STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County
Honorable Michael G. Nettles, Circuit Court Judge

KASHAUN BANKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000232

INDEX

ISSUE PRESENTED

Did the PCR Court err in not finding trial Counsel ineffective based on evidence an witness testimony?

Is it under the first Prong in Strickland, when trial Counsel admit for the record; That his medical Problem's affected his metal ability to represent his Client?

Did trial Counsel medical Problem's affected Counsel metal ability to represent his Client during trial?

Why did trial Counsel not Present the same argument in the Second Jackson V. Denno hearing as trial Counsel Present in the first Jackson V. Denno hearing?

Did the PCR Court err in not finding trial Counsel ineffective for not making Objection's?

Did the trial Court err in ruling Petitioner Confession was admissible given under the totality of the Circumstances Petitioner Confession was not freey and voluntarily tendered and where there was evidence Petitioner invoked his right to terminate the Custodial interrogation?

STATEMENT

On October 15, 2011, Keisha Holmes and Tenille Wilson went to their jobs at the Exxon gas Station on the Corner of Rivers Avenue and McMillan Avenue in North Charleston. Later that day, a man with his face covered, entered the Exxon gas Station with a gun, and began screaming at the clerks to give him the money. After they gave the man the money, he fled the Exxon gas station. The clerks immediatey called all.

The Police arrived and began the search for the robber. Officer McAlhaney responded to the Call but Other officers had already arrived. He then began searching the area. When he drove his car into the nearby church driveway, he saw Petitioner coming from the back Of the church. Officer McAlhaney state Petitioner ran.

Officer McAlhaney followed him and finally Confronted Petitioner. Petitioner was Wearing a black, nylon backpack. Because the report said a weapon was involved, the officer conducted a Pat down. In the backpack, the Officer found a Pellet gun which felt like a Pistol. He also found gloves, and money in Petitioner Shorts Pockets.

Detective conducted a Show-up Identifications. Petitioner was taken to the interview room at the North charleston Police Department, Detective Hill advised Petitioner of his Miranda rights. Petitioner did invoke his right to remain Silent under (Miranda key 43. Criminal law), and Detective Hill, Detective Lacher did not honor that request. On December 12, 2011, the Charleston County Grand Jury trial before the Honorable Stephanie P. McDonald on July 18, 2012 which ended in a mistrial, Petitioner was represented by Andrew D. Grimes and Megan S. Ehrlich. On April 22-25, 2013, Petitioner Proceeded to trial before the Honorable Kristi L. Harrington and a Jury.

Petitioner was represented by Andrew D. Grimes and Megan S. Ehrlich. The State was represented by E. Culver Kidd and Elizabeth Riddle. The State had the Surveillance Video, which showed the robbery taking place, from the Exxon gas station admitted into evidence. Petitioner Statement was admitted to the jury through witness testimony. The jury returned a verdict of guilty.

The judge sentenced Petitioner to twelve years incarceration. Petitioner attorney filed a notice of appeal. The appeal was perfected by Blakely Lynn Molitor. The Court of Appeals affirmed Petitioner Conviction and Sentence. State v. Banks, 2014-UP-479 (Ct. App. filed December 23, 2014).

(Andrew D. Grimes was lead counsel However Passed away in September 2014).

On July 10, 2015, Petitioner filed an application for Post-Conviction relief (PCR). The State filed a return on February 23, 2016. An evidentiary hearing was held on December 7, 2017, before the Honorable Michael Nettles. Petitioner was represented by James H. Falk, and the State was represented by Megan Jameson. On February 1, 2018, the PCR Judge filed an order denying Petitioner PCR application and dismissing it with Prejudice. PCR Counsel filed a notice of appeal.

ARGUMENT

Did the PCR Court err in not finding trial Counsel ineffective based on evidence an witness testimony.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adersarial process that the trial cannot be relied upon as having produced a just result." Strickland V. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); In Smalls V. State, 422 S.C. 174, 810 S.E. 2d 836 (2018), the Supreme Court held that to satisfy the Prejudice Prong of an ineffective assistance of Counsel claim, an applicant must demonstrate there is a reasonable Probability that, but for Counsel's errors, the result of the trial would have been different. The Court also held that the PCR Court should consider the strength of the State's case in light of the evidence as well as considering the impact of trial Counsel's error. The Supreme Court then found in Smalls that for the evidence to be overwhelming such that it Precludes a finding or Prejudice with regard to an ineffective assistance of Counsel Claim, the evidence must include Something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of Physical and corroborating evidence so strong that the Strickland standard of a "reasonable Probability the factfinder would have had a reasonable doubt" cannot possibly be met.

Under the First Argument there are 5 issue to satisfy Strickland in the totality of this Case.

On April 22-25, 2013, Mr. Grimes represented the Petitioner in trial. Befor judge Harrington and a Jury. As you read the Petitioner trial transcript you will see Mr. Grimes litigation and his argument. However, what you do not see is the Physical disposition, and excruiating Pain that Mr. Grimes was experienceing during the time of trial, which Ultimitly resulted in his lacking ability to Provide adequate representation to his client, which ultimitly resulted an enadiguate defense.

Is it under the First Prong in Strickland when trial Counsel admit for the record; That his medical Problem's affected his metal ability to represent his Client.

Issue Presented - (1)

Mr. Falk question to Petitioner: Q. you asked him to send you a letter about his health?, Petitioner answer to Mr. Falk: A. NO, he responded in a letter when I asked him what went wrong in my trial. (See PCR transcript Page 45, line 21-25). On July 8, 2014, Mr. Grimes sent the Petitioner a deposition admitting that his medical Problem's affected his metal ability to represent his client during trial. you will read the deposition on Page 6.

Did trial Counsel medical Problem's affected counsel metal ability to represnt his Client during trial.

