

STATE OF SOUTH CAROLINA
IN THE 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

APPENDIX

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1 am the sole judge of the law in this case. Do not think
2 that -- if you have any idea as to what the law is or
3 what the law should be and it does not agree with what
4 I'm about to tell you, you must abandon your own ideas
5 because you are sworn to apply the law and accept the
6 law and apply the law exactly as I state it to you now.

7 In every case tried in this Court before a
8 jury, the jury becomes the sole and exclusive judges of
9 the facts. A trial judge may not make any comment on or
10 statement to the jury about the facts in this case. You
11 are the sole judges of the facts in this case. Do not
12 think that by anything that I have said or done
13 throughout the progress of this trial that I have any
14 opinion about the facts in this case. The law does not
15 allow me to have an opinion about the facts in this
16 case. This is a matter solely for you to determine.

17 As jurors, it is your duty to determine the
18 effect, value, and weight of the evidence presented
19 during this trial.

20 The Indictment in this case charges Mr. Banks
21 with armed robbery. I remind you the fact that
22 Mr. Banks was arrested, charged, and indicted in this
23 case is not evidence and cannot be considered by you as
24 evidence of guilt in this case, nor does it create any
25 presumption or inference of guilt. An indictment is

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1 simply the formal written document which contains the
2 charge made against the Defendant. It is the formal
3 document by which this case is brought into this Court.

4 Just as the indictment in this case is not
5 evidence, any terminologies or labels used to refer to
6 the individuals involved in this case cannot be
7 considered as evidence. For example, the use of the
8 words "victim" or "defendant" are merely formal labels
9 and may not be considered by you as evidence.

10 Mr. Banks has pled not guilty to this
11 Indictment. A person charged with committing a criminal
12 offense in South Carolina is never required to prove
13 himself innocent. I charge you it is an important rule
14 of law that the defendant in a criminal trial, no matter
15 what the seriousness of the charge may be, will always
16 be presumed innocent of the crime for which the
17 indictment was issued, unless guilt has been proven by
18 evidence satisfying you of that guilt beyond a
19 reasonable doubt.

20 This presumption of innocence does not end when
21 you begin your deliberations, but it accompanies the
22 Defendant throughout the trial until you've reached your
23 verdict or a verdict of guilt based upon evidence
24 satisfying you of that guilt beyond a reasonable doubt.
25 The presumption of innocence is not mere legal theory.

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1 It is not just a legal phrase. It is a substantial
2 right to which every defendant is entitled unless you,
3 the jury, are satisfied from the evidence of the
4 Defendant's guilt beyond a reasonable doubt.

5 The State has the burden of proving Mr. Banks
6 guilty beyond a reasonable doubt. Some of you may have
7 served as jurors before in civil cases where you were
8 told it's only necessary to prove that a fact is more
9 likely true than not true such as by a greater weight or
10 a preponderance of the evidence. In criminal cases, the
11 State's burden must be more powerful than that. It must
12 be beyond a reasonable doubt.

13 Proof beyond a reasonable doubt is proof that
14 leaves you firmly convinced of the Defendant's guilt.
15 There are very few things in this world that we do know
16 with absolute certainty, and in criminal cases, the law
17 does not require proof that overcomes every possible
18 doubt. If, based upon your consideration of the
19 evidence, you are firmly convinced that Mr. Banks is
20 guilty of the crime charged, you must find him guilty.
21 If, on the other hand, you figure it is a real
22 possibility that Mr. Banks is not guilty, you must give
23 him the benefit of the doubt and find him not guilty.

24 There are two types of evidence that are
25 generally presented during the trial: direct evidence

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1 and circumstantial evidence. Direct evidence is the
2 testimony of a person who claims to have actual
3 knowledge of the facts, such as an eyewitness. It is
4 evidence which immediately establishes the main fact to
5 be proved. Circumstantial evidence is proof of a chain
6 of facts and circumstances indicating the existence of a
7 fact. It is evidence which immediately establishes
8 collateral facts from which the main facts may be
9 inferred. Circumstantial evidence is based on inference
10 and not on personal knowledge or observation.

11 You should weigh all of the evidence in this
12 case, and after weighing all of the evidence in this
13 case, if you are not convinced of the guilt of Mr. Banks
14 beyond a reasonable doubt, you must find him not guilty.

15 Necessarily, you must determine the credibility
16 of the witnesses who have testified in this case.
17 Credibility simply means believability. It becomes your
18 duty as jurors to analyze the evidence and evaluate the
19 evidence and determine which evidence convinces you of
20 its truth. In determining the believability of the
21 witnesses who have testified in this case, you have the
22 right to believe one witness over several witnesses or
23 several witnesses over one witness. You may believe
24 part of the testimony of a witness and reject the
25 remaining part of the testimony of that same witness.

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1 You have the right to consider what the witness has
2 exhibited to you, any interest, bias, prejudice, or
3 other motive in this case, and you may also consider the
4 appearance and the manner of a witness while on the
5 witness stand.

6 The rules of evidence ordinarily do not permit
7 witnesses to testify to opinions or to conclusions. An
8 exception to this rule exists for witnesses we call
9 expert witnesses. A witness who, by education and
10 experience, has become expert in some art, science,
11 profession, or calling may state an opinion as to the
12 relevant and material matter in which the witness claims
13 to be an expert and may also state the reasons for the
14 opinion. You should consider any expert opinion
15 received in evidence in this case and, like any other
16 evidence, give it the weight you think it deserves. If
17 you decide that the opinion of an expert witness is not
18 based on sufficient education and experience or if you
19 conclude the reasons given by the expert in support of
20 the opinion are not sound or that the opinion is
21 outweighed by other evidence, you may disregard the
22 opinion entirely. An expert witness's testimony is to
23 be given no greater weight than that of other witnesses
24 simply because the witness is an expert. Further, you
25 are not required to accept an expert's opinion even

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1 though it is not contradicted.

2 I instruct you and emphasize that the fact that
3 Mr. Banks did not testify is not a factor to be
4 considered by you in any way in your deliberations and
5 in your consideration on the question of guilt of
6 Mr. Banks. It must not be considered by you in any
7 manner whatsoever. A defendant has the constitutional
8 right to remain silent, and the assertion of this right
9 must not be considered by you in your deliberations. I
10 repeat, under your oath, you are to draw no conclusion
11 whatsoever from the fact that the Defendant in this case
12 did not testify.

13 It is part of your responsibility, Madam
14 Foreperson, that the fact that Mr. Banks did not testify
15 should not be discussed in the jury room at all.

16 Mr. Banks is not required to prove his
17 innocence; the burden of proof remains on the State
18 to prove guilt beyond a reasonable doubt.

19 Mere presence at the scene is not sufficient to
20 prove someone guilty of a crime. A defendant's presence
21 where a crime is being committed does not make a
22 defendant an accomplice or an aider and abettor of the
23 person committing the crime. The burden is on the State
24 to prove every element of the crime charged. If you
25 find, after reviewing all of the evidence, that the

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1 State has proved that Mr. Banks was only present at the
2 scene of the crime and that they have not proved beyond
3 a reasonable doubt any other participation in the crime,
4 then you must find Mr. Banks not guilty. The law is
5 that proof of one at the scene of the crime is not
6 sufficient to find someone guilty.

7 In order to establish credible liability,
8 criminal intent is necessary. For example, the mental
9 state required to be proven by the State for a
10 particular crime might be purpose, intent, knowledge,
11 recklessness, or criminal negligence. Criminal intent
12 must be proven by the State beyond a reasonable doubt.
13 It is always a matter that must be determined by the
14 jury from the circumstances surrounding the situation.
15 There is no way to prove intent to a mathematical
16 certainty because there is no way to tell with exact
17 certainty what a person had in mind. The law says that
18 criminal intent may be inferred from the circumstances
19 shown to have existed. This is how you make a
20 determination of whether or not the element requiring
21 intent was present.

22 It is not necessary to establish intent by
23 direct and positive evidence, but intent may be
24 established by inference in the same way as any other
25 fact by taking into consideration all of the acts of the

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1 parties and all the facts and circumstances of the case.

2 Criminal intent is a mental state. It is a
3 conscious wrongdoing. It is up to you to determine what
4 the Defendant intended to do based upon the
5 circumstances shown to have existed. Criminal intent
6 can arise from action or a failure to act. It may arise
7 from negligence, recklessness, or an indifference to
8 duty or to consequences. It is considered by the law to
9 be the equivalent of criminal intent.

10 Mr. Banks is charged with armed robbery. In
11 order to prove this offense, the State must first prove
12 beyond a reasonable doubt that Mr. Banks took property
13 from the person or presence of another person. Property
14 is in the presence of a person if it is within the
15 person's reach, inspection, observation, or control so
16 that the person could, if not overcome with violence or
17 prevented by fear, keep possession of the property. The
18 State must also prove beyond a reasonable doubt that
19 Mr. Banks carried the property away intending to
20 permanently deprive the owner of the property and to
21 keep the property for his own use. The slightest
22 removal of the property or the complete possession of
23 the property, even for an instant, by Mr. Banks is
24 sufficient to show a taking and carrying away of the
25 property. The taking and carrying away of the property

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1 must have been done with violence or by putting the
2 owner of the property in fear of violence.

3 Finally, the State must prove beyond a
4 reasonable doubt that Mr. Banks was armed with a deadly
5 weapon during the robbery or while alleging, either by
6 action or words, he was armed while using a
7 representation of a deadly weapon or any object which a
8 person present during the commission of a robbery
9 reasonably believed to be a deadly weapon. A deadly
10 weapon is any article, instrument, or substance which is
11 likely to cause death or great bodily harm. Whether an
12 instrument has been used as a deadly weapon depends upon
13 the facts and circumstances of each case.

14 Ladies and gentlemen, I'm now going to go over
15 the verdict form with you. There is absolutely no
16 significance in the way one -- the way -- the order that
17 I read these. It's simply something had to go on the
18 paper first.

19 In the Court of General Sessions for the Ninth
20 Judicial Circuit, 2011-GS-10-8069, State of South
21 Carolina versus Kashaun Banks, Defendant, verdict:

22 Number one, we, the jury, find Kashaun Banks
23 not guilty;

24 Or, we, the jury, find Kashaun Banks guilty of
25 armed robbery.

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1 Madam Foreperson, it is -- must be a unanimous
2 decision, meaning all 12 of you must agree. After you
3 have reached the unanimous decision, you will sign and
4 date the verdict form, then alert the bailiff by
5 knocking on the door that you have come to a verdict.

6 Is there any member of the first 12 that is
7 unable, for whatever reason, to begin your deliberations
8 at this time? If so, please signify by raising your
9 right hand.

10 All 12 jurors have indicated that they are
11 prepared and able to go forward with deliberations.

12 Ladies and gentlemen, this is the last time
13 that I will say this to you. Do not begin your
14 deliberations; do not discuss this case amongst
15 yourselves. We're gathering the verdict form and all
16 the evidence which will go back to you. Once that has
17 been accomplished, the bailiff will alert you when you
18 may begin your deliberations.

19 To my two alternates, I'm going to keep you
20 until deliberations have begun. But the same
21 admonishments to you. Do not begin your deliberations;
22 do not discuss this case amongst yourselves. I will
23 come and release you once the first 12 have begun their
24 deliberations.

25 Please rise for the jury. Please take all your

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1 belongings with you.

2 (The jury is escorted from courtroom
3 at 3:43 p.m.)

4 THE COURT: And I need you two to go on out.
5 They're going to put you in a separate room.

6 Thank you.

7 (The juror alternates are escorted from the
8 courtroom.)

9 THE COURT: Thank you. Be seated.

10 Any objection, corrections, additions to the
11 charge just read? From the State?

12 MR. KIDD: No, ma'am.

13 THE COURT: From the Defendant?

14 MR. GRIMES: Just for purpose of the record, we
15 renew our previous positions on strong-armed robbery and
16 circumstantial evidence.

17 THE COURT: And, once again, I think this was
18 clearly articulated, and I'm hoping on my -- my
19 correction and clarification. To me, the issue is not
20 whether or not it was a -- a weapon; it was whether or
21 not he had the weapon. There was no testimony that has
22 been presented that the individual came in had anything
23 other than what was believed by the two clerks at the
24 Exxon to be a weapon.

25 Anything further?

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1 MR. GRIMES: Nothing from the Defense, your
2 Honor.

3 THE COURT: All right.

4 All right. Mr. Banks, we're awaiting the
5 verdict; so they will put you in the holding cell. And
6 if there should be any questions or anything, we will
7 bring you back out.

8 Thank you.

9 THE DEFENDANT: Yes, ma'am.

10 (The Defendant is escorted from the courtroom
11 at 3:45 p.m.)

12 THE COURT: Check this verdict form, please.

13 (The verdict form is shown to the attorneys.)

14 MR. GRIMES: The verdict form looks fine, your
15 Honor.

16 THE COURT: Thank you.

17 (The verdict form and the admitted exhibits
18 were given to the jury at 3:59 p.m.)

19 (Court in recess.)

20 (The Judge enters the courtroom at 4:45 p.m.)

21 (The Defendant is present in the courtroom with
22 his counsel.)

23 THE COURT: The jurors want to view the video;
24 so we are going to view it in here.

25 MR. KIDD: You want me to stop or fast-forward

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1 and have the foreperson to tell me --

2 THE COURT: All right. Thank you.

3 MR. KIDD: Just watch it through. I'll do
4 whatever.

5 And there's actually another camera angle that
6 I didn't show them.

7 THE COURT: If you didn't show it before,
8 then --

9 MR. KIDD: Well, the disc is what's in
10 evidence. I mean, I didn't show it. I don't care if
11 they see it or not.

12 I just wanted you to know that --

13 I mean, in my opinion, it's in evidence, even
14 though I -- I didn't show it to -- it's been admitted.

15 THE COURT: Did you know there was another
16 camera angle on that?

17 MR. GRIMES: Yes, ma'am.

18 THE COURT: All right. Thank you.

19 (The jury is escorted into the courtroom
20 at 4:48 p.m.)

21 THE COURT: Thank you. Be seated.

22 Madam foreperson, I understand that you wish to
23 view the video. We're going to play the video for you,
24 and when you have seen what you -- what you're wanting
25 to see --

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1 THE FOREPERSON: Yes, your Honor.

2 THE COURT: -- if you will, just let me know.

3 And we can make the arrangements to go slower, faster,
4 but I need for you to tell me what you need to see
5 without specifically telling me what you need to
6 see. We're going to play it through one time, and then
7 you -- I guess you know what you're looking for --

8 THE FOREPERSON: Yes, your Honor.

9 THE COURT: -- on behalf of the panel. And so
10 let me know what else you need.

11 Mr. Kidd?

12 (The video is played.)

13 THE COURT: One more time.

14 JUROR: Can we move a little closer?

15 THE COURT: How many of you need to get closer?

16 (Three jurors come closer to the screen.)

17 JUROR: Can I sit here, and come around and
18 look?

19 THE COURT: Any objection?

20 MR. GRIMES: (Moves head from side to side.)

21 THE COURT: You may sit in the chair.

22 (The video is played again.)

23 THE COURT: You may sit in the chair, ma'am.

24 (The video is played again.)

25 THE COURT: All right. Madam Foreperson?

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1 THE FOREPERSON: Thank you, your Honor.
2 THE COURT: Good?
3 THE FOREPERSON: Thank you, your Honor.
4 THE COURT: All right. Please go and continue
5 your deliberations.
6 (The jury is escorted out of the courtroom
7 at 4:52 p.m.)
8 THE COURT: Thank you. Be seated.
9 We're at ease.
10 (Court is in recess; 4:52 p.m.)
11 (The Judge resumes the bench at 5:24 p.m.)
12 (The Defendant is present in the courtroom with
13 his counsel.)
14 (Jury Note Number 1 is marked as Court's
15 Exhibit Number 3.)
16 THE COURT: All rise.
17 (The jury is escorted into the courtroom
18 at 5:25 p.m.)
19 THE COURT: Mr. Kidd, is there, like, a title
20 page on this?
21 Please be seated.
22 MR. KIDD: There is a -- there's that.
23 THE COURT: All right.
24 I understand you want to view it again. View
25 the video.

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1 THE FOREPERSON: I'm sorry. Yes, your Honor.

2 THE COURT: And then you are going to tell us
3 when to pause it?

4 THE FOREPERSON: If that would be okay, yes, we
5 would like to do that.

6 THE COURT: It is perfectly okay. And my
7 understanding is that there are two different angles.

8 THE FOREPERSON: Oh, okay.

9 THE COURT: All right. So we will play this
10 angle, let us know when we should pause; and then if you
11 so wish, we could play the other angle.

12 MR. KIDD: I don't want to speak out of turn,
13 Judge. There's also a zoom function.

14 THE COURT: Zoom function on all of these?

15 MR. KIDD: Correct.

16 THE COURT: All right. Thank you.

17 I need you to -- I know it's very awkward and
18 archaic, but you're going to have to deal with the
19 foreperson. She is the spokesperson.

20 Mr. Kidd.

21 THE FOREPERSON: So we may go up to the front?

22 THE COURT: I'm sorry?

23 THE FOREPERSON: May we go up closer to the
24 front so we can see?

25 THE COURT: Yes.

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1 THE FOREPERSON: May we do that now?
 2 THE COURT: Yes.
 3 (Four jurors approach the monitor.)
 4 (State's Exhibit Number 2 is played.)
 5 THE FOREPERSON: Stop it now.
 6 THE JUROR: Can you go backwards a little bit?
 7 THE FOREPERSON: Can you go backwards a little
 8 bit?
 9 (State's Exhibit Number 2 is played.)
 10 THE FOREPERSON: Stop it there.
 11 (Respite.)
 12 THE FOREPERSON: Can you zoom it a little bit?
 13 (Mr. Kidd complies.)
 14 THE FOREPERSON: Thank you.
 15 (Respite.)
 16 THE FOREPERSON: Your Honor, may we look at the
 17 other angle?
 18 THE COURT: Yes.
 19 (Respite.)
 20 THE COURT: Mr. Kidd?
 21 MR. KIDD: It's uploading.
 22 THE COURT: Okay. Thank you.
 23 (Respite.)
 24 (State's Exhibit Number 2 is played.)
 25 THE FOREPERSON: Stop. And could you zoom it,

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1 please?
2 (Respite.)
3 THE FOREPERSON: Could we go back a little bit?
4 Closer to the door.
5 Can you go back to where he is coming into the
6 door? I'm sorry. I wasn't clear.
7 (Respite.)
8 THE FOREPERSON: That's great.
9 And can you try to zoom. Glad you're a tech
10 person.
11 (Respite.)
12 THE FOREPERSON: Is it possible to sharpen it
13 up any?
14 MR. KIDD: (Moves head from side to side.)
15 THE FOREPERSON: We could ask.
16 (Respite.)
17 THE FOREPERSON: All right.
18 You good?
19 Thank you, your Honor.
20 THE COURT: All right. Do you need any other
21 video shown to you?
22 THE FOREPERSON: Anything else?
23 No, thank you, your Honor.
24 THE COURT: Please go and continue your
25 deliberations, ladies and gentlemen.

