under the *Brecht/Kotteakos* standard thus is not the strength of the evidence or the probability of conviction at a hypothetical retrial absent the error," but rather "whether the error substantially affected the actual thinking of the jurors or the deliberative processes by which they reached their verdict.").

In summary, the appellate panel extended AEDPA deference beyond its limits. This was facilitated by the panel's "some evidence" standard, which allowed it to disregard significant facts in the record. Moreover, it applied a "correctness of the verdict" standard that this Court has squarely rejected even in federal habeas matters. This case presents an opportunity to correct and clarify those standards, before "AEDPA deference" renders federal habeas relief a dead letter.

## VI. CONCLUSION

For the reasons stated above, Todd J. Tibbs respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: July 23, 2019

By: */s/ John S. Crouchley*
**JOHN S. CROUCHLEY***
Deputy Federal Public Defender

Attorneys for Petitioner
TODD J. TIBBS
* *Counsel of Record*

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## CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for writ of certiorari contains 4,225 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 23, 2019.

*/s/ John S. Crouchley*
JOHN S. CROUCHLEY*
*Counsel of Record for Petitioner