Issue Presented - (2); under this issue there are 7 factor:

Factor-(1): On July 8, 2014, Mr. Grimes responded to the Petitioner in a deposition admitting at the time of Petitioner trial medical Problem's affected Mr. Grimes metal ability to represnt Petitioner.

Factor-(2): A long with the deposition Mr. Grimes included a Printout from his MUSC Health record, that give a clear list of they Active health Problems that may had add did to the Physical disposition and excruiating Pain that Mr. Grimes was experienceing during the time of trial.

Factor-(3): Mr. Grimes also included a letter from the liver specialist which is more detailed than the Summary and should Provide you with a good summary of the liver Problems, that also may had add did to the Physical disposition and excruiating Pain that Mr. Grimes was experienceing during the time of trial.

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July 8, 2014

Mr. Kashaun Banks, SCDC No.: 355175
c/o Turbeville Correctional Institution
P.O. Box 252
Turbeville, SC 29162

ATTORNEY-CLIENT PRIVILEGE

Re: *State of South Carolina v. Kashaun Banks*

Dear Mr. Banks:

I received your dated July 3, 2014. I do not believe that it would be unethical for you to use my medical condition as a grounds for a PCR application. Indeed, I believe it would be ineffective assistance of counsel for me to stay on a case when my medical condition affected my ability to represent someone.

I do not have a formal deposition of my medical condition at the time of trial. I, however, am including a printout from MyChart at MUSC that has a summary of my conditions even though some of them may be overstated. I believe that arose in your trial was the febrile illness (fever), which no one has provided an exact diagnosis. I also am including a letter from the liver specialist which is more detailed than the summary and should provide you with a good summary of the liver problems.

I hope that you find this information helpful, and I would appreciate it if you did not share it with other inmates because of the privacy issues raised by them.

Sincerely,

Andrew D. Grimes

Andrew D. Grimes

enclosures

MUSC Health
MEDICAL UNIVERSITY of SOUTH CAROLINA

Div. of Gastroenterology/Hepatology
25 Courtenay Drive
ART 7100A, MSC 290
Charleston, SC 29425

Phone (843) 792-6901
Fax (843) 876-4301

December 3, 2013

RE: GRIMES, Andrew D.

MRN# 759387 D.O.B: 06/08/1970 Date of Visit: 12/02/13	Date of Last Visit: 06/03/13 AGE: 43

"The 2014 MUSC Liver Disease and Transplant Symposium will be held all day Saturday February 22nd at the Crowne Plaza Hotel, Charleston. Gastroenterologists, Internists, Primary Care, Surgeons, Mid-levels and Nurses welcome"
.... Details to Follow....

KEY ACTIVE PROBLEMS:
Cirrhosis secondary to autoimmune hepatitis, Bx 2/98
Primary sclerosing cholangitis
Ulcerative colitis in remission
Controlled peripheral edema
IgA nephropathy (Bx 6/1/09)
Neutrophilic urticarial dermatitis
Possible periodic fever syndrome
Psoriasis
Recent frank hematuria – now low grade and intermittent
Hypothyroidism
2 small thyroid nodules
Recent exacerbation of pruritus
Recent exacerbation of diarrhea w/transient painful BMs and transient heavy rectal bleeding

KEY INACTIVE PROBLEMS:
Intermittent left thigh erythematous swelling
Resolved left knee swelling
Immune to hepatitis A and B

ACTIVE MEDICATIONS:
Humira subcutaneously ?frequency
Calcium w/vitamin D 1 qd
Hydroxyzine 25mg qhs ***increasing*** to maximum 100mg qhs
Levothyroxine 0.125mg qd
Lisinopril 10mg qd
Imodium 2mg prn for diarrhea
Myfortic 360mg bid
Lovaza 2g qd
Zofran 4mg po prn
Prednisone 10mg qd ***tapering*** to 0
Phenergan 25mg q 6 hrs prn

KEY PREVIOUS MEDICATIONS:
Colazal
Dovonex for psoriasis
Completed Twinrix vaccination
Clobetasol cream 0.05% topical for psoriasis
Ferrous sulfate
Colchicine
URSO
Betamethasone dipropionate
Aranesp
Lasix
Albuterol inhaler
Ferrous gluconate

Sodium bicarbonate 1.3g bid – tid
Demadex 20mg bid
Ambient qhs

ALLERGIES & ADVERSE DRUG REACTIONS:
Colchicine and codeine caused stomach upset

OLTx CANDIDATES ONLY:
CTP: MELD: AFP (Date:)
Listed for Transplant: ( ) Yes ( ) No ( ) On hold

Otis E. Engelman, Jr., MD
Palmetto Primary Care Physicians
87 Springview Lane, Suite A
Summerville, SC 29485

FOLLOW-UP VISIT

Dear Dr. Engelman:

I saw your patient at an elective followup visit in the Liver Clinic yesterday unaccompanied, 6 months since I saw him previously.

HISTORY: (key features, rest of history in chart)

There have been several new events, as follows. He has had an exacerbation of itching that he scores at 6-7/10 since 10/2013, which he says is now improving and occurs at night in bed. Next, he had a painful swelling of the right leg from the calf to the knee in 8/2013 for which he went to one of the Nason Imaging Centers (instead of coming here, which would have been preferable). Doppler interrogation of his legs bilaterally did not show venous thrombosis. I do not know the diagnosis but he was treated with antibiotics for presumed cellulitis, and these were apparently continued by Dr. Oates. Third, he has experienced an exacerbation of diarrhea over the past few weeks with 4 to 5 bowel movements daily. A couple of weeks ago, there was a lot of fresh blood in the stool, and bowel movements were painful. He wondered whether he had a fissure. This symptom has resolved and there is no longer blood in his stools or mucus. The only undigested food he sees is peanuts. Fourth, he experienced soreness in both legs, which felt hot in bed last night, but when he took acetaminophen, it improved. Incidentally, he thinks that his episodes of fever and erythema of the legs have decreased in frequency since he has been taking a combination of Humira and Myfortic. Otherwise, an extensive review of systems is negative and a review of his past medical, social and family history showed no changes.