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1 Would you please, Madam Foreperson, inquire as
2 to whether you wish to continue your deliberations for
3 the evening or come back in the morning? If you will
4 just send a note.

5 THE FOREPERSON: Yes.

6 THE COURT: Thank you.

7 (The jury is escorted from the courtroom
8 at 5:32 p.m.)

9 THE COURT: Thank you. Be seated.

10 We're waiting to see if they send a note.
11 We'll be at ease.

12 (The Judge steps off the bench at 5:34 p.m.,
13 and then resumes the bench at 5:38 p.m.)

14 THE COURT: All right. They want to come back
15 tomorrow. I'm just going to bring them in. Thank you.

16 (The jury is escorted into the courtroom
17 at 5:38 p.m.)

18 (Jury Note Number 2 is marked as Court's
19 Exhibit Number 4.)

20 THE COURT: Thank you. Please be seated.

21 Ladies and gentlemen, I understand that you
22 wish to come back in the morning to continue your
23 deliberations; is that correct?

24 THE FOREPERSON: Yes, your Honor.

25 THE COURT: Thank you.

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1 Ladies and gentlemen, it is absolutely vital
2 that you understand and follow the Court's instructions.
3 You may not read, watch, listen to any news accounts
4 regarding this case should there be any. You may not
5 have any independent discussions or do any independent
6 investigations regarding this matter. You may not go to
7 the scene where any of the alleged events are to have
8 taken place. You may not consider any issue in this
9 case until all 12 of you are back in the jury room.
10 Does every member of the jury understand my
11 instructions?

12 All right. All 12 jurors have nodded that they
13 are in agreement and understand.

14 Please be back in your jury room at 9:00 a.m.
15 We're going to take back -- for the evening, we will
16 lock up all of the evidence. Once all 12 of you are
17 back in the jury room, then we will bring the evidence
18 back to you. You may not begin deliberations until
19 all 12 of you are there. Do you understand that, Madam
20 Foreperson?

21 THE FOREPERSON: Yes, your Honor.

22 THE COURT: Please have a wonderful evening;
23 get some rest. See you back at 9:00 a.m. Thank you.

24 Please rise for the jury.

25 (The jury is escorted from the courtroom

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1 at 5:40 p.m.)

2 THE COURT: Thank you. Be seated. Anything
3 further regarding this case? Mr. Kidd?

4 MR. KIDD: No, ma'am.

5 THE COURT: Mr. Grimes?

6 MR. GRIMES: No, ma'am.

7 THE COURT: All right. Thank you.

8 MR. GRIMES: Thank you, your Honor.

9 THE COURT: See you in the morning, Mr. Banks.
10 I'm just going to have the bailiff give them
11 the evidence, so I'm not going to bring them in once
12 all 12 of them of here.

13 To my alternates, have a -- Ms. Sumpter,
14 Ms. Howieson, have a wonderful evening. You are free to
15 go.

16 THE ALT. JURORS: Thank you.

17 THE COURT: Thank you. You are welcome to come
18 back tomorrow.

19 THE ALT. JURORS: Thanks.

20 THE COURT: All right. Thank you for your
21 service.

22 MR. KIDD: I just got an E-mail from
23 Brian Alfaro.

24 THE COURT: All right. This is in reference
25 to -- we're done on this case; correct?

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1 MR. KIDD: Correct.

2 THE COURT: All right. We are off the record
3 on this matter. Thank you.

4 (The jury trial recessed at 5:41 p.m. on
5 April 24, 2013, to reconvene tomorrow, April 25, 2013, at
6 9:00 a.m.)

7 (End of Volume III of IV.)

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Official Court Reporter for the State of South Carolina

State versus Kashaun Banks
April 24, 2013
Jury Trial, Volume III of IV

REPORTER'S CERTIFICATE

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF BERKELEY)

I, **ROLAYNE M. VOLPE**, Certified Court Reporter, CCR,
and Registered Professional Reporter, RPR, do hereby
certify that the transcript of the foregoing
proceedings, **Volume III of IV**, accurately reflects the
events that occurred before me to the best of my ability
at the time and place set out on the caption hereto, the
witnesses having been duly cautioned and sworn, or
affirmed, to tell the truth, the whole truth, and
nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for,
related to, nor employed by any of the parties to the
action in which these proceedings were taken or to any
attorney or counsel employed by the parties hereto, nor
financially interested, directly or indirectly, in the
outcome of this action.

CERTIFIED AND SIGNED on this 22nd day of August,
2013.

ORIGINAL

Rolayne M. Volpe
ROLAYNE M. VOLPE, CCR, RPR
Certified Court Reporter and
Registered Professional Reporter
Commission Expires: 8/31/2021
SOUTH CAROLINA

Reported By:
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Official Court Reporter for the State of South Carolina

STATE OF SOUTH CAROLINA) GENERAL SESSIONS COURT
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
vs.) Case No.: 2011-GS-10-08069
KASHAUN CHRISTIAN BANKS,)
Defendant.)

ORIGINAL

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL, VOLUME IV OF IV
HEARD BEFORE JUDGE KRISTI LEA HARRINGTON
ON APRIL 25, 2013

ROLAYNE M. VOLPE, CCR, RPR
Court Reporter for the State of South Carolina at Large
Post Office Box 342
Summerville, South Carolina 29484

A P P E A R A N C E S

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April 25, 2013
Jury Trial, Volume IV of IV

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E X H I B I T S13 **DESCRIPTION****I.D.****ADMITTED**

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(No exhibits marked during this portion of the trial.)

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1 The above-styled cause came on for hearing on
2 the 25th day of April, 2013, at 9:12 a.m., before Judge
3 Kristi Lea Harrington, Circuit Judge for the Ninth
4 Judicial Circuit, presiding over the General Sessions
5 Court for the County of Charleston, when the following
6 proceedings were had and entered of record, to wit:

7 PROCEEDINGS

8 (Mr. Banks is escorted into the courtroom
9 at 9:12 a.m.)

10 THE COURT: Good morning, Mr. Banks. You may
11 have a seat. Those materials in front of you are
12 unrelated to your case. But we're getting ready to
13 start another trial. So just have a seat, and I ask you
14 not to mess with any of the other individual's items?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: Thank you. Mr. Grimes and
17 Ms. Ehrlich will be here momentarily.

18 (Respite.)

19 (All attorneys are present.)

20 THE COURT: All right. We have a verdict.
21 Anything before we bring in the jury?

22 MR. KIDD: No, ma'am.

23 THE COURT: Mr. Grimes?

24 MR. GRIMES: No, ma'am.

25 THE COURT: Let's bring in the jury.

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1 All rise.

2 (The jury is escorted into the courtroom
3 at 9:20 a.m.)

4 THE COURT: Thank you. Please be seated.

5 Madam Foreperson, I understand that the jury
6 has reached a verdict. If you will, hand the verdict
7 form to the bailiff.

8 THE FOREPERSON: Yes.

9 (Document is handed to the bailiff and then to
10 the Judge.)

11 (Document is handed to the Deputy Clerk of
12 Court.)

13 THE DEPUTY CLERK OF COURT: State of South
14 Carolina in the Court of General Sessions for the Ninth
15 Judicial Circuit, 2011-GS-10-8069, we, the jury, find
16 Kashaun Banks guilty of armed robbery.

17 If this is your verdict, please raise your
18 right hand.

19 (Jury complies.)

20 THE DEPUTY CLERK OF COURT: May the record
21 reflect that all 12 jurors raised their right hand.

22 THE COURT: Thank you.

23 Anything further required from the jury? From
24 the State?

25 MR. KIDD: Nothing from the State.

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1 THE COURT: Anything from the Defendant?

2 MR. GRIMES: Yes. We ask that the jury be
3 polled.

4 THE COURT: Please poll the jury.

5 THE DEPUTY CLERK OF COURT: When I call your
6 juror number, please raise your hand to identify
7 yourself. I will then ask you two questions. Please
8 answer with yes or no.

9 Ms. Foreman, Juror Number 292, is this your
10 verdict?

11 THE FOREPERSON: Yes.

12 THE DEPUTY CLERK OF COURT: Is it still your
13 verdict?

14 THE FOREPERSON: Yes.

15 THE DEPUTY CLERK OF COURT: Number 34, is this
16 your verdict?

17 JUROR NUMBER 34: Yes.

18 THE DEPUTY CLERK OF COURT: Is it still your
19 verdict?

20 JUROR NUMBER 34: Yes.

21 THE DEPUTY CLERK OF COURT: Number 246, is this
22 your verdict?

23 JUROR NUMBER 246: Yes.

24 THE DEPUTY CLERK OF COURT: Is it still your
25 verdict?

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1 JUROR NUMBER 246: Yes.

2 THE DEPUTY CLERK OF COURT: Juror Number 195,
3 is this your verdict?

4 JUROR NUMBER 195: Yes.

5 THE DEPUTY CLERK OF COURT: Is it still your
6 verdict?

7 JUROR NUMBER 195: Yes.

8 THE DEPUTY CLERK OF COURT: Number 72, is this
9 your verdict?

10 JUROR NUMBER 72: Yes.

11 THE DEPUTY CLERK OF COURT: Is it still your
12 verdict?

13 JUROR NUMBER 72: Yes.

14 THE DEPUTY CLERK OF COURT: Number 203, is this
15 your verdict?

16 JUROR NUMBER 203: Yes.

17 THE DEPUTY CLERK OF COURT: Is it still your
18 verdict?

19 JUROR NUMBER 203: Yes.

20 THE DEPUTY CLERK OF COURT: Number 268, is this
21 your verdict?

22 JUROR NUMBER 268: Yes.

23 THE DEPUTY CLERK OF COURT: Is it still your
24 verdict?

25 JUROR NUMBER 268: Yes.

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1 THE DEPUTY CLERK OF COURT: Number 75, is this
 2 your verdict?

3 JUROR NUMBER 75: Yes.

4 THE DEPUTY CLERK OF COURT: Is it still your
 5 verdict?

6 JUROR NUMBER 75: Yes.

7 THE DEPUTY CLERK OF COURT: Number 148, is this
 8 your verdict?

9 JUROR NUMBER 148: Yes.

10 THE DEPUTY CLERK OF COURT: Is it still your
 11 verdict?

12 JUROR NUMBER 148: Yes.

13 THE DEPUTY CLERK OF COURT: Number 157, is this
 14 your verdict?

15 JUROR NUMBER 157: Yes.

16 THE DEPUTY CLERK OF COURT: Is it still your
 17 verdict?

18 JUROR NUMBER 157: Yes.

19 THE DEPUTY CLERK OF COURT: Number 218, is this
 20 your verdict?

21 JUROR NUMBER 218: Yes.

22 THE DEPUTY CLERK OF COURT: Is it still your
 23 verdict?

24 JUROR NUMBER 218: Yes.

25 THE DEPUTY CLERK OF COURT: Number 142, is this

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1 your verdict?

2 JUROR NUMBER 142: Yes.

3 THE DEPUTY CLERK OF COURT: Is it still your
4 verdict?

5 JUROR NUMBER 142: Yes.

6 THE DEPUTY CLERK OF COURT: Your Honor, the
7 jury has been polled, and the verdict stands.

8 THE COURT: Thank you. Were there any jurors
9 whose number was not called; if so, please stand?

10 Thank you. There are none.

11 Anything further required of the jury,
12 Mr. Grimes?

13 MR. GRIMES: No, your Honor.

14 THE COURT: Mr. Kidd?

15 MR. KIDD: No, ma'am.

16 THE COURT: Ladies and gentlemen, this
17 completes your service to this case. Ladies and
18 gentlemen, if you will please return to your jury
19 deliberation room, I will be there in just a few moments
20 to personally thank you for your service to Charleston
21 County.

22 Please rise for the jury.

23 (The jury is escorted from the courtroom
24 at 9:23 a.m.)

25 THE COURT: Thank you. Be seated. Any motions

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1 or matters pertaining to the verdict? From the State?

2 MR. KIDD: No, ma'am.

3 THE COURT: Mr. Grimes?

4 MR. GRIMES: Yes, your Honor.

5 Under Rule 29, we ask the Court to grant a
6 post-trial motion for either a new trial or to set aside
7 the jury's verdict based upon the previous arguments for
8 a directed verdict at the close of the State's case and
9 the close of Defendant's case. Thank you, your Honor.

10 THE COURT: Mr. Kidd?

11 MR. KIDD: Judge, I believe the jury has
12 spoken, and there was sufficient evidence to establish
13 each element of the crime of armed robbery. It was on
14 the video. The gun, the gloves, and the money, and the
15 short period of time afterwards. The jury's verdict
16 should stand.

17 THE COURT: Anything further, Mr. Grimes?

18 MR. GRIMES: No, your Honor.

19 THE COURT: Based upon my review of Rule 29,
20 which you cited for post-trial motions, your motion for
21 a new trial is denied.

22 Mr. Grimes, is your client prepared to go
23 forward with sentencing at this time?

24 MR. GRIMES: Yes, ma'am.

25 THE COURT: All right.

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1 MR. KIDD: May I approach, Judge?

2 THE COURT: You may.

3 (Document is handed to the Judge.)

4 MR. KIDD: I'm not sure they signed it.

5 THE COURT: All right. Mr. Kidd, anything
6 further from the State?

7 MR. KIDD: Judge, just that the Defendant has
8 no prior record. He is a young man, so we understand
9 that, which is why we originally offered him ten years.
10 But he also took the stand in pretrial conference and
11 lied. He's taken no responsibility for his actions,
12 and I believe something greater than the minimum is
13 appropriate in this instance. It was a very violent
14 armed robbery. You've seen the video; you've heard the
15 testimony. And I think something between 13 and 15 is
16 appropriate in this case.

17 THE COURT: Mr. Grimes, just procedurally, I
18 notice that mom stepped outside of the courtroom. Do
19 you want to see -- I'll be happy to hear from her or
20 from whomever for sentencing.

21 MR. GRIMES: Thank you, your Honor.

22 (Ms. Proctor steps out of the courtroom to get
23 the mother.)

24 MR. GRIMES: I think Ms. Ehrlich is going to
25 speak first on behalf of Mr. Banks.

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1 MS. EHRLICH: I became involved with this case
2 before the first trial, so I've worked with Kashaun a
3 lot. I've spent a lot of time with him in helping him
4 prepare for the case, and I know that the Court had
5 indicated in pretrial rulings how appropriate he was
6 acting in the courtroom. I hope that you take that into
7 consideration. He's been extremely appropriate with us.

8 He -- while he comes across as extremely
9 articulate in the reported statement, I do think that
10 the fact that he has a learning disability, the fact
11 that he reads at such a low level, that the --

12 (Ms. Proctor and the mother enter the room.)

13 MS. ERHLICH: -- cognitive testing shows that
14 his IQ is 68. An IQ doesn't really change over time.
15 Once you are tested, there's not much movement; and he
16 was below 70, putting him in the mildly mentally
17 retarded range. So I think some of the articulateness
18 is him projecting confidence, when he's not actually as
19 confident as maybe he comes across. And I don't think
20 that that's that uncommon with people with disabilities
21 to try to put forth this kind of image of, Yeah, I
22 know everything that's going on. And, you know, I think
23 he takes a lot of effort in choosing his words overall,
24 because he wants to be perceived as articulate; he wants
25 people to not think that he is stupid.

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1 I do know that his mother loves him very much.
2 She's been with him throughout this case. She attended
3 jury qualifications. There's no doubt in my mind that
4 he has a very loving and supportive mother. We would
5 hope that you would give him the minimum sentence of ten
6 years. I think it's adequate; it's a significant period
7 of time for somebody at this age. He will have to serve
8 a lot of -- 85 percent of that sentence. It's going to
9 be a most serious offense for him, setting him up in the
10 future, if he got in more trouble, he would be facing a
11 lot more time than he is today. And that -- you know, I
12 think the ten years will be sufficient.

13 MS. PROCTOR: She does want to speak, your
14 Honor.

15 THE COURT: All right. Ma'am, if you'll stand
16 and state your full name for the record and please spell
17 your last name.

18 MRS. BANKS: My name is Annette Banks. My last
19 name?

20 THE COURT: Yes.

21 MRS. BANKS: B-a-n-k-s, Banks. I'm the mother
22 of Kashaun Banks. There's only three of us; my two
23 other daughters. In my heart -- in my heart, I don't
24 believe it was my son, but the decision has been made.
25 There's nothing that I can do about it. I know that

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1 I've raised him, and I raised him to the best of my
2 ability. I did everything to put him on the right path.
3 I already had him going to the military academy. And I
4 all I can ask is have mercy on him. And that's all I
5 can ask you. Because this is a mother's worst
6 nightmare. And he's my only son. And I know in my
7 heart he didn't do it. But it's already said and done.
8 So I just ask you if you just have mercy on him. He
9 have to serve some time; he got to serve some time. But
10 if you could just have mercy on him, the time that you
11 give him. I thank you.

12 THE COURT: Thank you, Mrs. Banks.

13 Mr. Grimes?

14 MR. GRIMES: Thank you, your Honor. And I know
15 you probably consider a lot of these factors, but I'd
16 like to hand up a copy of the Federal Statute, 18 USC
17 3553. I've given a copy to Mr. Kidd.

18 Initially, I'll talk about how I got involved
19 with Kashaun's case and got appointed to the armed
20 robbery case. Our first meeting, talking with him about
21 stuff, and he was kind of very stubborn. I asked him to
22 name some witnesses, as you heard from the tape there
23 was -- a girl's house, and he's -- he didn't want to
24 name the girl, because I think -- I think he was worried
25 because of the age difference between them. Thought she

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1 might get in trouble since he was 17 at the time, and
2 probably started seeing her a little bit before then,
3 and she was 27.

4 I think what happened was Mr. Banks had some
5 trouble -- financial trouble; he'd been living in
6 St. George; he had been going to the Woodlands up there.
7 Then he ended up in a homeless shelter for a while, and
8 that's exactly where he ran into this girl at, and she
9 -- he kind of fell under her influence, and, I guess,
10 you know, being 16, 17, going out with someone who is
11 27, it was a big deal to him, and he felt important.
12 You know, we kind of joked around about that a little
13 bit, as our relationship has gotten better. We've
14 talked in court a lot, and just talking about who looks
15 better in a suit. And I've let him wear one of my suits
16 because we're just about the same size. I don't do that
17 very often with clients. And I think what happened was
18 he was probably -- he was out there, it was more selling
19 drugs, involved in drugs -- I mean, obviously, the jury
20 has spoken, so we don't know --

21 THE COURT: Did you say Mr. Banks was involved
22 in selling drugs?

23 MR. GRIMES: I think there was some indication
24 of that in my pretrial investigation. But it's a
25 robbery. He'd always denied that. Except when he spoke

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1 with Sergeant Hill, and even there is -- the stuff that
2 he said to Sergeant Hill didn't pan out. Maybe one
3 reason why Mr. Kidd didn't introduce it.