EXAMINATION: (key findings, rest of examination in chart)

He actually looks reasonably well, but is obviously anemic. Weight 214-lbs, 97.1kg compared to 201-lbs at previous visit, giving current BMI of 28.2, based on height of 6'1", not exaggerated by overt fluid retention. BP 144/76, pulse 98/minute regular, O_2 saturation: 100% on ambient air.

MEDICAL DECISION MAKING:

The most recent laboratory results I have seen from here are from 10/17/13, when he was still very anemic at 7.9g/dL, with stable leukopenia of 2,600 and stable thrombocytopenia of 66,000. MCV was normal then at 90.1fl with a normal RDW of 13.5%. Obviously, I wonder about iron deficiency. Iron studies at the time of the current clinic visit show an extremely low serum iron level of 11mcg/dL but transferrin saturation could not be calculated because transferrin was below the lower limit of detection (90mg/dL). Ferritin, on the other hand, was at the upper part of the reference range at 306mg/mL, but may well have been elevated by his numerous inflammatory conditions. The result of soluble transferrin receptor testing is pending at the time of this dictation, and we can use this to decide whether we should give him iron intravenously*. The metabolic panel on 10/17/13 showed glucose of 180mg/dL (he cannot remember whether he had eaten), with BUN 49, creatinine 2.5,

which have essentially been stable since 2/2012, when the rise in creatinine to 2.5mg/dL occurred. Laboratory tests at the Nason Center in 8/2013 showed BUN 57 and creatinine 2.5. The most recent hepatic panel here was measured on 6/27/13, and showed continuing normality of bilirubin with mild elevation of AST 50, normal ALT 27, and 2-fold elevation of alkaline phosphatase. Alkaline phosphatase at the Nason Center was 3- 4-fold elevated at 436 units. The difference is difficult to explain, but we will obtain a non-contrast MRI scan (we cannot use gadolinium because of his renal failure), looking for hepatocellular carcinoma and possibly biliary abnormalities that might be visible. Serum albumin continues to be extremely low and was 1.6g/dL in 6/2013 here, and the same at Nason in 8/2013. The most recent urine protein/creatinine ratio on 10/17/13 was 1.38, which predicts for 1.38g proteinuria in 24 hrs. Therefore, he still has moderately heavy proteinuria but it has been much greater previously. This is likely due to his IgA nephropathy, which appears to be stable.

The patient is under the impression that there is some debate between Dr. Oates and Dr. Velez about the use of rituximab, which I leave to them to resolve. I do not see how it would help his renal lesion.

There are several serious points to address. As far as his itching is concerned, this may be due to his cholestatic liver disease (notwithstanding normal billrubin), and/or his renal impairment. I have advised him to hydroxyzine at night, starting at 25mg and increasing to 100mg to control this symptom. I do not have an explanation for his painful legs. This has been a problem for a considerable time, and may be associated with his relapsing inflammatory disease notwithstanding the decreased frequency of flares with the current immunosuppressive therapy. As mentioned above, we will see if he is iron deficient to guide treatment that could best be done intravenously*.

Finally, I did discuss with him the serious prospect that sooner or later his liver and/or kidney disease would deteriorate to the point that transplantation is necessary. Currently, his Child-Turcott-Pugh score is 7, based on hypoalbuminemia that admittedly may be partly due to urine losses. Similarly, the MELD risk score that is used for prioritizing patients who are listed for liver transplantation (which he is not), and for other prognostic purposes, gives a value of 17 by the Mayo method and 18 by the UNOS method that is used at the time of listing for transplantation and prioritization. However, the elevated MELD score is driven almost completely by his renal failure that is not a direct consequence of liver disease. Nonetheless, I will arrange for transplant evaluation.

I have requested stool examinations for enteric infection, C. difficile, Giardiasis, ova and parasites, as patients with colitis are perhaps even more susceptible to these complications than other individuals. Thus far, samples have not been received and it remains to be seen whether he will provide them. He is somewhat idiosyncratic at following advice. I have given him a follow-up appointment for 6 months' hence, but will take action for interim problems if they fall within my expertise.

We will repeat esophagogastroduodenoscopy in 7/2015, as the procedure in 7/2013 was normal.

If you or any of his other physicians have any questions or comments, I would be very pleased to hear from you.

Yours sincerely,

Adrian Reuben, MBBS, FRCP, FACG
Professor of Medicine
Director, Liver Service

Factor-(4): Mr. Falk question to Ms. Ehrlich: Q. Let me talk to you, you were second chair both on the initial trial in 2012, then also in 2013; is that correct?, Ms. Ehrlich answer to Mr. Falk: A. yes., Mr. Falk question to Ms. Ehrlich: Q. Did Mr. Grimes health deteriorate between those two times?, Ms. Ehrlich answer to Mr. Falk: A. It did. (see PCR transcript Page 10, line 5-11)

Factor-(5): Mr. Falk question to Ms. Ehrlich: Q. Is it fair to say that he was having somewhat of acute health problems during the week of that trial?, Ms. Ehrlich answer to Mr. Falk: A. yes. (see PCR transcript Page 11, line 3-15)

Factor-(6): Question: Is it clear to see that trial counsel medical problem's affected Counsel metal ability to represent Petitioner during time of trial?, Ms. Ehrlich State; Judge Harrington made a call to end Court early so that he would be able to get some Sort of rest or medical treatment that day. (see PCR transcript Page 11, line 17-19)

Factor-(7): The Court question to Ms. Ehrlich: What was his Problem?, Ms. Ehrlich answer to the Court: He had--he was--he had Chronic like an immune deficiency, Some Sort of disease and I believe they have the medical records, but he would Sometimes have a swelling and Pain his legs, be feverish to the Point that he had Chills and that would cause him Significant Pain and kind of weakness and I believe those were the types of symptoms that he was experiencing at the start of the trial. (see PCR transcript Page 11-12, line 24, 25, 1-8)

Why did trial Counsel not present the same argument in the second Jackson V. Denno hearing as trial Counsel Present in the First Jackson V. Denno hearing:

Issue Presented-(3); under this issue there are 4 factor:

Factor-(1): Evidence an witness testimony clearly show that trial Counsel was experienceing excruiating Pain that affected counsel metal ability to represent Petitioner which would equate to displaying a diminished Capacity during time of trial.

Factor-(2): On July 18, 2012, The Honorable Judge McDonald held a Jackson v. Denno hearing to determine the admissibility of Petitioner Confession.
Factor-(3): On Page 12 you will read the argument that Mr. Grimes Present to the court on July 18, 2012, in the Jackson v. Denno hearing, you also read Judge McDonald ruling.
Factor-(4): Petitioner was Prejudice by trial Counsel by not Presenting the same argument in the Second Jackson v. Denno hearing as trial counsel Presented in the first Jackson v. Denno hearing.

Did the PCR Court err in not finding trial Counsel ineffective for not making Objection.

ISSUE Presented-(4); Under this issue there are 5 Factor:

Factor-(1): At the beginning of the trial, the trial Judge in her opening remarks told the Jury: While all of these things may be true at times, Please remember this trial is not for entertainment. It is a fundamental Part of our democracy. It is a search for the truth in an effort to make Sure that Justice is done between the Parties before You here today. Please remember Searching for the truth and making sure that Justice is done is often Slow, (see Trial transcript Page 213-214, line 23-25, 1-5)
There was no objection by trial Counsel.
Factor-(2): Also at the beginning of the trial, the trial Judge in her remarks told the Jury: You are to determine the facts from the testimony you hear from the witness Stand and any Other evidence that is introduced in Court. If the evidence is admitted into evidence, it will go back with you during Your deliberations. (see Trial transcript Page 215-216, line 23-25, 1-3)
Now the First two Factor's is the mindset of the Jury throughout the trial.
Factor-(3): Mr. Falk question to MS. Ehrlich: Q. Was there ever any discussion or Consideration Whether or not Objecting to that language as being burden Shifting? MS. Ehrlich answer to Mr. Falk: A. I don't remember any discussion about that. We would normally object to that, Yes. (See PCR transcript Page 9-10, line 20-24, 1)

table.

THE DEFENDANT: Yes, ma'am.

MS. EHRLICH: Your Honor, just the Courts's indulgence for a second while we figure out whether we want to call any other witnesses.

THE COURT: Okay. No problem.

(PAUSE)

MR. GRIMES: Thank you, Your Honor. We have no further witnesses.

THE COURT: Okay. You all want to argue? All right. Happy to hear from you.

MR. GRIMES: Thank you, Your Honor. As you know, it's the State's burden to prove that Mr. Banks has given a statement that's knowing and voluntarily made and in compliance with Miranda. Our first argument is that he did invoke his right to remain silent and Detective Hill, Detective Lacher did not honor that request.

I think the courts have found that under Michigan vs. Mosley the five factors for the Court to look at. The first factor is whether the suspect was given Miranda warnings at the first interrogation. In this case, the State -- I don't have the exhibit number in front of me but it's an exhibit showing that Mr. Banks signed a Miranda advisement form, was read to him on the C. D. Obviously, there's questions whether he truly understood

his rights but the rights were given to him.

The second factor is whether the police immediately ceased the interrogation when the suspect indicated he did not want to answer the questions. In this case we have two sections where we believe Mr. Banks invoked his right to remain silent, starting in the unofficial transcript about page 11 where he said this conversation about the final word, that he wants to go to jail, and there's issue about continue.

We believe when you look at the context of the entire interview when he says continue it is to take him to jail. As Detective Hill said, he wasn't allowed to make any phone calls at the station because of security reasons; they don't know who he's calling or what he's doing. So the only place he can make a phone call is at the county jail.

And Mr. Banks testified he wanted to call his fiancée to get help, his way of getting help. I don't think it constituted invocation of the right to remain silent, the phone call itself or counsel. But when you look at the entire interview the continuance would be taking him to jail and it would make sense.

The third factor -- well, then at the end sort of the first section of the interview when he goes -- Detective Hill asked him if he had anything else to say

and he says no. That is a clear and ambiguous -- I'm sorry, invocation of his right to remain silent.

One of the cases we've cited out of the Fourth Circuit, Tice {verbatim} vs. Johnson, on page 10, from the North Carolina court, state court, and discussing the factual basis for the granting the habeas relief. It appears the Judge evaluated Tice's statement, he decided not to say any more, he found that was a clear and unambiguous request to remain silent.

In analogy in our case, case law, State vs. Kennedy at 333 S.C. 426, there the defendant said well, I think I need a lawyer. And there everyone understood that to mean he wanted a lawyer. The solicitor left the room and while the phrase itself, I think I may need a lawyer, might not be an ambiguous request under Davis vs. United States, 512 U. S. 452, when everyone understands that then it is a clear request.

Here detectives left, and according to Detective Hill he terminated the interview because I guess he just felt like he wasn't getting any further. But the fact when he says, I don't want to say anything else, that's Mr. Banks terminating the interview, and testified that was his way of terminating the interview.

The third factor is whether the police resumed questioning Mr. Banks only after the passage of a

significant period of time. The uncontrary evidence in this case is that 11 minutes passed. That is not a significant period of time.

And in some of the cases that discuss that the courts look at time ranges of an hour to three hour and usually it's in context with maybe a different officer coming in who the defendant may know or has a type of relationship with. And in this case there's nothing in the record showing what happened in that 11 minutes, nothing that said Mr. Banks said, I've changed my mind. I want to talk.