4 But he's certainly down on his luck, trying to
5 get money to help the young lady. So he's only 17,
6 working at a temporary job, Banks Construction, he's
7 lined up to go into the military school. We had
8 documentation from that. Didn't bring it today, but I
9 sent it to Mr. Kidd. Initially, we were trying to get a
10 -- strong armed robbery, plea straight up. I kept
11 pushing him for a YOA. I thought that would be
12 appropriate. But, ultimately, you know, he -- we
13 weren't able to work anything out.

14 And -- and in talking to Mrs. Banks as we were
15 preparing for the first trial, talking -- in case we did
16 call him as a witness to explain his learning disability
17 -- I think happened during birth. I think said
18 something about the oxygen being cuff off to him, and
19 suffering some slight brain damage there, and -- during
20 that process. And he's -- when you explain stuff to him
21 he understands it, very well. You know, he -- I --
22 after going through two trials, he's asked very
23 insightful questions. Like he asked me yesterday: Why
24 didn't I question Detective Wapner (phonetic) about the
25 1015 range in the statement. I said, Well, I couldn't

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1 because they didn't introduce the statement, and, you
2 know, he understood that. He picks up on a lot of good
3 things.

4 I think he has a very bright future ahead of
5 him when he is released. He's smart. Just has some
6 -- basically, you know, be accommodated under the
7 Disabilities Act. And, you know, we asked what he
8 wanted to do. His one dream was to go in the Marines
9 and become a sniper. And he had that aspiration. And I
10 said, Well, I don't know how you'd get in the Marines in
11 the first place, regardless of the robbery, if you can't
12 read. I'm not sure the military takes -- he said, I've
13 been working on that. The school is taking me -- they
14 pay -- they pay you somewhat to go there. They were
15 going to, you know, make sure he was able to catch up on
16 the tests and prepare him for the testing process and
17 everything. And that was his goal. And you've heard
18 that on the statement.

19 And the reason why this is one of his goals,
20 in talking about -- during the investigation about his
21 background, his grandfather had been in the military in
22 World War II and he'd tell him stories and he just kind
23 of grew up around that. Admiring his grandfather a lot
24 and wanted to sort of follow in his footsteps. And the
25 family moved from New York down here. In the Woodlands

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1 -- a lot of gangs in Woodlands, so his mother wanted to
2 get him out of that environment, and that's why they
3 were going to the military school.

4 But I think it's significant, even though he
5 was in schools, involved in gang activity, he didn't
6 pick up any juvenile record. And you've heard maybe
7 he was in -- he was in PTI for a drug charge out of
8 Berkeley County, and you would have thought if he was in
9 PTI, either a very weak case or it was to give him a
10 second chance.

11 As Mr. Kidd noted, he was 17 at the time of the
12 offense. The gun -- on video, it doesn't appear very
13 violent. But the BB gun -- BB gun rather than a real
14 gun. No one got hurt. He didn't try to -- never
15 threatened to hit anybody or pistol-whip anybody. Just
16 went in there to snatch and grab, basically, and ran
17 away.

18 When he came across -- the main thing he knew.
19 Initially, he ran, but he was cooperative. Told them he
20 had a BB gun in the bag. And, you know, I think he was
21 fairly cooperative with Sergeant Hill. He, you know,
22 gave him his version. You heard the debate about
23 whether he invoked his right to remain silent. Two
24 judges hear it and two different rulings. It shows -- I
25 don't think he's wasting anyone's time by going to

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1 trial. He shouldn't be punished for going to trial,
2 especially under those circumstances.

3 And I think, just from the factors under 3553,
4 talked about his character and background. You've seen
5 the reports. General assembly said ten years is an
6 appropriate sentence on armed robbery. For instance, a
7 lot of kids got ten years, and then they had several
8 armed robberies, some got reduced, I've seen lots of
9 other cases where real guns are used -- strong armed
10 robbery, and that's made one frustrating part, being
11 part of the -- it's not perfect, but some people do
12 worse things, get less time of --

13 THE COURT: I'm not worried about the other
14 people. I'm worried about Mr. Banks right here today.

15 MR. GRIMES: I understand that.

16 THE COURT: Thank you.

17 MR. GRIMES: Thank you, your Honor.

18 But this -- you know, one of the factors is
19 consistency of sentences imposed, I think, to be fair
20 for everyone across the board. That's why I was talking
21 about that.

22 I think a ten-year sentence would defer him
23 from doing anything in the future. Ms. Ehrlich noted,
24 it is a most serious offense. It's a strike; going to
25 do 85 percent in a maximum security prison, with grown

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1 men who have committed much worse crimes.

2 I don't know -- Kashaun's been putting on a
3 brave front when talking about that. They talked to
4 him, said, you sure you don't want to take a plea? I
5 think one of the initial offers was for strong-armed
6 robbery, but with a negotiated 15-year sentence. And I
7 said, Well, you may do more time on that, but it would
8 be -- maybe easier time in some way. And I think his
9 rational belief was: Prison time is prison time,
10 regardless.

11 I think a ten-year sentence will protect the
12 public from any further crimes of Kashaun. I don't
13 think he -- when he gets out, he won't be able to go
14 into the military, obviously; but one of his other goals
15 of school, is being a chef. Certainly could do that.
16 Certainly will have his family support. He did -- his
17 two sisters who have been supportive and coming in the
18 office to discuss his testimony.

19 I think what kind of bugs the whole family is
20 that the girl kind of lead him around. When we wanted
21 to call her and talk to her as a witness, she just
22 disappeared. She popped in for a little for the first
23 trial, and we haven't seen her since.

24 I think a ten-year sentence sends a message to
25 the community that armed robberies are serious, and

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1 people get serious time for that. Ten years' time is
2 serious time for a 17 year old. So I think in light of
3 all the circumstances, a ten-year sentence is
4 appropriate, and we'd ask the Court to be as merciful as
5 it can. Thank you, your Honor.

6 THE COURT: Mr. Banks, do you wish to address
7 the Court?

8 THE DEFENDANT: No, your Honor. No, ma'am.

9 THE COURT: Mr. Banks, please rise.

10 Mr. Grimes, have you advised Mr. Banks that
11 this is a violent and most serious offense and what that
12 means to him as far as the length of time that he must
13 serve from the sentence of this trial?

14 MR. GRIMES: Yes, ma'am.

15 THE COURT: Mr. Banks, do you understand those
16 two things?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Mr. Banks, you have the right to
19 appeal the verdict as well as the sentence that I'm
20 about to impose, but you must do so within ten days of
21 today's date. Do you understand?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Any questions about that?

24 THE DEFENDANT: No, ma'am.

25 THE COURT: Mr. Grimes, Ms. Ehrlich, you've

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1 advised Mr. Banks of his appellate rights; is that
2 correct?

3 MR. GRIMES: Yes, your Honor. And for the
4 record, your Honor, I told him we would have the Notice
5 of Appeal filed by Monday.

6 THE COURT: All right. Mr. Banks, I -- as I
7 indicated to you, in making my ruling and listening to
8 your interview, you are very articulate, and you have
9 -- have many things going for you. You have the love of
10 your mother. She seems very supportive. And Mr. Grimes
11 has been one of your biggest champions, and Ms. Ehrlich
12 as well. Unfortunately, watching that video over and
13 over and over again, it has become clear to me -- clear
14 to me from the very beginning and every time that I had
15 to sit here and watch that video of you going into that
16 store, with that BB gun, regardless if it was BB gun or
17 not, both the victims testified that they thought it was
18 a real gun.

19 They were there doing what they were supposed
20 to be doing: working, being productive citizens. And
21 you came in with a gun, BB gun, real gun, but with a
22 gun, and you were taking things that did not belong to
23 you. It's very violent. Very frightening.

24 I am taking into consideration that you do not
25 have a prior record, and I'm taking into consideration

Reported By:
Rolayne M. Volpe, CCR, RPR
Official Court Reporter for the State of South Carolina

State versus Kashaun Banks
April 25, 2013
Jury Trial, Volume IV of IV

1 that this carries from 10 to 30 years, and I'm also
2 taking into consideration that this is a violent and
3 most serious offense.

4 It's the Order of the Court on Indictment
5 2011-GS-10-8069 that you will be committed to the State
6 Department of Corrections for a term of 12 years. Give
7 you credit for the time that you have served.

8 Mr. Banks, by my calculation, you will still
9 have a substantial portion of your life left. I suggest
10 to you that you re-evaluate and look at what you have
11 going for you; and when you are released from the
12 Department of Corrections, that you still have a
13 substantial amount of time to make a contribution in a
14 positive way to society.

15 Good luck to you, sir?

16 THE DEFENDANT: Yes, ma'am.

17 MR. GRIMES: Thank you, your Honor.

18 MR. KIDD: Thank you, your Honor.

19 THE COURT: Anything further before we recess
20 from this matter? Mr. Grimes?

21 MR. GRIMES: No, ma'am.

22 THE COURT: Mr. Kidd?

23 MR. KIDD: No, ma'am.

24 THE COURT: Please withdraw -- when we bring
25 the evidence, Mr. Kidd, I'm going to give the gun back

Reported By:
Rolayne M. Volpe, CCR, RPR
Official Court Reporter for the State of South Carolina

State versus Kashaun Banks
 April 25, 2013
 Jury Trial, Volume IV of IV

1 to you.

2 Any objection?

3 MR. GRIMES: No, ma'am.

4 THE COURT: Thank you. All right. Thank you
 5 again. All four of you were very competent and ethical
 6 in your representation. Thank you.

7 ATTORNEYS IN UNISON: Thank you.

8 THE COURT: I'm going to have the Foreperson
 9 sign the Indictment.

10 So let's get ready for the next trial. Thank
 11 you.

12 (The jury trial concluded at 9:44 a.m. on
 13 April 25, 2013.)

14 (End of Volume IV of IV.)

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Reported By:
 Rolayne M. Volpe, CCR, RPR
 Official Court Reporter for the State of South Carolina

State versus Kashaun Banks
April 25, 2013
Jury Trial, Volume IV of IV

R E P O R T E R ' S C E R T I F I C A T E

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF BERKELEY)

I, **ROLAYNE M. VOLPE**, Certified Court Reporter, CCR,
and Registered Professional Reporter, RPR, do hereby
certify that the transcript of the foregoing
proceedings, **Volume IV of IV**, accurately reflects the
events that occurred before me to the best of my ability
at the time and place set out on the caption hereto, the
witnesses having been duly cautioned and sworn, or
affirmed, to tell the truth, the whole truth, and
nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for,
related to, nor employed by any of the parties to the
action in which these proceedings were taken or to any
attorney or counsel employed by the parties hereto, nor
financially interested, directly or indirectly, in the
outcome of this action.

CERTIFIED AND SIGNED on this 22nd day of August,
2013.

ORIGINAL

Rolayne M. Volpe
ROLAYNE M. VOLPE, CCR, RPR
Certified Court Reporter and
Registered Professional Reporter
Commission Expires: 8/30/2021
SOUTH CAROLINA

Reported By:
Rolayne M. Volpe, CCR, RPR
Official Court Reporter for the State of South Carolina

FORM 5

STATE OF SOUTH CAROLINA

County of Charleston2015-CP-10-3849
IN THE COURT OF COMMON PLEASYashaun Banks #355175

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2015 JUL 10 PM 4:50
JULIE J. ARMSTRONG
CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Turbeville Ct, Post Office Box 252 Turbeville,
SC 29162
2. Name and location of Court which imposed sentence In the Court of General
Sessions Ninth Judicial Circuit
3. Name(s) of co-defendant(s) (if any) NO
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) M-614275 / 2011GS1008069

- (b) _____
(c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
(a) 04-25-13 12 years
(b) _____
(c) _____
6. Check whether a finding of guilty was made:
(a) after a plea of guilty _____
(b) after a plea of not guilty Yes
(c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
(a) the name of each Court to which you appealed:
i. Direct Appeals
ii. _____
iii. _____
(b) the result in each such Court to which you appealed:
i. Denied
ii. _____
iii. _____
(c) the date of each such result:
i. Unknown
ii. _____
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. _____
ii. _____
iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
(a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Ineffective assistance of Counsel
- (a) Failed to relieve himself due to serious medical issues
- (b) Ineffective assistance of counsel failed to fully investigate
- (c) Ineffective assistance of counsel failed to be prepared and adequately litigate.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) U.S.C.A. Const. Amend. 6
- (b) U.S.C.A. Const. Amend. 6
- (c) U.S.C.A. Const. Amend. 6
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Direct Appeal
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Charleston County General Sessions
- ii. _____
- iii. _____

- iv. _____
- (c) the disposition thereof:
 - i. Denied
 - ii. _____
 - iii. _____
 - iv. _____

- (d) the date of each such disposition:
 - i. Never informed by Court or Counsel
 - ii. _____
 - iii. _____
 - iv. _____

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes, direct appeal

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
 - i. Ineffective assistance of counsel failed to relieve himself due to serious medical issues
 - ii. Ineffective assistance of counsel failed to fully investigate
 - iii. Ineffective assistance of counsel failed to be prepared and adequately litigate
- (b) the proceedings in which each ground was raised:
 - i. Direct appeal
 - ii. _____
 - iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? Mr. Andrew Grimes (Deceased) / Ms. Megan Ehrlich
- (c) your sentencing? Mr. Andrew Grimes (Deceased) / Ms. Megan Ehrlich
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Mr. Andrew Grimes (Deceased) / Ms. Megan Ehrlich
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Mr. Andrew Grimes (Deceased)
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Mr. Andrew Grimes (Deceased) 101 Meeting Street, 5th Floor
Charleston, SC 29401-2214
- ii. Ms. Megan Ehrlich 101 Meeting Street, 5th Floor
Charleston, SC 29401-2214
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial, sentencing, direct appeal
- ii. Trial, sentencing, direct appeal
- iii. _____

19. State clearly the relief you seek in filing this application:

Reverse and remand for a new hearing

20. Are you now under sentence from any other court that you have not challenged?

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, Kashaun Banks, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Kashaun Banks

SWORN to and subscribed before me this

day of

July, 2015

Emily Hale (L.S.)
Notary Public

My Commission Expires: 4-27-2016

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Kashawn Banks, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Kashawn Banks
Applicant

SWORN or affirmed to and subscribed before me this
7th day of July, 2015.

Ernie Hoge
Notary Public

My Commission Expires: 4-27-2016

2015-CP-10-3849

State of South Carolina
County of Charleston

Mr. Kashaun Banks, s.c.D.C. #355125
Applicant

V.

State of South Carolina
Respondent

The Court of common Pleas
Ninth Judicial Circuit
Case No: 2011GS1008069

Supplement and Amendment to
Prior P.C.A. Application

FILED
2015 JUL 10 PM 4:50
CLERK OF COURT
J. ARISTRONG

Issues on Appeal:

- 1) Ineffective Assistance of Counsel on Page 1.
- 2) Lack of Competency Hearing on Page 8.
- 3) Statement (Jackson v. Denno Hearing) on Page 13.
- 4) Counsel Failed to objection on Page 15.

Statement of the Case:

On October 15, 2011, At Exxon gas station in North Charleston, south Carolina where Tenille Wilson and Heisha Holmes were robbed. The Plaintiff (Kashaun Banks), Is accused of Armed Robbery in violation of section 16-11-330 of the South Carolina Code of laws of 1976, as amended. In that the defendant did willfully, unlawfully and feloniously rob a person by putting fear by the use or threat of force and violence, and that the defendant alleged his actions or words that he was armed by using representation of a deadly weapon which a person would reasonably believe is a deadly weapon.

The Plaintiff was indicted (2011GS1008069) on December 12, 2011 by the Charleston County grand jury, and appointed Counsel, Mr. Andrew Grimes and Ms. Megan Ehrlich, of the Charleston County public defender's office. Mr. Grimes failed to communicate with his client, to inform

him of the severity of his medical condition's. The Plaintiff Proceeded to a trial. On July 18-19, 2012, In the state of South Carolina v. Kashaun Banks, the honorable judge McDonald declared a hung jury. Upon the second trial On April 22-25, 2013, the Plaintiff was found guilty by the honorable judge Harrington, in which Plaintiff was represented by Mr. Grimes in the second trial.

Ineffective assistance of Counsel:

1. On April 22-25, 2013, Mr. Grimes represented the Plaintiff in trial.
2. Before judge Harrington and a jury. As you read the Plaintiff's
3. transcript you will see Mr. Grimes litigation and his argument.
4. However, what you do not see is the physical disposition, and
5. excruciating pain that Mr. Grimes was experiencing at the
6. time of trial, which ultimately resulted in his lacking ability to
7. provide adequate representation to his client, which ultimately
8. resulted an inadequate defense.
- 9.
10. Do to the severity of Mr. Grimes medical illness; (which ultimately
11. caused his untimely death) to display a lesser ability as would
12. be considered reasonably normal which would equate to displaying
13. a diminished capacity at trial. The Plaintiff and Mr. Grimes had a
14. conversation where Mr. Grimes stated to the Plaintiff, ("I believe
15. it would be ineffective assistance of counsel for me to stay
16. on a case when my medical condition affected my ability
17. to represent someone.") you will read the conversation on page 3.
- 18.
19. In all professional functions a lawyer should be competent,

1. Prompt and diligent. A lawyer should maintain communication
2. With a client concerning the representation. A lawyer should keep
3. in confidence information relating to representation of a client
4. except so far as disclosure is required or permitted by the Rules
5. of professional conduct or other law." (S.C.A.C.R. Rule 407)
6. Preamble (4)
- 7.
8. A defendant has a constitutional right to the effective assistance
9. of counsel. To demonstrate ineffective assistance of counsel, a
10. petitioner must show pursuant to the two-prong test enunciated
11. in *Strickland v. Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d
12. 674 (1984), that:
- 13.
14. (1) his counsel was deficient in his representation;
- 15.
16. and (2) he was prejudiced as a result. *Id.* at 687; see also *Williams*
17. *v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000)
18. (stating that the *Strickland* test provides sufficient guidance for
19. resolving virtually all ineffective assistance of counsel claims).
- 20.
21. To satisfy the first prong of *Strickland*, a petitioner must show that trial
22. counsel's errors were so serious that his performance was below the
23. objective standard of reasonableness guaranteed by the sixth
24. Amendment to the United States Constitution. With regard to the second
25. prong of *Strickland*, a petitioner "must show that there is a reasonable
26. probability that, but for counsel's unprofessional errors, the result of
27. the proceeding would have been different. *Strickland*, 466 U.S. at 694.