Detective Hill didn't know what he was doing. Detective Hill wasn't even sure what he was doing. He said he could be doing paperwork, watching a video. There's nothing showing that Mr. Banks asked the police to come back in, changed his mind and wanted to talk. There's nothing showing that another officer came by who he knew, said, Oh, I'll talk with you, and didn't like the way he was talking to me with this officer. It's completely silent as to what happened.

And four factors whether the police provided a fresh set of Miranda warnings before the second interrogation, this is probably a close question. They didn't actually give him a fresh set of Miranda warnings but they had asked if he still understood his rights, and

I think the tape, you hear a mumble in the background and I can't say for sure whether it's yes, no, but I'll let the tape speak for itself.

And the fifth factor is whether the second interrogation was restricted to a crime that had been the subject of the earlier interrogation, and in this case the last -- one of the last questions I asked Detective Hill was did this go on the same issues, same incident. He said, Yes.

When you look at Michigan vs. Mosley, Tice vs. Johnson our Supreme Court I think in the -- I think maybe in the Franklin case I handed up, although they let the confession in I think there was more significant passage of time, but they still recognize the five factors I discussed being the ones to look at.

And as the Court said, it's not the bright-line test. When you consider his age, inexperience of police interview it's like being arrested twice, but it's not like he was just taken straight to jail, which might not be uncommon in a drug arrest when you find drugs on somebody. There's no need for an in-depth interrogation.

Lack of experience with them and his testimony about how he understood his rights, what he meant to say, you know, how he wanted the interview to end. I think when you take all of that together it shows he clearly

unambiguously invoked his right to remain silent. The police did not scrupulously honor that. They resumed questioning on the same crime 11 minutes after he said that was his final word, and with that issue I'll rest.

THE COURT: Okay. Yes, sir?

MR. KIDD: I think to start out, I don't think Michigan vs. Mosley is really applicable in this case. In that case it's not really whether or not he invoked his rights. In that case the defendant said in quotes, I don't want to talk about these robberies. That was his clear invocation of his right to cease talking. And then they go into those factors about whether they reinitiate talking to him about a completely separate crime.

Michigan V. Mosley is really not on point. What we are talking about is whether something in an invocation of someone's rights or not, and I think -- you know, I believe it was in the State vs. Moses case which I sent you this morning, which was 390 S.C. 502, which I'm proud to cite since it was -- I believe it was authored by my former Judge Pieper. It says, When an accused has invoked the right to remain silent or invoked the right to counsel as such the suspect must invoke these rights unambiguously. A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that avoids difficulties of proof and provides

And that -- you know, grant it that's some legalese language there, but what that means is that if they say, Kashaun, I'm going to reduce you to strong armed robbery if you tell me you did this, then that is a consequence of the promise and that would be the sort of promise of leniency that would render a statement involuntary.

I think it was clear that Kashaun was read his rights by Officer Hill. He said he couldn't read so Officer Hill read his rights to him. He asked him specifically, at least about some of them, did he understand them, and Kashaun responded that he did and even in his own words told Officer Hill what they meant to him.

I think you get an overall flare throughout the interview that while he might be illiterate to some extent he's an intelligent individual, at least streetwise to some extent --

THE COURT: I agree with you.

MR. KIDD: -- and he knows exactly what's going on. And if he wanted to quit talking to the officers he knew all he had to say was I'm done talking to you and, you know, I want lawyer.

Court's indulgence one moment?

THE COURT: Sure.

MR. KIDD: And once again, still in that Aleksey

case, before law enforcement officers are required to discontinue questioning the suspect must clearly articulate his desire to end the interrogation, and that's just not present here.

THE COURT: Okay. Thank you, sir.

Yes, sir. Anything further?

MR. GRIMES: Briefly, Your Honor. First, we believe, just for ease of reference, on page 11 of our unofficial transcript about 31:35 when detective asked him, Is that your final word?

That's my final word.

I believe that's a clear invocation of his right to remain silent. Given Aleksey that may be debatable.

THE COURT: There's a little bit more to Aleksey than they read to me.

MR. GRIMES: And at the end when he says, Is there anything else you want to say, Mr. Banks said, No. Officers left the room, concluded the interview, and I thing that brings it kind of to the Kennedy case where the defendant there said, I think I may need a lawyer. The solicitor there left the room, understood it. And when you look at the whole picture of everything, totality of the circumstances, there was a clear invocation of his right to remain silent.

THE COURT: Okay. Thank you, sir.

Okay. Significantly in Aleksey, A-l-e-k-s-e-y, Justice Burnette concludes that in the context of the particular interview, That's all I've got to say, was not an unequivocal invocation.

Significantly, he adds; However, even if the statement is interpreted to be an invocation of appellant's right to remain silent it is un controverted that appellant himself reinitiated conversations with the agents after the tape recorder was turned off.

Reinitiation on the part of the criminal defendant, here the appellant in Aleksey, is the keystone in that case. The Court got to have it both ways. You know, they could uphold Judge Cottingham on, That's all I've got say, which multiple, multiple other courts have found is an invocation in other contexts, in some contexts it might not be, but here, even if it wasn't or even if it was, the defendant reinitiated.

Here in the context of this particular interview -- and I agree. He's somewhat street smart. We don't know if that was his wife or his fiancée but he just said right here on the stand, which demonstrates the dangers sometimes of letting defendants talk, Well, she was 28 and I was 13 and that's why I said she was my sister. So he is somewhat street smart.

But here's the problem. He cannot read. He's 17

years old. He's repeatedly asking to talk to the one person he says has ever been there for him. I don't know if it's his fiancée, I don't know if it's his sister. He may have thought based on his understanding that you have anything else you want to say, No, I'm concluding this interview, meant that they were following what they explained to him on that Miranda waiver sheet.

And I will say it again. Sergeant Hill did a great job going through the sheet with him. He did a great job reading to him the bottom part and having him initial it, but when they stopped at 12:14 and he said, I'm concluding this interview, he needed to follow Mosley when they went back to talk to him in the context of this particular case with an undereducated fellow under all the totality of circumstances that are here.

So the statement is out, based on the preponderance of the evidence and based on the totality of the circumstances, based on what could be found to be an unequivocal termination at the interview point, No, that even if that in and of itself didn't terminate it when the officer said, I'm concluding this interview, he needed to do more when he went back, and he probably needed to wait more than 11 minutes under Mosley to do it. So you all did a great job. Thank you so much for all the law that you sent me all night long.

Trial Counsel in Petitioner Case was a seasoned Criminal defense attorney. He knew how to Push an issue to obtain Correct action. Therefore, trial Counsel was ineffective for not Objecting and instilling this Concept into the mind of Judge. The Judge's remarks in Petitioner Case were Prejudicial Particularly since they were Provided at the beginning of the trial. The remark gave the Jurors the mindset form the beginning that they were to Obtain the truth. The role of the Jury was to determine if the State Proved beyond a reasonable doubt that Petitioner was guilty.

Factor-(4): under issue-(4) the first two factor's is the mindset of the Jury throughout the trial. Do to trial Counsel being under diminshed Capacity at time of trial. Trial Cousel failed to object when the State admitted Petitioner statement to the Jury through Witness testimony. Trial Counsel was ineffective for not objecting to the statement which would have Preserved the issue for the Court of APPeals (see Trial transcript Page 394, line 11-24) You will read the ruling from the Court of APPeals on Page 24.

Factor-(5): under issue-(4) the first two factor's is the mindset of the Jury throughout the trial. The State had the Surveillance Video, which was showed the robbery taking Place, from the EXXon gas station admitted into evidence. The Suspect was a maskman, Detective Hill Compare the Petitioner to a maskman which is suggetive to the Jury which Creates a misidentification. Trial Counsel was ineffective for not objecting to Suggetive misidentification. (see Trial transcipt Page 405, line 5-16)

Did the trial Court err in ruling Petitioner Confession was admissible given under the totaliy of the Circumstances Petitioner Confession was not freey and voluntarily tendered and where there was evidence Petitioner invoked his right to terminate the Custodial interrogation.

Issue Presented-(5)

Detective Hill advised Petitioner of his Miranda rights. Tr. 60, ll. 24-Tr. 61, ll. 2. During the initial interview, Petitioner was seventeen year old and had completed the tenth grade. Tr. 62, ll. 6-8. Petitioner told Hill he could not read and he had a learning disability.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kashaun Banks, Appellant.

Appellate Case No. 2013-001036

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2014-UP-479
Heard December 11, 2014 – Filed December 23, 2014

AFFIRMED

Blakely Lynn Molitor, of Collins & Lacy, PC, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General David A. Spencer, and Assistant Attorney General Kristin M. Simons, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Kashaun Banks appeals his conviction for armed robbery, arguing the trial court erred in finding his confession was admissible evidence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Moses*, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010) ("[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." (alteration in original) (quoting *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)) (internal quotation marks omitted)); *State v. Smith*, 337 S.C 27, 32, 522 S.E.2d 598, 600 (1999) (holding unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review).

AFFIRMED.

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

Tr. at 62, ll. 9-11; Tr. 89, ll. 9-11. Petitioner most recent Individualized Education Program indicated he read on a kindergarten level and his IQ level placed him in the mildly mentally disabled range. Tr. 102, ll. 1-4; Tr. 103, ll. 13-16. Hill read each of Petitioner rights to him and had him initial after each one. Tr. 62, ll. 16-25. Detective Hill then began to question Petitioner. Tr. 65, ll. 3-4. Shortly after questioning began, Petitioner requested to make a phone call to his sister to obtain help. Tr. 118, ll. 3-8. Hill refused to allow the phone call. Tr. 118, ll. 23 - Tr. 119, ll. 4. Petitioner interpreted the refusal as an indication he was required to keep answering Hill's questions. Tr. 119, ll. 2-4. At no point during Petitioner request for a phone call was the interview stopped. Tr. 119, ll. 5-7. During questioning, Petitioner indicated he had plan to enter the military. Tr. 65, ll. 22-25. Hill responded by telling Petitioner it was unlikely he would be able to enter the military with a robbery conviction and encouraged Petitioner to "come clean." Tr. 68, ll. 1-7. Petitioner denied robbing the Exxon and told Hill that was his "final word." Tr. 68, ll. 22-25. Petitioner then asked if they could continue, meaning he was ready to finish the interview and proceed to jail. Tr. 119, ll. 19-24. Hill asked if Petitioner had anything else to say, to which he responded "no." Tr. 70, ll. 8-13. The initial interview concluded at 12:14 am. Tr. 70, ll. 22-24. Hill returned to the interview room at 12:25 am, and again advised Petitioner of his Miranda rights. Tr. 71, ll. 2-6; Tr. 81, ll. 14-16. Hill then asked Petitioner if he wanted to change his story and told him it would not look good if he didn't tell the truth. Tr. 81, ll. 17-19; Tr. 87, ll. 23-25. Hill testified he proceeded this way because it was his job to get Petitioner to confess. Tr. 88, ll. 4-12. During the second portion of the interview, Petitioner confessed to robbing the Exxon as he felt it was what Hill "wanted to hear," and confessing would end the interview process. Tr. 75, ll. 10-16; Tr. 126, ll. 6-8. Prior to trial, the judge held a Jackson V. Denno hearing to determine the admissibility of Petitioner confession. Tr. 58-142. Petitioner, relying on State V. Kennedy, 333. S.C. 426, 510 S.E.2d 714 (1998), argued the confession should be suppressed because it was the result of a police initiated interrogation conducted after Petitioner unequivocally invoked his right to remain silent. Tr. 94, ll. 2-24. The State argued, pursuant to State V. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), Petitioner did not invoke his right to remain silent because statement that he was done talking was ambiguous and not an unequivocal of his right to discontinue questioning. Tr. 96, ll. 13 - Tr. 97, ll. 25. Petitioner also argued, under State V. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987), Hill's statement that Petitioner