Berkeley County
 219 N. Hwy. 52, Suite E
 P.O. Box 1687
 Moncks Corner, SC 29461
 (843) 899-2777
 (843) 899-2701 Fax
 Cody Groeber
 Chief County Public Defender

Ninth Circuit Public Defender
Berkeley & Charleston Counties

D. Ashley Pennington, Circuit Defender
 publicdefender@charlestoncounty.org
 (843) 958-1850

Charleston County
 O.T. Wallace Building
 101 Meeting Street, 5th Floor
 Charleston, SC 29401-2214
 (843) 958-1850
 (843) 958-1860 Fax
 Lorelle D. Proctor
 Chief County Public Defender

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



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

Phone (843) 792-6901
Fax (843) 878-4301

December 3, 2013

RE: GRIMES, Andrew D.

MRN# [REDACTED]
D.O.B: [REDACTED] 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

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 INACTIVE PROBLEMS:

- Intermittent left thigh erythematous swelling
- Resolved left knee swelling
- Immune to hepatitis A and B

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

Olls 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, O₂ 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 2,800 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 189mg/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 2.6mg/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 438 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 bilirubin), 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-Turcotte-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, FACC
Professor of Medicine
Director, Liver Service

AR/mm/1209
grimesand_12022013r

cc:

James C. Oates, MD
MUSC Rheumatology

Juan C. Velez, MD
MUSC Nephrology

Jeffrey Wong, MD
MUSC East Cooper Primary Care

Beatrice Hull-Janulyte, MD
MUSC Endocrinology

*PS: Soluble transferrin receptor is not elevated. Thus, he is not demonstrably iron deficient.

Competency:

1. Plaintiff avers that he was denied, but entitled to a hearing of
2. Competency that was provided in *Pate v. Robinson* 383 U.S. 375,
3. 36 S.Ct. 886 (U.S. 1966) (Pate Hearing).
- 4.
5. The foregoing is to provide evidence of prior and current proof that
6. Court denied plaintiff 18 U.S.C.A. Const. Amend. XIV, V Due process
7. of law. It was Court error of descretion to provide a Pate Hearing,
8. Prior to trial. Counsel for plaintiff made the Court aware of plaintiff
9. disability concerning his literacy.

10.

11.

Pate Hearing:

12. A proceeding in which the trial Court seeks to determine Competency
13. to stand trial. *Pate v. Robinson*, 383 U.S. 375, 36 S.Ct. 886 (1966); 18
14. U.S.C.A. §§ 4241-4247. Also termed competency hearing; incompetency
15. hearing. (Cases; Criminal law 625.10-625.35. C.J.S. Criminal law §§
16. 551, 554-555, 557).

17.

18.

The Gray Silent Reading Tests (G.S.R.T.):

19. Is a measure of reading comprehension. The student is asked to
20. read passages then answer questions in paper-pencil format.

21.

22. Kashaun earned the following score on the (G.S.R.T.):

23. Silent Reading Quotient: 55 Percentile: 1 Age Equivalent: 7-0

24.

25. The Developmental Test of Visual Motor Integration:

26. Was administered to Kashaun to assess his visual motor skills.

27. Kashaun earned a standard score of 69, a percentile rank of

1. 2, and age equivalent of 6 year's, 3 months. Results indicated that
 2. his visual motor skills were within the Borderline/slow learner
 3. range.

4.

5. South Carolina Eligibility Requirements:

6. The South Carolina criteria for Placement as a learning disabled
 7. Student are as follows: 1. The student exhibits a severe discrepancy
 8. between achievement and intellectual ability that adversely affects
 9. his or her educational performance in one or more of the following
 10. areas: Basic Reading Skills, Reading Comprehension, Mathematical
 11. Calculation, Mathematical Reasoning, Oral Expression, Listening
 12. Comprehension, and Written Expression.

13.

14. Summary and Conclusion:

15. Kashaun is a 12 year old male who was referred for a
 16. psychoeducational evaluation following a reevaluation
 17. determination meeting where the team requested an evaluation
 18. due to not receiving information from Kashaun previous schools.
 19. Based on the results of this evaluation, Kashaun overall cognitive
 20. abilities were measured within the mentally disabled range. His
 21. achievement in all areas measured were significantly
 22. below average for his age and were discrepant with his
 23. measured cognitive ability, with the exception of phonological
 24. memory, which was in the below average range. Because Kashaun
 25. academic achievement is discrepant with his measured cognitive
 26. abilities, Kashaun currently meets South Carolina state
 27. guidelines for students with a specific learning disability.

Recommendations:

1. While Kashaun currently meets state criteria as a student
2. with a specific learning disability, his achievement profile more
3. closely resembles that of a student with a mild mental disability.
4. The attached recommendations may be helpful to Kashaun
5. teachers and parents.
- 6.
7. "In *Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836, 841 (1966), the Court
8. found the defendant was entitled to a competency hearing although
9. his defense counsel never demanded a hearing on the matter.
10. Moreover, the Court rejected the notion that the fact that the
11. defendant appeared competent and displayed mental alertness and
12. understanding during the trial precluded need for a competency
13. hearing. *Id.* at 385, 86 S.Ct. at 842. The court found that reasoning
14. offers no justification for ignoring other evidence of the defendant's
15. incompetence. As in *Pate*, the district court in this case found the
16. defendant's demeanor at the first phase of the trial did not
17. demonstrate any evidence of incompetency. Nevertheless, the
18. fact does not permit the court to ignore medical evidence." U.S.
19. *v. Mason*, 52 F.3d 1286 C.A.4 (N.C.) 1995, *state v. White*, 364 S.C. 143,
20. 148, 611 S.E. 2d 927, 929 (N.C.) (S.C. App 2005).
- 21.
22. ("Pate Hearing" A proceeding in which the trial court seeks to
23. determine whether a criminal defendant is competent to stand
24. trial. Also termed competency hearing; incompetency hearing.
25. *Black's Law Dictionary* 9th ed 2009.)
- 26.
27. The A.B.A. 2-prong standard generally reflects this test, but

1. is not tempered with the rational communication element for
 2. the assistance prong, as announced in *State v. Harris*, 114 Wash.
 3. 2d 419, 789 p.2d 60 (1990). We therefore must adopt a slightly
 4. modified standard in South Carolina which satisfies the mandate
 5. of federal due process, the Common law, and the South Carolina
 6. Constitution. By doing so, we announce the appropriate test in
 7. South Carolina as a two-prong analysis. The first prong is the
 8. Cognitive prong which can be defined as: Whether a convicted
 9. defendant can understand the nature of the proceedings, what
 10. he or she was tried for the reason for the punishment, or the nature
 11. of the punishment. The second prong is the assistance prong which
 12. can be defined as: Whether convicted defendant possesses
 13. sufficient capacity or ability to rationally communicate with
 14. Counsel". *Singleton v. State*, 813 S.C. 75, 84, 437 S.E.2d 53 (S.C.1993).
 15.

16. Avered in *State v. Blair*, 275 S.C. 529, 532, 273 S.E. 2d 536, 538
 17. (S.C.1981), Appellate argues that trial court erred in failing to
 18. conduct a competency hearing pursuant to S.C. Code of Law's
 19. §44-23-430. The state contends Blair waived the right by failing
 20. to request the hearing. In a similar case, the United States
 21. Supreme Court found a sanity hearing can not be waived. *Pate v.*
 22. *Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966). In *Pate*, the accused
 23. failed to demand a sanity hearing. The hearing was provided
 24. by Illinois law. The Supreme Court found the fact counsel placed
 25. the accused sanity in issue throughout the proceedings indicated
 26. the right was not waived. In the case at bar, Blair's sanity was
 27. the crucial issue throughout the trial. Therefore, we find failure

1. to request the hearing did not waive the right to such hearing.

2.

3. Since the right was not waived the question becomes whether the

4. hearing should have been held. Section § 44-23-430, provides a

5. Competency to stand trial hearing shall be held after a psychiatric

6. examination has been ordered under § 44-23-410:

7.

8. The word shall may be construed as permissive effect legislative

9. intent, particularly when the statute directs a court to determine

10. certain matters. 82 C.J.s statutes § 380, at pg. 881 (1953). However,

11. a statutory provision is generally regarded as mandatory where

12. the power or duty to which it relates is for the security or protection

13. of private rights. 73 Am. Jur. 2d statutes § 27 at pg. 284 (1974); 82

14. C.J.S. Supra. The statute is designated to protect accused's right

15. to a fair trial a due process determination of the competency

16. and fitness to stand trial.

17.

18. The standard for determine whether an accused is entitled to

19. a competency to stand trial hearing has been set forth in a

20. recent case interpreting Pate v. Robinson, supra: The impact of

21. our decision in Pate v. Robinson, is that the evidence of a defendant's

22. irrational behavior, his demeanor at trial, and any prior medical

23. opinion on competence to stand trial are all relevant in determining

24. whether further inquiry is required, but that even one of those

25. factor, standing alone, may in circumstances, be sufficient:

26. Drope v. Missouri 420 U.S. 162, 180, 95 S.Ct. 896 (1975), State v.

27. Belfort, WL 832624 (*1) (S.C. App. 2007).

1. Mr. Grimes used the plaintiff mental disability in the suppression
 2. of evidence hearing (Jackson v. Denno). However, Mr. Grimes
 3. failed to request a competency hearing (Pate v. Robinson) to
 4. determine whether plaintiff was indeed competent to stand
 5. trial. Therefore, Mr. Grimes was ineffective on basis that had
 6. he raised a request for competency hearing, there is a
 7. likely chance that out-come of trial would have been different.
 8.

9. Statement (Jackson v. Denno hearing):

10. On April 22, 2013, Mr. Grimes represented the plaintiff in trial
 11. by jury before the Honorable Judge Kristi L. Harrington. In
 12. the (Jackson v. Denno) hearing to determine if a statement
 13. previously made by the plaintiff was voluntary or
 14. involuntary, Mr. Grimes failed to present the same argument
 15. that was raised at a former pre-trial hearing. In the
 16. former trial, before the Honorable Judge Stephanie P.
 17. McDonald, it was ruled that the plaintiff invoked his right
 18. to remain silent. Judge McDonald's ruling was based on
 19. the arguments raised in Michigan v. Mosley and Tice v.
 20. Johnson, which list the five-prong test in determining
 21. whether a defendant has invoked his right to remain
 22. silent. See: (Trial Transcript page 213; lines 10-11).
 23.

24. The plaintiff feels that Mr. Grimes, in the latter pre-trial
 25. hearing should have introduced evidence of Miranda
 26. Rights violation, (Miranda v. Arizona, 86, 383-384, U. S.
 27. 474-1627) as evident by him stating to interviewing

1. detective, "That's my final word" after being asked if he had
 2. "any final words." (Audio Confession page 16). Detective
 3. blatantly continued questioning after plaintiff plainly and
 4. clearly invoked his right to remain silent. The plaintiff
 5. did not "initiate desire to further converse, communicate,
 6. or exchange conversations with police", (quoting Edwards
 7. v. Arizona, 101 A, 450-453, U.S., 1987). Plaintiff feels that
 8. his Miranda Rights were further violated after
 9. detective interviewing initiated a second interrogation
 10. by stating, "I was just coming back in here to afford
 11. you another chance to tell me the truth", (Audio Confession
 12. page 30). Based on U.S. v. Finch (998 F. 2d 349, 356, 6th
 13. Circuit 1993), this constitutes as functional equivalent
 14. of interrogation. U.S. v. Finch states, "The functional
 15. equivalent of interrogation consists of words or actions
 16. on the part of the police... that the police should know are
 17. reasonably likely to elicit an incriminating response from
 18. the suspect."
 19.

20. Michigan v. Mosley has set forth five factors to analyze
 21. and ascertain whether the defendant's right to cut
 22. off questioning was "scrupulously honored". They are:
 23. (1) whether the suspect was given Miranda warnings at
 24. the first interrogation; (2) whether police immediately
 25. ceased the interrogation when the suspect indicated he
 26. did not want to answer questions; (3) whether police
 27. resumed questioning the suspect only after ~~the~~ passage

1. of a significant period of time; (4) whether police
2. provided a fresh set of Miranda warnings before
3. the second interrogation; and (5) whether the second
4. interrogation was restricted to a crime that had
5. not been a subject of the earlier investigation.
- 6.

7. Counsel Failed To Object:

8. Furthermore, Mr. Grimes failed to object to plaintiff
9. statement when it was mentioned by detective at
10. trial. Had Mr. Grimes objected to this, it would have
11. been preserved for the Court of Appeals, On (Trial
12. Transcript page 394, line 11-24) and (Audio confession
13. page 17-19, 17:32-19:16).

14.

15. Mr. Grimes failed to object to the video tape. Detective
16. Hill was compare the plaintiff to the suspect. Which the
17. suspect is a mashman, which creates a misidentification,
18. On Trial Transcript page 405, line 5-16.

19.

20.

21.

22.

23.

24.

25.

26.

27.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**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.

Conclusion:

Based on the above, the conviction and sentence should be reversed, and the case remanded for a new trial.

Yashaun Banks
Yashaun Banks
#355175
P.O. Box 252
Turbeville, SC 29162

SWORN to and subscribed before me this
7th day of July 2015
Emily J. [Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-27-2016

Kashaun Banks, #355175
Turbeville Correctional Institute
P.O. Box 252
Turbeville, S.C. 29162

Ms. Julie J. Armstrong
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Dear Ms. Armstrong:

I am submitting my P.C.R. application along with my brief. I would like to know if you could please notarize and file it with my application.

I thank you in advance for your cooperation in this matter. If you have any questions or comments concerning this matter, please do not hesitate to contact me.

Sincerely,
Kashaun Banks
Kashaun Banks

SWORN to and subscribed before me this
17th day of July 2015
[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-27-2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
	)	
Kashaun Banks, #355175,	)	2015-CP-10-3849
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed July 10, 2015, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2011 term of the Charleston County Grand Jury for one (1) count of Armed Robbery (2011-GS-10-8069). Andrew Grimes, Esquire, and Megan Ehrlich, Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Kristi Lea Harrington sentenced Applicant to incarceration for twelve (12) years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Banks, 2014-UP-479 (Filed on December 23, 2014). The Remittitur was issued on January 7, 2015.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina

Department of Corrections, the application, and the trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. "Failed to relieve himself due to serious medical issues;"
 - b. "Failed to fully investigate;"
 - c. "Failed to be prepared and adequately litigate."
2. "U.S.C.A. Const. Amend. 6"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

Respondent submits that Applicant's allegation of Ineffective Assistance of Counsel is without merit. In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial 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, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

IV.

Respondent further interprets Applicant's second allegation as a claim of due process violations. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with

specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that an Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

[SIGNATURE BLOCK ON NEXT PAGE]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

February 23, 2016.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

KASHAUN BANKS, #355175)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2015-GP-10-3849

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esq.
 Falk Law Firm, LLC
 PO Box 1058
 Charleston, SC 29402

DATED this 23rd day of February, 2016.


 Elizabeth McLellan, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Kashaun Banks, #355175)

Plaintiff,)

vs.)

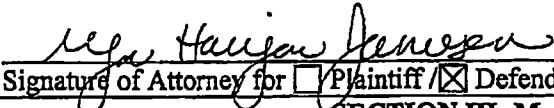
STATE OF SOUTH CAROLINA)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO: 2015-CP-10-3849

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: James Kristian Falk, Bar No. Address: Falk Law Firm, LLC PO Box 1058 Charleston, SC 29402 Phone: _____ Fax: _____ E-mail: _____ Other: _____	Defendant's Attorney: Megan Harrigan Jameson, Bar No. Address: South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: _____ Fax: _____ E-mail: _____ Other: _____
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☒ NO	
SECTION II: Motion/Order Type	
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant January 23, 2018 Date submitted	
SECTION III: Motion Fee	
☐ PAID - AMOUNT: \$ _____ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT.
2015-CP-10-3849

KASHAUN BANKS,
APPLICANT,
VS.
THE STATE OF SOUTH
CAROLINA,
RESPONDENT.

)
)
)
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)
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)
)
)

TRANSCRIPT OF
RECORD

DECEMBER 7, 2017
CHARLESTON, SC

B E F O R E:

HONORABLE MICHAEL NETTLES

A P P E A R A N C E S:

MEGAN JAMESON, ESQUIRE
Attorney for the Respondent

JAMES K. FALK, ESQUIRE
Attorney for the Applicant

* * * * *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

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1 (The following proceedings were held
2 December 7, 2017, Charleston County, South
3 Carolina, @ 10:37 a.m.)

4 MS. JAMESON: Your Honor, the next
5 matter is going to be Kashaun Banks. Your Honor,
6 may I approach with your packet?

7 THE COURT: Yes.

8 MS. JAMESON: May it please the Court,
9 the next matter is Kashaun Banks versus the State
10 of South Carolina, docket number 2015-CP-10-3849.
11 Mr. Banks was indicted during the November 2011
12 term for the Charleston County grand jury for one
13 count of armed robbery following the robbery of an
14 Exxon station in North Charleston. Andrew Grimes
15 and Megan Ehrlich from the Charleston County Public
16 Defender's Office represented him. On April 22nd,
17 2013, he proceeded to a jury trial before Judge
18 Harrington where he was convicted as indicted and
19 Judge Harrington sentenced him to 12 years
20 imprisonment.

21 A notice of appeal was filed on his
22 behalf and on appeal he challenged unadmitted
23 statements that were not introduced at trial
24 arguing they were not freely and voluntarily given
25 to law enforcement. Following briefing and oral

1 argument the South Carolina Court of Appeals
2 affirmed his conviction and sentence on
3 December 23rd, 2014. The remittitur was issued on
4 January 7th, 2015. On July 10th, 2015, he filed an
5 application for post-conviction relief alleging he
6 was being held in custody unlawfully because
7 counsel failed to move to be relieved due to a
8 serious medical issue, counsel failed to fully
9 investigate and counsel failed to be prepared and
10 adequately litigate his case at trial. The State
11 made its return on February 23rd, 2015, requesting
12 an evidentiary hearing be held. He is represented
13 by Mr. Falk and applicant is present in the
14 courtroom.

15 THE COURT: Mr. Falk, I am going to ask
16 you if you could to enumerate the grounds for
17 post-conviction relief which you intend to present
18 to the Court here today.

19 MR. FALK: Your Honor, this is somewhat
20 of an unusual case. This is Mr. Grimes and I don't
21 know if this was close to one to the last cases
22 that he tried, but actually we are certainly going
23 forward on the fact that possibly his physical
24 health was limiting his ability to perform at a
25 level. And it's interesting because Mr. Grimes

1 actually sent my client a letter on July 8th, 2014,
2 where he sort of invited a PRC application based on
3 his mental health issues. And I would bring that
4 letter in through in Mr. Banks' testimony.

5 And then we are going to show some
6 areas where I'm going to try and draw some specific
7 examples from the transcript where it looks like
8 Mr. Grimes might have been struggling and it is the
9 struggling that you possibly would expect from
10 someone who is trying their first case. Mr. Grimes
11 has a tremendous amount of experience.