would not be able to join the military unless he confessed amounted to a promise of leniency. Tr. 134, ll. 21 - Tr. 135, ll. 1. The State argued Hill's encouraging Petitioner to tell the truth did not render his confession involuntary. Tr. 137, ll. 5-10. The judge found Petitioner statement in response to Lieutenant Hill was not an unequivocal invocation of his right to discontinue questioning and that Hill's statement regarding Petitioner ability to enter the military did not equate to a promise of leniency. Tr. 141, ll. 10 - Tr. 142, ll. 1. The judge erred. The trial judge determins the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977). It is the prosecution's duty to prove a confession was voluntarily made. State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977). The burden is also on the is State to prove by a preponderance of the evidence that a defendant's rights were voluntarily waived. State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988). A determination of whether a confession was voluntarily given requires an examination of the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Coercion is determined from the viewpoint of the suspect. State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007). The court must determine if the defendant's will was overborne. See Dickerson v. united states, 530 U.S. 428, 433 (2000). Appellate entities in South Carolina have recognized that appropriate factors to Consider in the totality-of-circumstances analysis include: background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency." State v. Parker, 381 S.C. 68, 87, 671 S.E.2d 619. 629 (2008). The Supreme Court of the United States has held the Miranda opinion requires a person not only be notified of their rights under Miranda, but also any exercise of those rights be scrupulously honored. Michigan v. Mosley, 423 U.S. 96, 103 (1975). Specifically, the Supreme Court has found the critical safeguard regarding Miranda warnings is a person's right to cut off questioning. Id. The purpose of requiring law enforcement to respect a person's exercise of that right is to counteract the coercive pressures of the custodial setting. Id. at 104. "The admissibility of statements obtained after the person in custody has decided to remain silent depends on whether his 'right to cut off questioning' was 'scrupulously honored. Id. Several Federal Courts have discussed the requirement to scrupulously honor an individual's

right to cut off questioning as it applies to the time period between questioning sessions. For example, the United States District Court for the Southern District of Georgia held a defendant's rights were not scrupulously honored where the time period between when questioning ceased and then resumed was a mere fifteen minutes. U.S. V. Morris, 491 F. Supp. 226, 231 (S.D. Ga. 1980). In U.S. V. Morris, the defendant was read Miranda warnings and indicated he did not wish to talk. Id. Questioning immediately ceased but was resumed approximately fifteen minutes later, after the defendant was again informed of his rights. Id. The court noted the factors to be considered when determining whether the defendant's rights were honored were passage of a substantial period of time, subsequent questioning on a distinct charge, and the discovery of new and different facts. Id. Similarly, the United States District court for the District of Kansas has held the passage of twenty minutes between interrogations, absent any other occurrences, is not sufficient to find a defendant's rights were scrupulously honored. U.S. V. Stewart, 51 F. Supp. 2d 1136, 1145 (D. Kan. 1999). In U.S. V. Stewart, the defendant received Miranda warnings and was questioned for approximately ten minutes before he indicated he no longer wanted to talk to the investigator. Id. at 1142. Approximately twenty minutes later, the investigator returned to the interview room and conducted a second interrogation. Id. In determining the defendant's right to terminate questioning was not scrupulously honored, the Court noted the defendant did not initiate any conversation with the investigator after invoking his right to remain silent, nor had anything occurred or otherwise developed during the twenty minute break which would justify the second interrogation. Id. at 1145. Relying on the factors discussed in State v. Parker, the facts in the instant case reveal Petitioner confession was not freely and voluntarily given under the totality of the circumstances. At the time of his arrest, Petitioner was a seventeen year old minor with a kindergarten reading level and a documented learning disability. Petitioner had only completed through the tenth grade and his IQ placed him in the category "mildly, mentally disabled." Additionally, Lieutenant Hill admitted he specifically told Petitioner he would not be able to join the military if he did not confess to the armed robbery. He explained he proceed in that fashion because it was his job to get a suspect to confess. This clearly amounts to police misrepresentation. Furthermore, Petitioner mother was not present at the interrogation and Petitioner requests

to make a Phone call to contact a family member were ignored. Petitioner also testified he only told Hill he committed the robbery because he felt it was what Hill "wanted to hear," and was the only way he could end the interrogation. The coercive nature and undue Pressure Placed on Petitioner during the interrogation, combined with Hill's misrepresentations about Petitioner ability to enter in the military and Petitioner age and mental disability, clearly indicate Petitionr confession was neither voluntary nor freely given, and was therefore, not admissible. Furthermore, it is evident Petitioner invocation of his right to terminate questioning was not scrupulously honored. Petitioner stated he no longer wanted to talk to Hill during the first investigation and declared he had given his "final word." While Hill did stop the interrogation initially, he returned to the interview room a mere eleven minutes Later and resumed questioning. Under Morris and Stewart, this is simply not enough time. During the eleven minute break, Petitioner did not request to resume the interview. Moreover, there were no new developments or factual discoveries during the eleven minute break that would have justified the resumption of questioning. Based on the facts, it is abundantly clear Petitioner invocation of his right to terminate the interview was not scrupulously honored, and thus, his confession was not admissible. The State may argue Petitioner did not invoke his right to remain silent, and thus waived his rights based on State v. Alehsey, 343 S.C. 20, 538 S.E.2d 248 (2000); however this case is clearly distinguishable. In Alehsey, the Supreme Court held the defendant's statement, "That's all I've got to say," was not an unequivocal invocation of his right to discontinue questioning. Id. at 31, 538 S.E.2d at 253-54. In Alehsey, the defendant reiniated communication with the police after he initially stated he was done talking. Id. at 31, 538 S.E.2d at 253 (emphasis added). The court noted the suspect, not the police, must control the time, duration and subject matter of an interrogation. Id. at 31, 538 S.E.2d at 254. In ruling the confession was admissible, the Court relied heavily on the fact the defendant himself initiated farther communication with law enforcement after his initial interrogation. Id. "Law enforcement officers may certainly speak with a suspect who reinitiates communication subsequent to an invocation of rights." Id. Petitioner case is distinguished from Alehsey in that the defendant in that case requested to speak to to law enforcement on his own accord. Had the defendant in Alehsey not requested to