12 THE COURT: Of course we will be able
13 to hear all those. Of course that's generally
14 categorized as mental health of trial counsel. We
15 will talk about all of that. But I just want you
16 to enumerate in full point fashion which grounds we
17 are going forward with here today. Is that
18 essentially it?

19 MR. FALK: Well, there was the issue
20 that was raised on appeal. And in that regard, it
21 relates to the issue that my client raises as far
22 as the statements. There was a Jackson v. Denno
23 hearing in this case. And Judge Jefferson
24 ultimately -- it would appear that she was going to
25 let the statement come in. However, as this case

1 played out, the statement was never admitted and
2 the Court of Appeals sort of gave an interesting
3 opinion in the case where they sort of stated that
4 we can't even address this Jackson v. Denno issue
5 because there was discussion made in limine about
6 trying to keep it out, but it was never preserved
7 for appellate review. I am wrestling with that
8 opinion, because it doesn't look as though it
9 became relevant since the statement was never
10 offered.

11 MS. JAMESON: Your Honor, I believe
12 just for the record that that is what the
13 unpublished opinion says, is that just strictly it
14 is not preserved because the statement was never
15 admitted against Mr. Banks. I don't believe it
16 goes any further than that.

17 MR. FALK: Normally when I see that in
18 an appellate review -- I mean in appellate opinion
19 I focus on that as being unpreserved at trial, but
20 I'm not sure that even -- I don't think there is
21 prejudice because there is no --

22 THE COURT: So the statement issue, you
23 are not going to forward on that.

24 THE DEFENDANT: Excuse me, Your
25 Honor --

1 THE COURT: Hang on just one second,
2 Mr. Banks. You are going to have an opportunity to
3 talk, but now is not the time. You will have an
4 opportunity to confer with your lawyer. You are
5 going to have an opportunity to get on the witness
6 stand and speak, but it's not your time now and I
7 will hear from you, hear everything that you have
8 got to say at the appropriate time. Does that
9 sound fair enough?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right. Just be
12 patient. We are going to handle this. Yes, sir.

13 MR. FALK: And there is one other item.

14 THE COURT: So we are not going forward
15 on the issue of the statement because of the
16 circumstances.

17 MR. FALK: Well, I believe that's what
18 my client wants to address the Court because he'd
19 still prefer to go forward on this.

20 THE COURT: So to that extent we are
21 going to address the issue about the statement.

22 MR. FALK: Yes. There is one other
23 issue that I did not talk to Ms. Jameson about and
24 I do believe that trial counsel should have made
25 comment or objection to the judge's opening charge.

1 This is on page -- this happens a couple of times.
2 This charge came pre Beaty, but this is where Judge
3 Jefferson used this is the search for the truth
4 language in her opening charge which the courts
5 have since that time found to be inappropriate
6 language, although I don't think they find it
7 prejudicial.

8 THE COURT: I think in the case of
9 addressing that very issue it said it was not
10 prejudicial. They just encouraged trial judges not
11 to do that.

12 MR. FALK: I agree with that.

13 THE COURT: We will address that issue
14 certainly. Anything else?

15 MR. FALK: No, Your Honor.

16 THE COURT: All right. You may
17 proceed.

18 MR. FALK: May I call Ms. Ehrlich to
19 the stand? She was second chair in this case.

20 THE COURT: All right. Very good.

21 MEGAN EHRLICH

22 having been duly sworn, testifies as follows:

23 THE CLERK: Please state your full name
24 and spell your first and last name for the record.

25 THE WITNESS: Megan Ehrlich, M-E-G-A-N,

1 last name is E-H-R-L-I-C-H.

2 DIRECT EXAMINATION

3 BY MR. FALK:

4 Q. Just address this one issue quickly.
5 If you can just look at page 214 of your
6 transcript, lines 1 through 3.

7 A. (Witness complies with request.) Which
8 line?

9 Q. 214, lines 1 through 3.

10 A. Yes.

11 Q. Just make sure you are on the same
12 page. Is that part of the judge's opening remarks
13 to the jury?

14 A. Yes, it is the search for the truth
15 line.

16 Q. It's a search for the truth to make
17 sure that justice is done between the parties,
18 that's why you are here today?

19 A. Yes.

20 Q. Was there ever any discussion or
21 consideration whether or not objecting to that
22 language as being burden shifting?

23 A. I don't remember any discussion about
24 that.

25 Q. Do you --

1 A. We would normally object to that, yes.

2 Q. If you heard that language tomorrow in
3 the trial you would object to that, would you not?

4 A. Yes.

5 Q. Let me talk to you, you were second
6 chair both on the initial trial in 2012, then also
7 in 2013; is that correct?

8 A. Yes.

9 Q. Did Mr. Grimes' health deteriorate
10 between those two times?

11 A. It did.

12 Q. You work every day in the public
13 defender's office; is that correct?

14 A. I do.

15 Q. And you worked frequently with him?

16 A. I did. I worked with Mr. Grimes on
17 many occasions.

18 Q. So you would be aware of how he was
19 doing on a day-to-day basis, at least as far as --

20 A. For the most part.

21 Q. Observations you could make about his
22 general health?

23 A. Yes.

24 Q. And you were aware that he was having
25 some chronic health issues in the latter part of --

1 A. He had significant health problems,
2 yes.

3 Q. Okay. Is it fair to say that he was
4 having somewhat of acute health problems during the
5 week of that trial?

6 A. Yes. Just to clarify, I went through
7 kind of some e-mails to make sure I had the
8 timeline correct. I know that on the 23rd which
9 was the Tuesday he was not feeling well to the
10 point that during the lunch break he was -- spent
11 the lunch break in a coworker's office on a couch,
12 had chills and was under a blanket and definitely
13 not feeling well that day and I believe on that
14 same day it was Judge Harrington who was the trial
15 judge, not Judge Jefferson.

16 Q. I am sorry.

17 A. She made a call to end court early so
18 that he would be able to get some sort of rest or
19 medical treatment that day.

20 THE COURT: You say she did what?

21 THE WITNESS: She ended court early
22 that day. I believe we ended court a little after
23 three.

24 THE COURT: What was his problem?

25 THE WITNESS: He had -- he was -- he

1 had chronic like an immune deficiency, some sort of
2 disease and I believe they have the medical
3 records, but he would sometimes have a swelling and
4 pain in his legs, be feverish to the point that he
5 had chills and that would cause him significant
6 pain and kind of weakness and I believe those were
7 the types of symptoms that he was experiencing at
8 the start of the trial.

9 BY MR. FALK:

10 Q. Weren't you also -- did you also
11 observe, and I'm not sure if you just testified to
12 that, but during the lunch break he was shivering?

13 A. He went into Lori Proctor's office.
14 She has got a couch in her office and spent the
15 lunch break resting very like chilled, had a
16 blanket over him and I remember that very well and
17 being concerned about that.

18 Q. Were you also having some communication
19 -- was he married or --

20 A. The reason I remember the timeline is
21 because I was communicating with his girlfriend who
22 worked in the courthouse. She was concerned over
23 whether or not he was angry at her based on like a
24 passing. And I was explaining back to her that he
25 was not feeling well and I thought that was

1 probably the reason why he had not been as friendly
2 as he normally would be toward her.

3 Q. You said you worked on several
4 occasions with him?

5 A. Yes.

6 Q. And that's not typical for him to spend
7 lunch shivering under a blanket?

8 A. That's the worst I can remember him
9 being. It was not completely out of the norm for
10 him to get sick preparing for trial. I think the
11 stress of trial would often bring out some of his
12 symptoms. But the specific instance of being under
13 the blanket and shaking stands out in my memory.

14 Q. In getting ready for this hearing did
15 you review some of the testimony by Craig
16 McCalhaney?

17 A. I did.

18 Q. I believe that starts about page 254?

19 A. Okay.

20 Q. Just to sort of get a context, this is
21 a case where part of your defense was that they had
22 gotten the wrong person; is that correct?

23 A. Correct.

24 Q. Because this was a robbery at an Exxon
25 station and there was a period of time police

1 apprehended somebody within -- and there's a
2 dispute as to timeline -- between 10 and 20 minutes
3 later?

4 A. Right. There's an allegation of armed
5 robbery in a gas station. The person is not caught
6 on scene. There was an identification that was
7 suppressed by the Court. So the argument was that
8 they have the wrong person.

9 Q. And there was discrepancy between Mr.
10 Banks' actual height and weight and some of the
11 descriptions that were given on the initial 911
12 call; is that part of your recollection?

13 A. Yes.

14 Q. And so Mr. Grimes was attempting to
15 cross-examine, I am not sure if it's Detective
16 McCalhaney or agent or whoever it was, and using a
17 series of photographs?

18 A. Yes.

19 Q. And these are -- and so if you look at
20 page in the transcript about 283 going forward, do
21 you recall that part of the trial where he was
22 attempting to use some photographs in order to
23 identify where agent Mr. McCalhaney, policeman
24 McCalhaney was at the time?

25 A. Based on the transcript I can remember

1 that, yes.

2 Q. Okay. And if you review the transcript
3 does it look like he was having difficulty?

4 A. I think there were objections to him
5 not laying the foundation. And he was not able to
6 get -- I think most of the pictures were not
7 admitted.

8 Q. In all your work with Mr. Grimes did he
9 usually sort of have a problem fumbling with
10 getting photographs admitted into evidence and
11 laying a foundation for a photograph?

12 A. I think it would depend on the case. I
13 think Mr. Grimes was a talented attorney. I think
14 -- I don't know if he gave up on those, trying to
15 get those in or not. I don't know.

16 Q. But do you understand how the
17 photographs fit into sort of the trial strategy?

18 A. I do.

19 Q. Because that was where the car was
20 parked that the agent who apprehended?

21 A. Right.

22 Q. And sort of what view he had of the
23 scene?

24 A. Right.

25 Q. How far away he was from the Exxon

1 station?

2 A. Yes.

3 Q. He had four or five photographs and he
4 was unable to lay foundation for any of them; is
5 that correct, or close?

6 A. I don't remember the number, but in
7 reviewing the transcript there were several times
8 that he was not able to get the pictures admitted.

9 Q. He also had a problem trying to admit a
10 photograph of what he believed was possibly a
11 condom wrapper?

12 A. I believe so. There was some sort
13 of --

14 Q. That's on page 315. I am sorry. I
15 should have given you the page numbers.

16 A. Did you say page 315?

17 Q. I am sorry, I should give you the line
18 number. I have given you the wrong page number. I
19 am sorry. Hold on. 310.

20 A. Okay.

21 Q. Lines 21 through 24, 25.

22 A. Right.

23 Q. And then moving on to 313 he was I
24 think trying to impeach the track that the dog had
25 as far as the fence that the dog had to go around,

1 that's on page 313 line 7 through 11?

2 A. Yes.

3 Q. I can keep sort of pointing to these
4 issues that he appeared to have as far as trying to
5 get the testimony admitted, he tried to. So I mean
6 do you think he was at his best that day?
7 Unfortunately you are the only one that kind of
8 knows, right, because it's not necessarily going to
9 jump off in front of you on the transcript?

10 A. Right. I mean I don't know if he was
11 at his best. I don't know if I can answer that
12 question honestly. I'm not sure.

13 THE COURT: Really whether he was at
14 his best is really kind of irrelevant. Was his
15 performance inferior?

16 THE WITNESS: I think it's possible.
17 He definitely wasn't feeling well that day and he
18 was struggling through this portion of questioning
19 with the officers. Whether or not it was because
20 of his health or he had a bad day, I don't know.

21 BY MR. FALK:

22 Q. Well, maybe take this a little bit out
23 of order because I'm going to try and show the
24 letter through my client, but were you aware that
25 he wrote my client a letter about his health?

1 A. Yes. Mr. Grimes' paralegal provided me
2 with a copy of the letter.

3 Q. And he also sent his medical records?

4 A. He sent him his medical records and
5 invited -- indicated that he felt like it was
6 something Mr. Banks should look into.

7 Q. And he certainly had a chronic health
8 issue for a period of time? He didn't send this
9 letter out in every case, did he?

10 A. I don't know of any other case that he
11 sent a letter out like that.

12 Q. This is a little bit aside. Have you
13 had many cases where they have had -- withdraw
14 that. Let's talk about the statement that Mr.
15 Banks has a concern with and that's on page 345.
16 Excuse me, 394, lines 11 through 24.

17 A. I see that. Talking about the
18 questioning regarding the cell phone?

19 Q. About the cell phone.

20 A. Yes.

21 Q. And that was all about -- that cell
22 phone, that statement about the cell phone, that
23 all came about that was where Mr. Banks handed the
24 cell phone to the person who was interrogating him
25 and asked him to go call his girlfriend or wife,

1 whoever it was or sister?

2 MS. JAMESON: Your Honor, I believe
3 that's a misclassification or mischaracterization
4 of the record. I think it was on the scene, not
5 during any sort of interrogation. I think the
6 record speaks for itself on that.

7 THE COURT: I'll ask that you rephrase
8 the question.

9 BY MR. FALK:

10 Q. So he asked a police officer to call
11 his sister?

12 A. He asked a police officer to call who
13 he said was his sister, yes.

14 Q. And what is your recollection of how
15 that came about? Who was -- when did that
16 transpire?

17 A. That I cannot remember without looking
18 at notes from the recorded interview. I don't know
19 if you have that.

20 Q. May I have a moment?

21 THE COURT: Yes.

22 (Attorney confers with client.)

23 BY MR. FALK:

24 Q. We will have to find this in the
25 record. It is my recollection of going through the

1 Jackson v. Denno hearing that that thing about the
2 cell phone came as part of the interrogation. When
3 he broke during the interrogation he handed the
4 cell phone to the police officer and asked him to
5 call his sister.

6 A. I think that's correct. I would have
7 to -- I may have notes from the interview in the
8 boxes over there if you want me to look at that.

9 Q. Would that have been something to
10 object to in your mind as far as if it was, in
11 fact, my client sort taking a break from an
12 interrogation and asking the police officer to call
13 his sister, would that be something that would --
14 that you would consider objecting to as possibly
15 violating his right to exercise his Miranda rights
16 to stop the interrogation?

17 A. If it was part of the interview, and he
18 was asking to make a phone call, and that we were
19 arguing at some point that he had invoked his right
20 to remain silent and that he asked for help, I
21 remember there's part of the interrogation where
22 he's saying that he was trying to -- he wanted to
23 call for help and that the sister would have been
24 the person that he was calling for help. And so,
25 yes, possibly. And this was different than the

1 first trial. So the cell phone -- do you want me
2 to talk about the cell phone?

3 In the first trial there was a cell
4 phone found as part of the evidence near the
5 property or in the backpack and in the first trial
6 one of Mr. Grimes' argument was that the police
7 never did anything to link Mr. Banks to that cell
8 phone. So that was an argument that maybe police
9 had dropped the ball in identifying who the
10 backpack belonged to. They were saying the
11 backpack belonged to the robber. Our argument was
12 that Mr. Banks wasn't the robber and had they done
13 more work with the cell phone they would know that.

14 So the first trial ends in a mistrial
15 and the second trial the State tried to correct
16 that by bringing this up to connect Mr. Banks to
17 the cell phone. So, yes, we should have tried to
18 find a way to object to that because I think that
19 potentially made a difference in the outcome.

20 Q. And certainly if that is sort of
21 evidence to somebody taking a break as part of
22 interrogation that you all argued as part of the
23 Jackson v. Denno hearing that certainly would be --

24 A. Yes.

25 Q. Although you lost the Jackson v. Denno

1 hearing, there would have been a time to certainly
2 preserve the objection?

3 A. Correct.

4 THE COURT: They ultimately did not
5 admit the statement, am I understanding correctly
6 as to that?

7 MR. FALK: They did not admit his
8 statement, but still part of the grounds -- there
9 was part of the grounds in the -- to keep the
10 statement out I guess was twofold. One, whether or
11 not it was coerced and voluntary, et cetera and one
12 was whether or not he exercised his rights whether
13 it be Michigan v. Mosley or Miranda to stop the
14 interrogation.

15 THE WITNESS: Right.

16 THE COURT: But it didn't come in
17 anyway.

18 MR. FALK: No, but my argument would be
19 possibly that this is a ground, a key of piece of
20 evidence being this telephone and the reason why
21 this officer is talking about the telephone is
22 because it happened during an interruption or a
23 cessation.

24 THE COURT: You may continue.

25 BY MR. FALK:

1 Q. Let me just -- a couple other areas
2 where it sort of stands out. If you would look at
3 page 364, lines 14 and 15 where Mr. Grimes is
4 cross-examining Officer Swagell?

5 A. Yes. Where they asked him how are you
6 doing today and he says not bad. Feeling better
7 than yesterday.

8 Q. And a couple of times, I had it marked,
9 I dropped it, where Judge Harrington tells Mr.
10 Grimes if you need any breaks you just call me or
11 let me know if you want to take any extended breaks
12 the day.

13 A. Yes.

14 Q. So it was possibly clear not only to
15 some of the other people who observed possibly Mr.
16 Grimes is feeling sick that day, yourself, maybe
17 his girlfriend, some of the other witnesses who
18 were in the courtroom were asking how he was
19 feeling? I am just saying is that --

20 A. Judge Harrington was definitely aware
21 based on us leaving early and giving him an
22 opportunity for breaks. Whether or not the
23 witnesses knew or not, I can't remember if the
24 witnesses were in court the first day and observed
25 him or not or if Mr. Grimes was just offering on

1 his own which he maybe sometimes would do by
2 commenting on how he was doing. I think -- I don't
3 know if they observed it or if he was just saying
4 well, I'm doing better than yesterday.

5 Q. I have never had a police officer want
6 to know how my health was. So it sort of stood out
7 to me.

8 A. I can't remember if they were in here
9 or not. I don't think the witnesses were
10 sequestered in this trial.

11 MR. FALK: I don't believe I have any
12 further questions. Thank you.

13 THE COURT: Cross-examination.

14 CROSS-EXAMINATION

15 BY MS. JAMESON:

16 Q. Good morning, Ms. Ehrlich. How long
17 have you been practicing law?

18 A. Since 2006.

19 Q. How long have you been at the PD's
20 office?

21 A. Since 2006.

22 Q. Do you know when Andrew was appointed
23 on this case?

24 A. The case was originally assigned to him
25 in October of 2011 I believe.

1 Q. When did he ask you to assist with this
2 case?

3 A. I got brought in prior to the first
4 trial which I think was in 2012, not long before
5 that first trial.

6 Q. And the first trial resulted in a hung
7 jury?

8 A. Yes.

9 Q. Had you tried cases with Andrew before?

10 A. I had.

11 Q. Do you know roughly how many?

12 A. I don't.

13 Q. More than one?

14 A. Oh, yeah.

15 Q. More than ten?

16 A. Maybe not more than ten. He had sat
17 with me second chair before and I had sat with him
18 second chair before. I don't know how many times.

19 Q. Did you meet with Mr. Banks before the
20 first trial and before this trial?

21 A. I can't remember if I had a one-on-one
22 meeting with him before the first trial or just met
23 him with Mr. Grimes. I know I had at least a
24 one-on-one meeting with him prior to the second
25 trial.

1 THE COURT: I sort of gather Mr. Grimes
2 is no longer with us? How long after this trial
3 did he pass? How old was he?

4 THE WITNESS: He passed away in
5 September of 2014.

6 THE COURT: This trial was when?

7 THE WITNESS: April of 2013.

8 THE COURT: How old was he?

9 THE WITNESS: I believe he was 44 when
10 he passed away.

11 THE COURT: As a result of his
12 condition or something else?

13 THE WITNESS: That's -- he was in a car
14 accident either on the way or coming from the jail
15 and I don't know the details of if his condition
16 caused the car accident, but he crossed over lanes
17 of traffic and ended up colliding with a tree and I
18 believe his medical issues contributed to him not
19 being able to save him. But there was a car
20 accident. What caused the car accident I'm not
21 sure of; I don't know.

22 THE COURT: Yes, ma'am. You may
23 proceed.

24 BY MS. JAMESON:

25 Q. But you did meet with Mr. Banks?

1 A. I did.

2 Q. And what was your role in the trial,
3 both of the trials?

4 A. My role was more to prep him for the
5 Jackson v. Denno and work with him. I had worked
6 in family court before and worked with younger
7 Defendants and had a good rapport with them
8 typically. And so because Mr. Banks had been in
9 special education I think Andrew felt like I would
10 be good to be working on this case.

11 Q. Moment's indulgence. I think you got
12 into it a little bit in your direct examination,
13 but can you briefly tell the Court what the
14 allegations were here, what the State alleges
15 happened?

16 A. So the allegation in the case was that
17 somebody went into a gas station with a weapon and
18 robbed the station. I think took the cash till,
19 ran out. There was discrepancy between the
20 description given and ultimately Mr. Banks. There
21 was a K9 track that led to a backpack and items
22 that they were able to try to connect with the
23 robbery I believe including some gloves maybe that
24 was found in the backpack. And I believe it was a
25 B.B. gun they said was used.

1 Q. And the backpack was actually found on
2 Mr. Banks, correct? He was wearing it?

3 A. He was either wearing it or it was on
4 the ground right beside him. I can't remember. If
5 you point me to the transcript I can look.

6 Q. Either way, whether it was on or off,
7 it was in close proximity to him?

8 A. Right.

9 Q. And he was found within two blocks of
10 that Exxon station. There was a discrepancy
11 whether it was 10 minutes or 18 minutes later, but
12 within a 20-minute period?

13 A. I believe so.

14 Q. Did you review any of the discovery
15 materials in this case?

16 A. I did.

17 Q. Was there surveillance video?

18 A. There was.

19 Q. What did the surveillance video show?

20 A. The surveillance video was from inside
21 the store so it showed the actual incident. I
22 believe the State used maybe some -- would freeze
23 the screen for the jury.

24 Q. Did it show the gloves that the suspect
25 was wearing?

1 A. Yes.

2 Q. Were those identical or similar to the
3 gloves that were found in the backpack?

4 A. Yes.

5 Q. And did the B.B. gun resemble -- that
6 was found in the backpack in Mr. Banks' possession,
7 was that similar to the B.B. gun that was shown on
8 the surveillance?

9 A. I assume so.

10 Q. Do you know if the two store clerks who
11 were working at the Exxon testified to that?

12 A. I know they both testified. I can't
13 remember if the details -- if they identified the
14 gun or said it looked similarly. I know the gloves
15 were much easier to see than the weapon.

16 Q. Do you know if Mr. Grimes used an
17 investigator on this case?

18 A. He did.

19 Q. Was it the PD investigator that you
20 have your office?

21 A. Yes, he would have used Lee Gin who was
22 our investigator at the time. He would have been
23 the one -- he visited the crime scene and took
24 pictures.

25 Q. Are you aware of what sort of

1 investigation Andrew and this investigator did?

2 A. I know that they went to the crime
3 scene. I know that they took pictures. I cannot
4 remember if they attempted to interview the two
5 store clerks. They looked into the K9 officer and
6 the K9 actual dog. I think they requested over a
7 thousand pages of records to kind of attack the
8 credibility of the K9 track.

9 Q. Do you recall that K9 officer
10 testifying at trial?

11 A. I do.

12 Q. Did he cross-examine him based on that
13 investigation into the dog's tracking?

14 A. Yes.

15 Q. And did the K9 track before Mr. Banks
16 was in custody or after he was in custody?

17 A. That I can't remember without looking
18 at the transcript. I'm sorry.

19 Q. Your Honor, the record will speak for
20 itself, but the State submits that he was already
21 in custody in a law enforcement vehicle when the K9
22 tracked directly to the vehicle.

23 THE COURT: Say that again.

24 MS. JAMESON: The K9 handler started at
25 the Exxon and tracked and at that time applicant

1 was already in the police cruiser and the K9
2 tracked directly to the police cruiser is what the
3 record will reflect.

4 BY MS. JAMESON:

5 Q. Do you recall the overall defense
6 strategy that you and Mr. Grimes --

7 A. They have the wrong person was kind of
8 our theme.

9 Q. Did he point out any discrepancies with
10 things that applicant was taken into custody with
11 that he didn't have at the robbery like a Sprite or
12 anything like that?

13 A. There was questioning about the
14 difference in the clothing. I think the robber was
15 supposed to be wearing pants. I know Mr. Banks was
16 wearing shorts. There was a big issue with a
17 Sprite bottle.

18 Q. Can you explain that for the Court.

19 A. I feel like there was an issue with a
20 whether -- I can't remember if it was the robber
21 didn't have a Sprite bottle, but there was a Sprite
22 bottle found on scene. There was cross-examination
23 about the discrepancy in the description of the
24 robber compared to Mr. Banks given by the store
25 clerk. So I think there was a strong focus on

1 that.

2 Q. And you and Andrew moved to suppress
3 Mr. Banks' statements, correct?

4 A. Yes.

5 Q. Have you had a chance to review the
6 transcript?

7 A. I have reviewed it a few days ago, so
8 if there is a specific point you want me to look at
9 refer me to it.

10 Q. Just overall. Do you recall how many
11 witnesses were called?

12 A. The two store clerks, the K9 officer,
13 and maybe two or three officers. There weren't
14 that many witnesses in this case. It was the two
15 store clerks and then I think three officers maybe?

16 Q. Did you call any witnesses during the
17 Jackson v. Denno?

18 A. During the Jackson v. Denno, yes.

19 Q. Who did you call?

20 A. We called Mr. Banks and then we called
21 a special education teacher from the school
22 district.

23 Q. What was your strategy behind calling
24 the special education teacher?

25 A. He had been in special education and

1 one of Andrew's arguments with regard to the
2 suppression of the statement was that he --
3 potentially it wasn't voluntarily given and so we
4 wanted to show that he had a learning disability.
5 He couldn't read well at the time. And we wanted
6 to make sure that was clear to the Court.

7 Q. Do you recall the arguments? Do you
8 recall how many arguments he made in support of
9 suppression? Was it just one ground or did you and
10 Andrew have multiple grounds?

11 A. There were definitely at least two
12 grounds. One was that he had invoked his right to
13 remain silent when speaking with the officer. I
14 think he said I'm done. And then the second was
15 that it wasn't voluntarily made based on his
16 limitations.

17 Q. Your Honor, for the record the
18 Defendant's suppression argument starts on
19 page 127. And Judge Harrington ultimately denied
20 this motion and allowed the State -- told the State
21 that statement could come in, correct?

22 A. Correct.

23 Q. But the statement didn't come in?

24 A. That's right. They decided not to
25 admit the statement once the trial had started

1 going.

2 Q. Did you and Mr. Grimes move to suppress
3 evidence from the search based on any Fourth
4 Amendment violations?

5 A. Andrew had some arguments to try to
6 keep the backpack out.

7 Q. Do you know if that was ultimately --

8 A. It was denied.

9 Q. And you and Mr. Grimes also moved to
10 exclude identification from one of the store
11 clerks, correct?

12 A. Correct. That was granted.

13 Q. That was granted. So no identification
14 was made of Mr. Banks in this case, correct?

15 A. Correct.

16 Q. Based on the motion in limine that was
17 granted?

18 A. Yes.

19 Q. Do you recall whether there were any
20 lesser includeds?

21 A. Andrew requested strong arm robbery and
22 that was denied.

23 Q. Did you try to present any testimony
24 regarding Mr. Banks' learning disability or IQ?

25 A. Yes.

1 Q. Can you expound on that for the Court a
2 little bit?

3 A. The same witness that we used in the
4 Jackson v. Denno we wanted to call to kind of
5 address because in the opening statement Andrew
6 referred or kind of eluded to the fact that they
7 may hear a statement, and so we wanted to bring out
8 some of his special education needs in front of the
9 jury and that request was denied.

10 Q. Why was that request denied?

11 A. I think they objected on the grounds of
12 relevance maybe.

13 Q. Because the statement never came in?

14 A. Because the statement never came in. I
15 think Mr. Grimes maybe submitted to proffer the
16 testimony, but there was -- I think Judge
17 Harrington asked us if it would be basically the
18 same from pretrial and we agreed it would be
19 basically the same and she didn't allow us to
20 proffer it. I think she incorporated that into the
21 record as a proffer.

22 Q. So it would be preserved for appellate
23 review?

24 A. It was.

25 Q. Would you say you were an active second

1 chair in this case?

2 A. Not as far as in front of the jury. I
3 didn't have any of the witnesses in front of the
4 jury. The only witnesses I would have handled in
5 front of the jury was the special education
6 teacher. A lot of my involvement was more working
7 with Mr. Banks and prepping him for Jackson v.
8 Denno and just helping Andrew. But it wasn't a
9 case where -- I didn't do the opening. I didn't do
10 the closing. I didn't do any of the trial
11 witnesses.

12 Q. And I believe there was testimony on
13 direct that court broke early on Tuesday the 23rd?

14 A. I believe so.

15 Q. And I think you testified before that
16 that was the worst you had ever seen Andrew was on
17 the 23rd?

18 A. That incident with the couch. I'm not
19 talking about in court, just that incident on the
20 couch really stood out to me as him not feeling
21 well shaking under a blanket.

22 Q. Did you see him visibly shaking in the
23 courtroom?

24 A. I can't remember if he was shaking in
25 the courtroom.

1 Q. And that day when he was feeling very
2 poorly at lunch court broke early that day?

3 A. It did.

4 Q. Much has been made about these pictures
5 that weren't admitted. Have you ever in your
6 12 years experience not been able to get photos in
7 for lack of foundation?

8 A. Sure.

9 Q. Regarding the condom or piece of paper
10 that was found in the backpack, because do you
11 remember what the actual objection from the State
12 was there?

13 A. It might have been relevance. I can't
14 remember. If you know the page number.

15 Q. 310. Lines -- the bottom half of the
16 page.

17 A. According to the record, Mr. Kidd just
18 objected, but didn't give a ground.

19 Q. If you'll kind of review the page, this
20 objection is in regards to Andrew kind of
21 classifying or characterizing that this was a
22 condom and that teenagers practice safe sex, not
23 trying to admit it, not being able to get it in
24 based on any sort of foundation on 310, correct?

25 A. I am looking at 309 because I think

1 that's where it starts. Looks like the picture
2 came in, but the question was objected to.

3 Q. So the picture did come in. He was
4 able to get in the picture of possibly the condom?

5 A. It's the questioning that was objected
6 to.

7 Q. And this discussion about the phone and
8 Mr. Banks asking to call his sister, not really his
9 sister, his fiancée, the statement never came in,
10 correct, his statement to law enforcement?

11 A. They never played the statement in
12 front of the jury.

13 Q. Regarding -- if you will turn to
14 page 214, regarding those allegations about the
15 search for the truth language that Judge Harrington
16 used in her opening charge to the jury?

17 A. Right.

18 Q. This trial was or are you familiar with
19 the Supreme Court recent case of Beaty?

20 A. Yes.

21 Q. This trial was in 2013, correct?

22 A. Right.

23 Q. Before that?

24 A. Yes.

25 Q. So I think your testimony was you would

1 object if this happened tomorrow?

2 A. Right.

3 Q. Back then in 2013 did you find it
4 objectionable to object to that language from Judge
5 Harrington?

6 A. I mean I don't remember specifically
7 telling Andrew you need to object here.

8 Q. Moment's indulgence, Your Honor. Did
9 Mr. Grimes seem medically unable to perform his job
10 during this trial?

11 A. I can't really answer that question. I
12 know that he didn't feel well, especially on the
13 23rd and we ended court early because of that.

14 Q. I believe you testified that it was
15 routine for the stress to kind of get to him and he
16 would not be feeling well before trials?

17 A. It was not uncommon for him to get sick
18 when he was in trial just because I think the
19 stress of trial affected him differently because of
20 his medical condition.

21 MS. JAMESON: No further questions,
22 Your Honor.

23 THE COURT: Any redirect?

24 MR. FALK: Your Honor, may I have a
25 moment.

1 THE COURT: You may.

2 REDIRECT EXAMINATION

3 BY MR. FALK:

4 Q. I am trying to get to the point of this
5 telephone call. If you could look at page 395.

6 A. (Witness complies with request.)

7 Q. Mr. Grimes is cross-examining Officer
8 Latcher?

9 A. Page 395.

10 Q. Yes.

11 A. Okay.

12 Q. So Officer Latcher was one of the
13 people who was involved in the interrogation; is
14 that correct?

15 A. I believe so or he was at least present
16 at the detective's bay that day.

17 Q. Because if you look through the
18 cross-examination I mean I guess it's --

19 A. There's the cross about the description
20 of the room.

21 Q. Right.

22 A. He either was part of the interrogation
23 or at the station. Sometimes the officer comes in
24 at the end to talk to them or gather their
25 belongings.

1 Q. If you go on to page 396 line 12 I
2 guess that they are talking about the telephone
3 call from the cell phone where he extracts the
4 number at 12:05 at night?

5 A. Right.

6 Q. So that's the call that was taking
7 place to the wife or to the sister, whoever that
8 was, but that's the telephone call?

9 A. Right.

10 Q. So it was not -- so that was made
11 during -- so that took place during one of the
12 breaks in the interrogation?

13 A. I can't remember if it was during one
14 of the breaks or at the end without looking at
15 those notes.

16 Q. It wasn't when he was first
17 apprehended?

18 A. I don't think so.

19 MR. FALK: No further questions.

20 THE COURT: All right. You may step
21 down. Thank you. Call your next witness.

22 MR. FALK: Call Mr. Banks.

23 THE COURT: We are going to take about
24 a five-minute recess, then we will proceed forward.
25 We will stand at ease for five minutes.

1 (A recess transpired.)

2 THE COURT: Mr. Falk, you are
3 recognized.

4 MR. FALK: I'm going to call Mr. Butler
5 to the stand.

6 THE COURT: Mr. Butler, if you can come
7 forward and the deputy will help you in that
8 regard.

9 KASHAUN BANKS

10 having been duly sworn, testifies as follows:

11 THE CLERK: Please state your name and
12 spell your last name.

13 THE WITNESS: Kashaun Banks,
14 K-A-S-H-A-U-N B-A-N-K-S.

15 THE COURT: Thank you, Mr. Banks. Mr.
16 Falk, you are recognized.

17 MR. FALK: Your Honor, I was talking
18 about another case when I said Mr. Butler. Of
19 course we are calling Mr. Banks to the stand.

20 DIRECT EXAMINATION

21 BY MR. FALK:

22 Q. Mr. Banks, your medical condition has
23 changed since the date of the trial?

24 A. Yes, sir.

25 Q. What is your current?

1 A. Not really sure.

2 Q. Now, not necessarily the cause, but
3 what are your current symptoms? What are you
4 suffering from? You are obviously in a wheelchair.
5 Do you have use of your legs?

6 A. Not really, sir.

7 Q. And the stutter, is that a recent
8 change in your condition?

9 A. Yes, sir.

10 Q. Because there was some issues raised at
11 the Denno hearing about some education -- special
12 education plans, that you had some educational
13 needs.

14 A. Yes, sir.

15 Q. This is something different than that,
16 the stutter right now?

17 A. Yes, sir.

18 Q. May I approach the witness?

19 THE COURT: Yes.

20 BY MR. FALK:

21 Q. Is that a letter that you received from
22 Mr. Grimes?

23 A. Yes, sir.

24 Q. Now, is that the letter that's attached
25 to your application, that you put as part of your

1 application?

2 A. Yes, sir.

3 Q. And so this is a letter that's part of
4 the record that was attached to his PCR
5 application. When did you receive that?

6 A. Not really sure.

7 Q. What kind of time period from when you
8 first went up the road to when you got the letter?
9 Was it two months, was it two days?

10 A. Close to a year.

11 Q. Okay.

12 A. Over, maybe.

13 Q. Now, did you -- prior to him sending
14 you that letter did you have some conversations
15 with Mr. Grimes about his health?

16 A. Yes, sir.

17 Q. What were those conversations?

18 A. How was he doing, that was all.

19 Q. You mean did he -- did you at sometime
20 ask him questions -- oh, you asked him how he was
21 doing?

22 A. Yes.

23 MS. JAMESON: Your Honor, I would
24 object to this line of questioning as hearsay.
25 It's clearly offered for the truth of the matter

1 asserted because Mr. Grimes' health is the subject
2 of this application.

3 MR. FALK: I think I asked him --

4 THE COURT: What was the question?

5 MR. FALK: I asked him did they have
6 any -- did he have any conversations about his
7 health prior to that letter. I am trying to
8 establish what led up to Mr. Grimes sending the
9 letter to the extent that Mr. Banks would have any
10 knowledge.

11 THE COURT: I will allow you to ask
12 that. We all know that he was having some health
13 problems. Probably most relevant thing is that
14 letter. I would like to read it.

15 MS. JAMESON: Your Honor, it is
16 attached to the application.

17 THE COURT: Very good.

18 By MR. FALK:

19 Q. Did you ask him to send you a letter?

20 A. Yes, sir.

21 Q. You asked him to send you a letter
22 about his health?

23 A. No, he responded in a letter when I
24 asked him what went wrong in my trial.

25 Q. Okay. And he sent you that letter?

1 A. Yes, sir.

2 Q. What were your observations of him
3 during the trial? He represented you almost a year
4 before that, right, at the first trial?

5 A. Yes, sir.

6 Q. From your observations did he seem the
7 same?

8 A. No, sir.

9 Q. Can you give me any specific
10 observations that you have as to how he was
11 different?

12 A. His arguments were different. I feel
13 because he was operating under diminished capacity
14 at the time of my second trial he failed to argue
15 in my second Jackson v. Denno hearing in the same
16 manner that he did in my first Jackson v. Denno
17 hearing.