Speak with the officer again, the interrogation would have been over Completely. Conversely, in this case, it was Hill who resumed the interrogation after Petitioner stated he had said his "final word." Unlike the defendant in Aleksey, Petitioner did not reinitiate communication with Lieutenant Hill after the first portion of the interview was completed. Instead, Hill returned to the interview room after a brief break and resumed the interview even though Petitioner had previous given his "final word." Under the totality of the circumstances, the State failed to prove Petitioner confession was freely and voluntarily tendered, and that Petitioner invocation of his right to termination questioning was scrupulously honored. Petitioner Should Consequently be granted a new trial.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
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S.C. SUPREME COURT

Certiorari to Charleston County
Honorable Michael G. Nettles, Circuit Court Judge

Kashaun Banks,

V.

PETITIONER

State of South Carolina,

RESPONDENT

CERTIFICATE OF SERVICE

This brief have been served upon the Supreme Court of South Carolina, Post Office box 11330 Columbia, South Carolina 29211. This brief also have been served upon Megan Harrigan Jameson, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201.

SWORN to and subscribed before me this
18th day of September, 2018
(L.S.)
Notary Public for South Carolina

My Commission Expires: 5-18-26

Kashaun Banks

Petitioner

CONCLUSION

Based on the above, Certiorari should be granted, and Petitioner's Convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,

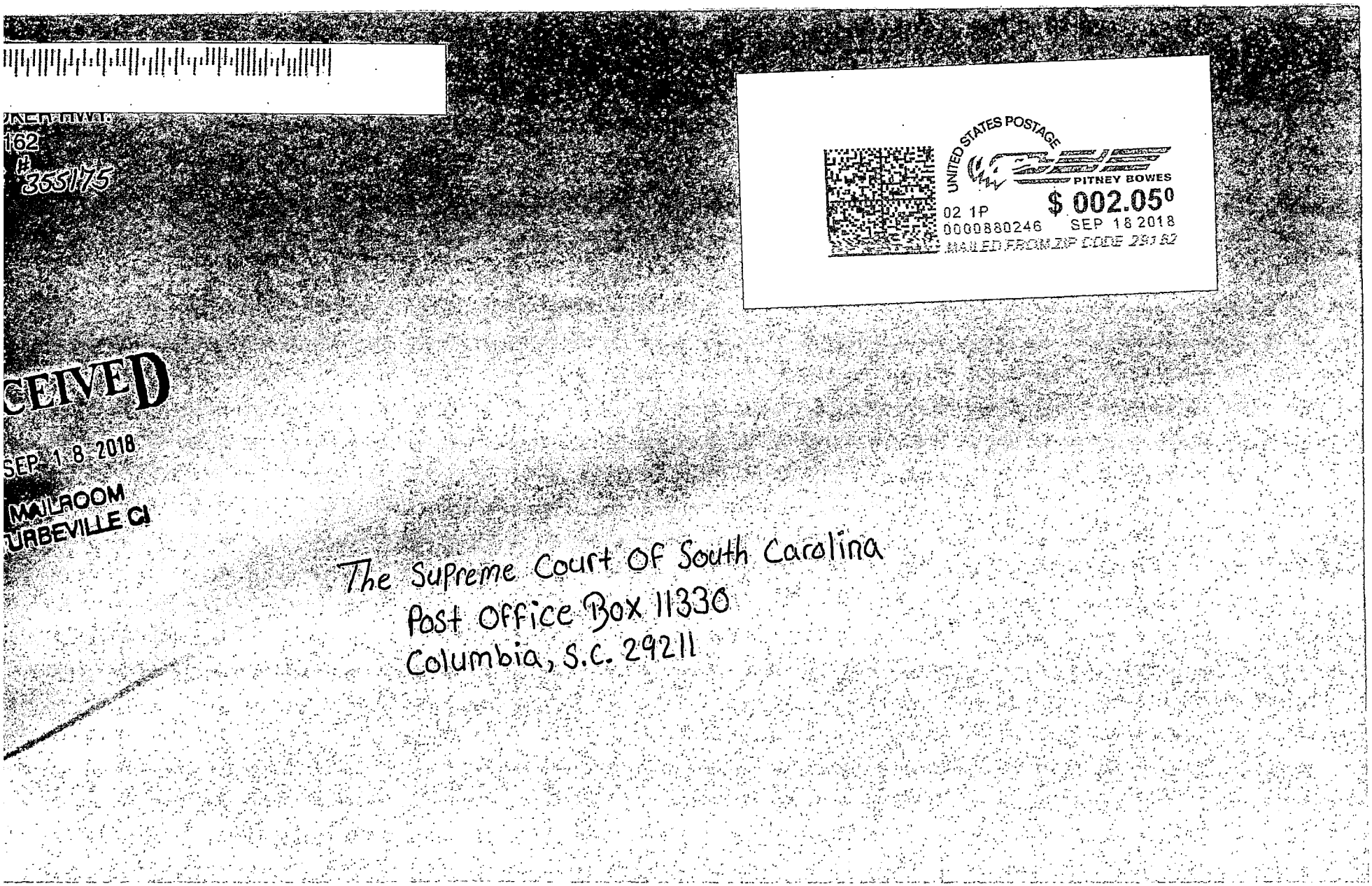
Khashaun S.C. Banks

Petitioner

SWORN to and subscribed before me this 18th day of September 20 18 (L.S.)

Notary Public for South Carolina

My Commission Expires: 5-18-26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