18 Q. Because you think there were different
19 cases that he argued at the first versus the second
20 hearing?

21 A. Yes, sir. One case which was Michael
22 v. Mosley which gives the Court a five-prong test
23 which in determining whether or not the Defendant
24 has revoked his right to remain silent.

25 Q. That's the United States Supreme Court

1 case?

2 A. Yes, sir, I believe.

3 Q. Is it Michael or is it Michigan v.
4 Mosley?

5 A. It's M-I-C-H-I-G-A-N v. M-O-S-L-E-Y.

6 Q. You are right. It is Mosley. But it's
7 your understanding in that case that it's a case
8 where they talk about -- what you do when somebody
9 is being interrogated and he asks to stop, is that
10 correct, and when it is proper to come back in?

11 A. Yes, I believe so.

12 Q. And you are saying that he argued that
13 in the first Jackson v. Denno hearing; is that
14 correct?

15 A. Yes, with Judge McDonald he raised that
16 issue that I invoked my right to right to remain
17 silent and she said that that was inadmissible
18 based on Michael v. Mosley.

19 Q. It is your recollection that it's not
20 the second transcript that he argued that case
21 before Judge Harrington?

22 A. Mr. Grimes did not raise that issue to
23 Judge Harrington which changed the outcome of my
24 trial.

25 Q. Okay.

1 A. Mr. Grimes failed also to object when
2 the statement was introduced by witness testimony.

3 Q. What statement is that?

4 A. The statement between the prosecutor
5 and the detective regarding Exhibit No. 20 based on
6 the cell phone during the conversation of the
7 interrogation.

8 Q. So that was the cell phone; is that
9 correct?

10 A. Yes.

11 Q. And so you asked somebody to make a
12 telephone call, is that correct, on your behalf?

13 A. Yes.

14 Q. And where were you when you asked for
15 that telephone call to be made?

16 A. Was in the interrogation room.

17 Q. Okay. And you asked -- this was when
18 you had a break in the proceedings; is that
19 correct? You had said I want to stop; is that
20 correct? You tried to stop your interrogation?

21 A. Yes.

22 Q. And during that intermission you asked
23 somebody to make a telephone call for you on your
24 behalf; is that correct?

25 A. Yes.

1 Q. And that was -- so the police officer
2 then was able to talk about that telephone
3 conversation at your trial; is that correct?

4 A. Yes, sir.

5 Q. Okay. So you did not ask for that
6 telephone call to be made when you were first
7 apprehended, did you?

8 A. No, sir.

9 Q. Okay. So you believe that there were
10 different arguments that were raised at the first
11 Denno hearing that were not raised at the second
12 Denno hearing?

13 A. Yes, sir.

14 Q. And at the second Denno hearing Judge
15 Harrington was going to allow your statement; is
16 that correct?

17 A. Yes, sir.

18 Q. What else did you observe that was
19 different from the two trials?

20 A. That Mr. Grimes failed to argue in
21 extreme in the Jackson v. Denno hearing which also
22 changed the outcome and Mr. Grimes failed under the
23 Constitution, Sixth Amendment of the objection
24 standard of legal representation in my second
25 Jackson v. Denno hearing presiding Judge

1 Harrington. However, Mr. Grimes failed to show
2 Judge Harrington that I invoked my rights to remain
3 silent using case law Michael v. Mosley as he
4 raised the issue to Judge McDonald in the first
5 trial. Furthermore, Mr. Grimes failed as an
6 attorney under the objection standard to remove his
7 self as counsel.

8 Q. I was just trying to ask you some
9 specific observations that you noticed he did. I
10 will withdraw the question. Is there something
11 else you would like to --

12 A. Mr. Grimes -- Judge Harrington would
13 have ruled that this statement was inadmissible.
14 Mr. Kidd would not have the ability to ask the
15 detective about the conversations regarding the
16 cell phone as Exhibit No. 20 before the jury
17 because that would be admitting the testimony and
18 Mr. Grimes failed to object and as evidence to show
19 the direct appeal court stated that the issue was
20 not --

21 Q. Preserved?

22 A. Objected to due to the ineffective
23 assistance of counsel of Mr. Grimes.

24 Q. Okay. Your Honor, what I would like to
25 do is if I could recall Ms. Ehrlich back to the

1 stand on one issue he had raised as far as the
2 difference in the arguments raised at the two
3 hearings. Would you have an objection to that?

4 MS. JAMESON: Are you done with his
5 testimony? I don't have any questions for this
6 witness.

7 THE COURT: You can step down. Thank
8 you very much. Counsel approach the bench.

9 (Off-the-record conference.)

10 THE DEFENDANT: Your Honor, I did
11 request my first trial transcripts to show that Mr.
12 Grimes did not argue the same manner in which he
13 did my second trial and my first trial transcript
14 arguments are not here, sir.

15 THE COURT: Very good. Thank you.

16 MR. FALK: If I could just briefly call
17 Ms. Ehrlich to the stand.

18 THE COURT: I will remind you that you
19 are still under oath.

20 BY MR. FALK:

21 Q. Do you recall the Jackson v. Denno
22 hearing from the first trial in 2012?

23 A. I remember having the hearing. And I
24 remember the ruling being different, but I can't
25 remember what cases Mr. Grimes argued without a

1 transcript.

2 MR. FALK: Okay. Then no questions.

3 THE COURT: You may step down. You may
4 call your next witness.

5 MR. FALK: We have no more witnesses.

6 MS. JAMESON: State does not have any
7 witnesses to call.

8 THE COURT: Be happy to hear closing
9 argument from you, Mr. Falk.

10 MR. FALK: Your Honor, I do believe the
11 letter that he filed along with his application
12 somewhat speaks for itself. We do almost have Mr.
13 Grimes testifying. We heard Ms. Ehrlich say this
14 is not a letter that he would always send out. It
15 was unusual. She certainly was aware that the
16 paralegal had the letter sent out. I believe
17 there's no question about the authenticity.

18 THE COURT: You have read the letter.
19 It really doesn't say anything about his mental
20 acuity, does it? It talks about he's got some
21 problems, nobody really knows what, he has got some
22 liver problems, got some problems with thrombosis,
23 got some cellulite, got all kind of things going
24 on. Really don't know what's wrong with him.

25 MR. FALK: So I think if we had this

1 letter that we see that possibly through testimony
2 there was a flare-up of these conditions during the
3 trial.

4 THE COURT: I think there's no question
5 that he was having some physical difficulties, but
6 this letter itself, wouldn't you agree, doesn't
7 really address his mental acuity, does it?

8 MR. FALK: Not directly.

9 THE COURT: Okay. And I think it's
10 clear that he was having some physical problems
11 throughout the trial. That's undisputed. Go
12 ahead.

13 MR. FALK: And then we do believe that
14 there was a difference in the way that the Jackson
15 v. Denno argument was argued in the first pretrial
16 hearing. My client was citing the case from his
17 recollection that they argued Michigan v. Mosley
18 which is a Supreme Court case which deals with what
19 to do when somebody is in the middle of an
20 interrogation that is stopped and it goes through a
21 five-part test as to when it is reasonable for the
22 State to resume the interrogation. And that's the
23 situation that you had here. He called a halt.
24 And he wanted to talk to somebody, whether it was
25 his sister or his girlfriend. And that's when he

1 handed one of the police officers his telephone,
2 told the police officers to use the phone to call
3 the girlfriend, sort of let them know what was
4 going on. And we believe that that is a direct
5 result of -- that conversation transpired because
6 of the interruption in the Jackson v. Denno hearing
7 and that it shouldn't have been admissible had the
8 hearing not been admissible. And Mr. Grimes should
9 have objected at that point to that testimony
10 coming in regarding the telephone and Ms. Ehrlich
11 testified as to the importance of the telephone as
12 far as tying Mr. Banks to the crime.

13 THE COURT: I would assume that this
14 was the phone that was found in the backpack?

15 MR. FALK: Yes. It was one that was on
16 his -- in his possession. I believe it was the one
17 that was found in his backpack, but it's unusual
18 that they would have given that back to him while
19 he's being interrogated. Yes, that's the phone.

20 THE COURT: All right. What would you
21 say about the fact that that probably would be
22 cumulative in that it was found either in his
23 possession or in the backpack which was in his
24 constructive possession because it was in close
25 proximity. So it really is -- makes no difference.

1 They could prove it by saying that the phone was
2 found in the backpack, it was found right beside
3 him or it was found in his pocket, wherever it was.
4 And in addition to that I don't know -- I can't
5 understand from or not glean from what you have
6 said about him making the argument about stopping
7 the interrogation because the State in their
8 infinite wisdom didn't introduce it because -- I
9 don't know why they didn't, but I would assume they
10 thought that would be reversible error to do so.
11 They chose just to go forward without it.

12 So really the argument about whether he
13 asserted his right to right to remain silent really
14 is kind of irrelevant because the statement did not
15 come in.

16 MR. FALK: Our argument is that the
17 difference in the two cases on the telephone is
18 that officer was able to certainly use his words to
19 say that was, in fact, his telephone because he
20 told him to go into the phone, look up this
21 telephone number, call this person. So that all
22 happened during the interruption or the
23 intermission of the interrogation. That's our
24 argument.

25 THE COURT: Okay. Anything further?

1 MR. FALK: No, Your Honor.

2 THE COURT: I will be glad to hear from
3 you, Ms. Jameson. Let's start off with the health
4 of the trial counsel.

5 MS. JAMESON: Your Honor, I would
6 submit this was an excellently tried case and no
7 stone was left unturned. If you look at the record
8 Mr. Grimes vigorously cross-examined all witnesses.
9 He preserved every possible objection, made sure
10 they were preserved for appellate review. There
11 were numerous pretrial motions including a
12 successful motion that kept out the identification.

13 While the motion to suppress Mr. Banks'
14 statement was denied, the State would submit that
15 it's irrelevant because it was never introduced by
16 the State during trial. And moreover, to respond
17 to Mr. Falk's classification that Mr. Banks ended
18 the interrogation, that's the exact argument that
19 Mr. Grimes made. The language from Mr. Banks was
20 he said that's my final word. And that was all
21 presented to Judge Harrington and Judge Harrington
22 found that that was not invocation of his rights or
23 that he wanted to cease the interrogation.
24 Officers come back ten minutes later and at that
25 time applicant said let's continue. Mr. Grimes

1 argued that the let's continue means let's go ahead
2 complete moving towards booking, not let's continue
3 the interrogation. But all of those arguments were
4 made to Judge Harrington and ultimately Judge
5 Harrington ruled differently than Judge McDonald.

6 Those arguments were all presented.
7 The argument from Michigan and Mosley, while that
8 case was not specifically mentioned, those
9 arguments were all made to the Court.

10 I would submit there was not deficient
11 performance at all in any of the pretrial motions,
12 but ultimately it's irrelevant because the
13 statement didn't come in.

14 THE COURT: What do you think about the
15 fact that they were able to use his assertion of
16 the cell phone during the interrogation?

17 MS. JAMESON: I think that's ultimately
18 irrelevant. He was found within two blocks
19 anywhere from 10 to 18 minutes wearing a backpack.
20 I can't recall directly from the transcript, but I
21 believe it was on him. But if not on him directly
22 next to his person. It had distinctive gloves that
23 were seen on the surveillance video. That was
24 before the jury. And the B.B. gun was testimony
25 from the store clerks that it resembled --

1 THE COURT: You're saying that the
2 statement in the interrogation really didn't add
3 anything to it because they were able to put it on
4 him virtually where it was found.

5 MS. JAMESON: Yes, Your Honor. So it
6 ultimately is irrelevant and I think the testimony
7 from Ms. Ehrlich was in the first trial Andrew was
8 able to make much ado about the fact they couldn't
9 connect the cell phone to him and why didn't you
10 take the cell phone into custody. That's one of
11 the luxuries both the State and the defense have
12 when there is a mistrial or retrial is both sides
13 get to strengthen their cases and that's what
14 happened here and I don't think that shows Mr.
15 Grimes was deficient because both sides have the
16 luxury here.

17 Also the State would submit that the
18 letter doesn't establish any sort of deficiency on
19 Mr. Grimes' behalf. If Your Honor reads it closely
20 all it says is that he doesn't believe it would be
21 unethical to raise a claim of ineffective
22 assistance of counsel if his medical condition
23 affected his performance at trial. It never says
24 that it did. It attaches the medical records, but
25 it never said that it did affect his performance

1 and it even notes there is no formal disposition of
2 what his medical condition is at the time.

3 So I think the State interprets the
4 letter differently than applicant or Mr. Falk are
5 interpreting it and I believe the --

6 THE COURT: He certainly had an
7 opportunity he could have said that I was not --
8 did not have my entire faculties at that time. If
9 he chose to do so he could have said that I was so
10 sick I wasn't able to adequately represent you, but
11 he didn't.

12 MS. JAMESON: He certainly could have
13 and he didn't and I think that letter is just in
14 response to applicant asking if it would be
15 unethical to raise this sort of claim. That's all
16 the letter really says.

17 I believe the other allegation was
18 regarding the truth seeking language. That was
19 before Beaty so I don't think counsel can be found
20 deficient for failing to object and ultimately as
21 our Supreme Court found in Beaty it's harmless and
22 had no impact on the verdict here. I think overall
23 this is an excellently tried case.

24 And while Mr. Grimes might have been
25 having some health issues during the trial, I don't

1 think it impacted this outcome at all. This is an
2 excellently tried case. No stone was left unturned
3 and the State would submit that relief should be
4 denied.

5 MR. FALK: Your Honor, if I could,
6 regarding the letter, just I promise this will be
7 the last thing I will say about it. I'm trying to
8 envision a situation where I would send this
9 letter, send my medical records to somebody unless
10 I didn't think there was a reason why I was going
11 to share that. And I think that he is inviting
12 this PCR based on the fact and that he maybe
13 doesn't say it in plain language, but --

14 THE COURT: Even if he does, I have
15 seen lawyers in my tenure on the bench that get up
16 and say they were ineffective, but what the lawyer
17 has -- even if he would have said in that letter I
18 was not in my right mind, I was sick, could not
19 think clearly, I was ineffective, that is not
20 determinative what the trial lawyer had to say. It
21 was the transcript, the ultimate performance.

22 MR. FALK: Yes, Your Honor.

23 THE COURT: I think, but I might be
24 wrong. Based on the presentations that have been
25 made here in court here today and my reviewing of

1 the relevant parts of the transcript, and I
2 specifically find that the health of the trial
3 counsel did not affect his performance. And, of
4 course, the law doesn't require that he be the very
5 best lawyer in the world, it doesn't require that
6 he give the Defendant a fair trial, but that he
7 perform up to a certain standard which he certainly
8 has fulfilled.

9 He enlisted the use of an investigator,
10 sent the investigator to the scene. He filed a
11 number of pretrial motions which were effectively
12 argued. I think that the fact that the statement
13 was suppressed in the first trial is more of an
14 indication of the judge's ruling rather than
15 presentation and argument and judges quite often
16 rule in a different fashion because they see it
17 differently.

18 I think that it was not the health of
19 the trial counsel that caused him to be convicted.
20 I think the evidence that was presented, there was
21 a robbery, Defendant was found in close proximity
22 to the store, there were a number of items in the
23 bag including the gloves and the gun that were
24 found in the bag that was either on him or in close
25 proximity, really is what caused him to be

1 convicted. There was overwhelming evidence that
2 was set out here today and in the trial transcript.

3 As far as the opening charge, in Beaty
4 they talk about this at some point in time -- well,
5 actually in Beaty they brought up this issue and
6 thought it was a burden shifting that language
7 that's been set forth in the record here today
8 about truth finding and it's the obligation of the
9 jury to find the truth.

10 That particular charge was approved by
11 the Supreme Court, actually given to the trial
12 bench and it had been raised then in Beaty and they
13 thought about it and said it was probably not a
14 good idea to do that. But I would venture to say
15 -- well, in Beaty I think it's important to say
16 that they thought it was not prejudicial, they did
17 not reverse the case based on that. But I would
18 venture to say that that sort of academic argument
19 that lawyers like to talk about and the Supreme
20 Court likes to talk about, but really the jury
21 probably pays very little attention to that. They
22 probably pay attention to it, but attach very
23 little significance to it. Essentially just
24 telling them to do what they think is right and
25 apply the law as the judge charges it to them and

1 make a finding of fact. I think that's what it
2 says.

3 And if you were to try ten different
4 cases, more importantly I don't think that that
5 makes any difference whatsoever, this language pre
6 Beaty. There were -- that's been in the jury
7 charge for numerous years and there have been a lot
8 of people who have been found not guilty with that
9 particular charge in there. I think it has very
10 little effect. It's just the Supreme Court saying
11 it is probably not the very best language. I don't
12 think it adversely affected the results here today.
13 I think all of the issues with regards to the
14 statement are irrelevant because the statement was
15 not entered into evidence.

16 With regard to any statements that was
17 made in the interrogation that proved ownership of
18 the phone I think are cumulative in view of the
19 fact of where they found the phone.

20 I'm going to ask that Ms. Jameson
21 prepare an order consistent with that and submit a
22 copy of that to Mr. Falk to insure it accurately
23 reflects what I have ruled here today. We will
24 stand at ease until 1:30.

25 MS. JAMESON: Thank you, Your Honor.

1 (These proceedings were concluded at
2 12:15 p.m. December 7, 2017, Charleston County,
3 South Carolina.)
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1 CERTIFICATE OF REPORTER

2
3 I, Ruth C. Weese, Registered Diplomate
4 Reporter for the State of South Carolina at Large,
5 do hereby certify that the foregoing transcript is
6 a true, accurate, and complete record.

7 I further certify that I am neither related
8 to nor counsel for any party to the cause pending
9 or interested in the events thereof.

10 Witness my hand, I have hereunto affixed my
11 official seal this 1st day of March, 2018 at
12 Charleston, Charleston County, South Carolina.

13
14 *Ruth C. Weese*

15 _____
16 Ruth C. Weese
17 Registered Diplomate
18 Reporter
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2648
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AG
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GS

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Kashaun Banks, SCDC # 355175,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-10-3849

ORDER OF DISMISSAL

FILED
CLERK OF COURT
2016 FEB -1 11:13 AM '16

This matter comes before the Court by way of an application for post-conviction relief filed July 10, 2015, by Kashaun Banks (Applicant). The State (Respondent) made its Return on February 23, 2016, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened December 7, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Following the evidentiary hearing, this Court denied the application from the bench. This order follows.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its December 2011 term, the Charleston County Grand Jury indicted Applicant for armed robbery (2011-GS-10-8069) for following the October 15, 2011, robbery at gun point of an Exxon gas station in North Charleston. Applicant was represented by Andrew Grimes¹ and Megan Ehrlich of the Charleston County Public Defender's Office. The case was

¹ Grimes, who was lead counsel for Applicant, passed away in September of 2014.

prosecuted by Assistant Solicitor E. Culver Kidd, IV, of the Ninth Circuit Solicitor's Office prosecuted the case.

On April 22, 2013, Applicant proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Kristi L. Harrington, circuit court judge.² At the conclusion of the trial, the jury convicted Applicant as indicted. Judge Harrington sentenced Applicant to twelve years imprisonment.

A notice of appeal was filed on Applicant's behalf and an appeal perfected by Blakely Lynn Molitor, Esquire. On appeal, Applicant challenged an unadmitted statement that was not introduced at trial, arguing it was not freely and voluntarily given to law enforcement. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Banks, 2014-UP-479 (filed on December 23, 2014). The Remittitur was issued on January 7, 2015.

ALLEGATIONS RAISED

In his application, Applicant alleged trial counsel was ineffective for failing to move to be relieved due to a serious medical issue, for failing to fully investigate his case, and failing to be prepared and adequately litigate his case.

At the evidentiary hearing, Applicant proceeded forward on allegations that trial counsel was ineffective for failing to move to be relieved due to a serious medical issue, failing to adequately argue for the suppression of his statement to law enforcement, and failing to object to the trial court's instruction regarding "seeking the truth."

² Applicant originally proceeded to a jury trial before the Honorable Stephanie P. McDonald, at that time a circuit court judge, on July 18, 2012. However, the trial ended in a mistrial.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant called Assistant Public Defender Megan Ehrlich, who assisted lead counsel Andrew Grimes with Applicant's case and acted as a second chair at both of his trials, to testify. Ehrlich testified she has been practicing law since 2006 and her entire career has been with the public defender's office. She testified Grimes was appointed to represent Applicant in October of 2011 and he asked her to assist with the case before Applicant's first trial in 2012. She testified she had tried numerous cases with Grimes before. She testified she met with Applicant several times and her main role was to work with Applicant and prepare him to testify at the Jackson v. Denno³ hearing and during trial. She testified the State alleged Applicant had robbed a gas station, which was captured on video surveillance, and then was arrested two blocks away eighteen minutes later with a backpack that contained the distinctive gloves and a BB gun that were seen in the surveillance video. Additionally, she testified a trained canine and his handler tracked Applicant from the gas station to where he was arrested. Ehrlich testified Applicant gave a statement to law enforcement implicating himself in the robbery.

Ehrlich testified she and Grimes discussed the elements of armed robbery with Applicant, as well as the potential sentences of ten to thirty years imprisonment. She testified they used the public defender's office's investigator, Lee Jean, to assist with this case. She testified the defense team visited the crime scene, took pictures, and attempted the interview the two clerks who were working at the time of the robbery. She testified they requested and received records on the

³ 378 U.S. 368 (1964).

canine and his handler, which amassed more than a thousand pages, and Grimes reviewed all these records in the hope of finding anything useful to attack the canine's track of Applicant.

Ehrlich testified she and Grimes moved to suppress Applicant's statement in a pre-trial Denno hearing, arguing the statement was involuntarily given based on a variety of factors, including he: (1) was a minor; (2) had a tenth grade education and suffered from learning disabilities; (3) his mother was not present, and his request to call his "sister"⁴ was refused; (4) was induced by misrepresentations regarding Applicant's future ability to join the military; and (5) he invoked his right to remain silent. She testified the defense called Applicant and Monica Tudder, the Director of Programs for Exceptional Children for Dorchester 4 School District, who testified Applicant was in special education classes and received services from the school district for learning disabilities. She testified following the hearing and argument from defense counsel and the State, the trial court denied the motion to suppress. She testified this was different than Applicant's first trial, where Judge McDonald granted the motion to suppress his statement. However, she testified the State never introduced Applicant's statement during the trial.

Ehrlich testified the defense also moved to suppress the evidence obtained from the search of Applicant, arguing it was obtained following an illegal detention in violation of Applicant's constitutional rights. She testified the trial court denied this motion. She testified defense counsel also moved to suppress identifications made by the store clerk. She testified the trial court granted this motion, finding the identification was unduly suggestive and not so reliable as to have no substantial likelihood of misidentification.

⁴ During the hearing, Applicant testified that although he requested to call his sister, his intention and desire was to contact his fiancé.

Ehrlich testified the defense strategy was that law enforcement had arrested and charged the wrong person with the robbery. She testified the defense team highlighted the difference in the clothing of the person and the surveillance video and Applicant when he was arrested, as well as a Sprite bottle in Applicant's possession that was not shown with the robber. She testified the defense team also highlighted inconsistencies in the description of the suspect and Applicant, including height and weight differences. She testified the defense also tried to present testimony to the jury regarding Applicant's IQ and learning disabilities, but the trial court refused to allow such testimony.

Ehrlich testified Grimes had chronic health issues during the last few years of his life, including during this trial. She elaborated the issues involved chronic immune deficiencies, swelling and pain in his legs, and overall pain and chills throughout his body. She testified he passed away in September of 2014 following a severe car accident, but thinks his pre-existing medical conditions contributed to his death. She testified she recalled Grimes feeling particularly bad one day during the trial (April 23, 2013), when he spent the lunch break on the couch of a fellow public defender wrapped in blankets. She testified the trial court ended court early that day to allow Grimes to go to the doctor. She testified she had exchanged emails with Grimes's girlfriend during the trial about Grimes's health. She testified this is the worst she can recall Grimes feeling during a trial, but could not testify that it impacted his performance. However, she testified that it was not uncommon for Grimes to feel ill immediately before and during a trial, which she acknowledged is a taxing experience for any lawyer.

Ehrlich testified the defense team requested a jury instruction on the lesser-included offense of strong arm robbery, which was denied by the trial court. She testified the trial court

gave an instruction on a trial being a search for the truth, which is objectionable based on current law but was not objectionable at the time of Applicant's trial.

Following Ehrlich's testimony, Applicant testified on his own behalf. He testified that his current medical condition has changed since his trial. He elaborated that he no longer has the use of his legs and is wheelchair bound, as well as suffers from a stammer and stutter problem that significantly impacts his speech. Applicant testified that following his trial but prior Grimes's death, Grimes sent him a letter on July 8, 2014, in reply to his inquiry as to whether it would be appropriate for Applicant to file a PCR action alleging Grimes was ineffective due to his medical condition. (A copy of this letter was attached to Applicant's filed PCR application). Applicant testified he thinks Grimes performed differently, and worse, at his second trial due to his poor health. He elaborated that Grimes made different legal arguments at his second trial that were not successful and cited to the trial court's denial of his motion to suppress his statement where the first trial court (Judge McDonald) had granted his motion to suppress. Applicant also cited to questioning about a cellular phone from the first trial to the second trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813

(1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to his allegations of ineffective assistance of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant.

Allegation: trial counsel was ineffective for failing to move to be relieved due to a serious medical issue

Applicant asserts trial counsel was ineffective for failing to move to be relieved based on a serious medical condition, which he alleges impaired his ability to represent Applicant diligently and directly resulted in his conviction. This Court finds this allegation is without merit and that the health of Grimes, his lead trial counsel, did not affect his performance in any way. This Court has reviewed the record from Applicant's trial and finds that the case was excellently tried, with the defense team raising numerous motions that were all effectively argued to the trial court (some of which were successful, such as the suppression of the identification of Applicant). Counsel also properly preserved issues for appeal and vigorously cross-examined all of the State's witnesses. This Court notes trial counsel also fully investigated the case, used an investigator, and went to the scene of the crime. Overall, the Court finds counsel's performance not only met but exceeded the professional standards required of defense counsel. This Court finds Applicant has failed to establish trial counsel performed deficiently.

Moreover, this Court finds Applicant has failed to establish any resulting prejudice from trial counsel's alleged deficient performance due to his health. This Court finds it was not the health of trial counsel that resulted in Applicant's conviction, but rather, the overwhelming evidence of Applicant's guilt presented by the State at trial that led to his conviction, including the canine track of Applicant from the crime scene, Applicant's arrest in close proximity to the scene following his arrest, and his possession of a weapon and gloves. Because there is overwhelming evidence of Applicant's guilt, he cannot establish any prejudice. See Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (finding no prejudice occurs, despite trial

counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt). This Court finds this allegation must be denied and dismissed.

Allegation: trial counsel was ineffective for failing to adequately argue for the suppression of Applicant's statement to law enforcement

Applicant asserts trial counsel was ineffective for failing to adequately argue for the suppression of his statement. In support of this allegation, Applicant argues the trial judge from his first trial (which resulted in a mistrial) suppressed his statement, but the trial judge for his second trial denied his motion to suppress. However, this statement was never introduced into evidence during Applicant's trial, and therefore, had absolutely no effect on the outcome of his trial. This Court finds this allegation is without merit and must be denied and dismissed with prejudice.

Allegation: trial counsel was ineffective for failing to object to the trial court's jury instruction regarding "seeking the truth"

Applicant asserts trial counsel was ineffective for failing to object to the trial court's instruction to the jury during its opening charge that a trial is a search for the truth. The pertinent part from the trial court's opening charge is as follows:

Ladies and gentlemen of the jury, the case that we are about to try is the case of the State versus Kashaun Shed Christian Banks. Before we begin this trial, I want to tell you that this trial probably will be different from what you might expect. Most people don't have the opportunity to come to court as you are doing now. And most people think, from watching television and reading books and watching movies, that the courtroom is a place of high drama, intense action, and riveting circumstances. 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, deliberate, and repetitive, the opposite of what you may have seen on television or in movies or read in books. This courtroom is a place of honor. It is dedicated to the protection and preservation of citizens' rights through what many have called the greatest justice system ever created.

Trial Tr. P. 213-214 (emphasis added). Applicant argues this language these opening remarks by the trial court were impermissible because it improperly shifted the burden of proof. In support of this argument, Applicant cites to State v. Beaty, a recent South Carolina Supreme Court case where the Court reviewed the circuit court's "truth seeking" language in its preliminary jury remarks. Op. No. 27693, — S.C. —, —S.E.2d —, 2016 WL 7474479 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13–14), reh'g granted Mar. 24, 2017.⁵ In Beaty, which came out more than *three years after* Applicant's trial, our supreme court explained,

[A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Id. at 15–16. Nevertheless, the supreme court held the defendant was unable to show prejudice from the comments sufficient to warrant reversal. Id. at 16.

This Court finds this allegation is without merit and must be denied and dismissed with prejudice. This Court finds that at the time of Applicant's trial in 2013, the jury instruction given

⁵ As of the time of this order, the Supreme Court has yet to issue a new opinion or order following its grant of rehearing in Beaty. Therefore, the opinion is not final.

by the trial court was widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. Therefore, as this charge was commonly used and was proper at the time of Applicant's trial, this Court finds trial counsel was not deficient for failing to object to this charge.

Finally, this Court finds the Supreme Court's recent decision of Beaty is not controlling on this case for several reasons. Initially, the Beaty decision, which was decided more than three-and-a-half years after Applicant's trial, represents a change from longstanding precedent in South Carolina that had approved of such a jury instruction. Because the Supreme Court in Beaty has adopted a new standard that such truth seeking language was improper for a jury instruction and this opinion comes more than three-and-a-half years after Applicant's trial, this Court cannot conclude, and refuses to conclude, that it can be used to hold Applicant's counsel deficient in the present case. See Frierson v. State, 417 S.C. 287, 299 n. 7, 789 S.E.2d 762, 768 n. 7 (Ct. App. 2016) (quoting Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454 (1994) overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Our courts have 'never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.' "; see also Robinson v. State, 308 S.C. 74, 77–78, 417 S.E.2d 88, 91–92 (1992) (holding defense counsel was not ineffective in failing to present evidence of battered woman's syndrome in support of wife's self-defense claim where trial took place six years before our supreme court recognized battered woman's syndrome as relevant to a claim of self-defense)).

Second, this Court finds reliance on Beaty would be imprudent at this time as it is not a final decision. On March 24, 2017, the Court granted both parties' petitions for rehearing and

held additional oral argument. However, as of the date of this order, the Supreme Court has not issued a new opinion or order. Because Beaty is not yet final, this Court finds reliance on it in Applicant's case would be misplaced. This Court finds this allegation must be denied and dismissed with prejudice.

CONCLUSION

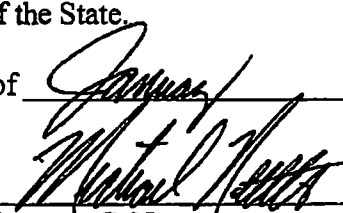
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 26 day of January, 2018.


MICHAEL G. NETTLES
Presiding Judge - Ninth Judicial Circuit

Florence, South Carolina

CDD20111007069

WITNESSES

North Charleston Police Department

AGENCY CASE NUMBER

2011038637

ARREST WARRANT NUMBER

M614275

DATE OF ARREST

October 15, 2011

ACTION OF GRAND JURY

THE BAL

Victoria H. Meggs

ACTING FOREPERSON

Foreperson of Grand Jury

Date:

DEC 13 2011

VERDICT

Guilty

Maria R Wiley
Foreperson of Petit Jury

4/23/13
Date:

INDICT

DOCKET NO. 2011GS1008069

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

December Term 2011

THE STATE

vs.

KASHAUN SHED CHRISTIN BANKS

DOB: 1993

B/M

Indictment for

Armed Robbery

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on December 12, 2011 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about October 15, 2011, in Charleston County, South Carolina, at [REDACTED] by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a pistol, the Defendant, KASHAUN SHED CHRISTIN BANKS, did take and carry away goods and/or monies from the person or immediate presence of Tenille Wilson, with the intent to permanently deprive her of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

→ and Keisha Holmes

Amended 7/19/2012

[Signature]

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

[Signature]
CULVER KIDD
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
 STATE VS.
Kashaun Shed Christin Banks

AKA:

Race: BLACK Sex: M Age: 18DOB: 1993 SS#: [REDACTED]Address: Cashew Street AptCity, State, Zip: Charleston, SC 29407DL#: [REDACTED] SID#: SC01992692*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Armed Robbery

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1008069A/W#: M614275Date of Offense: 10/15/2011S.C. Code §: 16-11-0330(A)CDR Code #: 0139

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Kidd, Culver

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 12 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$, provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ § 56-5-2995 (DUI Assessment) \$12 \$ § 56-1-286 (DUI Breath Test) \$25 \$ Proviso 47.9 (Public Def/Prob) \$500 \$ § 14-1-212 (Law Enforce. Funding) \$25 \$ 75.00§ 14-1-213 (Drug Court Surcharge) \$150 \$ § 50-21-114(BUI Breath Test Fee) \$50 \$ § 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.90PTUP days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender FundOther:

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk Whitney HaskinCourt Reporter: Royanne Walker

SCCA 1217 (03/2011)

Presiding Judge Christina HanningJudge Code: 2151Sentence Date: 4/25/13

ARREST WARRANT

M-614275

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Charleston

THE STATE
against

Kashaun Shed Christin Banks

Address: Meeting St

Charleston, SC 29403-4832

Phone:

SSN:

Sex: M

Race: B

Height: 6

Weight: 165

DL State: SC

DL #:

DOB:

1993

Agency ORI #:

SC0100800

Prosecuting Agency: North Charleston Police Department

Prosecuting Officer: Craig McAlhany - 0270

Offense: Robbery / Armed Robbery

Offense Code: 0139

Code/Ordinance Sec: 16-11-0330(A)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/☐ Municipality of

The accused

is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant
on

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, SC 29401

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Charleston

Personally appeared before me the affiant

Craig McAlhany / M. Poulos

who

being duly sworn deposes and says that defendant

Kashaun Shed Christin Banks

did within this county and state on or about 10/15/2011

violate the criminal laws of the

State of South Carolina (or ordinance of

☒ County/☐ Municipality of

Charleston

in the following particulars:

DESCRIPTION OF OFFENSE: Robbery / Armed Robbery

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

See Attached Affidavit

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Charleston

Affiant's Address

2500 City Hall Lane

North Charleston, SC 29406-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 10/15/2011

defendant Kashaun Shed Christin Banks

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/☐ Municipality of

Charleston

) as set forth below:

DESCRIPTION OF OFFENSE: Robbery / Armed Robbery

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable

Sworn to and subscribed before me

on 10/16/2011

(L.S.)

Signature of Issuing Judge

Priscilla B. Brader

Judge Code: 5749

Judge's Address

3870 Leeds Avenue, Suite 106

North Charleston, SC 29405-7469

Judge's Telephone

(843)746-9822

Issuing Court:

☒ Magistrate☐ Municipal☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 515

603

BAIL set by

Judge Baldwin
 in 10-16-V
 Type and Amount: 100,000
 Name of Surety: (circled)

PRELIMINARY HEARING held by

Judge _____
 on _____
 Defendant Attorney: _____
 Decision: _____

DISPOSITION before

Judge _____
 on _____
 by _____
 (indicate jury trial, bench trial, plea, nol. pros., etc.)
 Disposition: _____
 Sentence: _____

JURORS

WITNESSES

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
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Name: _____
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CODEFENDANTS



FILED
 2011 OCT 18 PM 4:48
 JULEE J. STRONG
 CLERK OF COURT
 BY _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTON

AFFIDAVIT

OCA# 2011038637

Personally appeared before me, a magistrate of this County, one *M. Poulos*,
who first being duly sworn, deposes and says that

KASHAUN BANKS

did within this County and State on the 15th day of October, 2011, violate the criminal laws
of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE
ARMED ROBBERY
VIOLATION OF SECTION
16-11-330

The affiant states there is probable cause to believe that the defendant named above did commit the
crime(s) set forth, and that such probable cause is based on the following facts:

That on October 15, 2011 at approximately 2150 hours, while at [REDACTED]
(Exxon), which is located in the City of North Charleston, County of Charleston, and State of
South Carolina, the defendant, KASHAUN BANKS, did commit the offense of ARMED
ROBBERY violation of section 16-11-330 of the South Carolina Code of Laws of 1976, as
amended. In that the defendant did willfully, unlawfully and feloniously rob a person by putting
fear by the use or threat of force and violence, and that the defendant alleged his actions or words
that he was armed by using representation of a deadly weapon which a person would reasonably
believe is a deadly weapon.

The defendant entered the business quickly from the rear entrance, armed with a large
brown and black pistol, pointed it at the clerk (victim, Keisha Holmes) who was tending the
register behind the counter and demanded money. In fear for her life the victim complied by
removing the cash drawer and the defendant grabbed the drawer which contained approximately
\$127.72 and fled the business on foot through the same door that he entered from. Keisha
Holmes, Tenille Wilson, SGT. S. Hille, MPO Mcalhaney and MPO Cummins are witnesses to
prove the same. This incident was recorded by the business video surveillance system. All this
done against the form of the Statute and against the peace and dignity of the State of South
Carolina.

Sworn to and Subscribed before me
this 16 day of Oct
2011.

[Signature]
Signature of Judge

[Signature]
(AFFIANT)

Address: 2500 City Hall Ln
N. Charleston, SC 29406
Phone: (843) 554-5700