No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Term,

_____

SHAMIR KANE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in upholding the District Court's joinder, under Fed. R. Crim. P. 8, of counts in an indictment related to one Hobbs Act robbery, and witness tampering charges that flowed from it, with other counts in the indictment involving an unrelated Hobbs Act robbery which did not involve witness tampering?
2. Is the statement of facts read at the guilty plea hearing of a government witness admissible as substantive evidence under Fed. R. Evid. 801 (d)(1)(A) where the witness testifies inconsistently with the statement of facts at the defendant's trial?

LIST OF PARTIES

In addition to the United States, SHAMIR KANE was a party in these proceedings in the United States Court of Appeals for the Third Circuit in his capacity as appellant in 18-3723.

TABLE OF CONTENTS

PAGE

APPENDIX

Appendix A

Judgment

Appendix B

Non-precedential opinion of the United States Court of Appeals for the Third Circuit affirming judgment of sentence. United States v. Kane, 18-3723 (3d Cir. January 23, 2020).

Appendix C

Order Memorandum of District Court denying Kane's Motion for severance

Appendix D

Order Memorandum of District Court denying Kane's Motion for a New Trial

TABLE OF AUTHORITIES

STATUTES

FEDERAL RULES OF CRIMINAL PROCEDURE AND EVIDENCE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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SHAMIR KANE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner SHAMIR KANE respectfully prays that a writ of certiorari issue to review the non-precedential Opinion and judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled proceedings on January 23, 2020.

OPINIONS BELOW

The January 23, 2020 Judgement and non-precedential opinion of the United States Court of Appeals for the Third Circuit is reported at United States v. Kane, 18-3723 (3d Cir. January 23, 2020) and are attached as Appendix A and B, *infra*. Attached as Appendices C and D are the Order memoranda issued by the District Court relevant in the consideration of the instant writ.

FEDERAL RULES OF CRIMINAL PROCEDURE AND EVIDENCE INVOLVED

Fed. R. Crim. P. 8. Joinder of Offenses or Defendants

> (a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
>
> (b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 14 (a).

> (a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Fed. R. Evid. 801 (d)(1)(A).

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition[.]

A. PROCEDURAL HISTORY

A grand jury sitting in the Eastern District of Pennsylvania returned a Fourth Superseding Indictment charging Kane[1] with conspiracy to commit Hobbs Act robbery[2], Hobbs Act robbery[3]

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[1]Kane was charged with three others: Tanaya Martin, Ashley Sterling and Lamar Griffin. Martin was charged in Count One, involving an October 3, 2015 robbery of a bank in Philadelphia; Counts Two, Three and Four, involving the August 6, 2016 gun-point robbery of the T-Mobile Store in West Philadelphia; and Count Seven and Eight, involving two instances of witness tampering of two of the three victims of the August 6th robbery. Sterling was charged in Count Seven, charging witness tampering on December 2, 2016 of a victim of the August 6th

and using and carrying a firearm during a crime of violence[4], stemming from the armed robbery of a T-Mobile store in West Philadelphia on Saturday morning, August 6, 2016 (Counts Two, Three and Four); Hobbs Act robbery and a second count of using and carrying a firearm during a crime of violence, stemming from the armed robbery of a T-Mobile store in Cheltenham, Pennsylvania on Monday evening, August 22, 2016 (Counts Five and Six); and witness tampering[5], stemming from two incidents, one on December 2, 2016 and a second on January 9, 2017, wherein Kane, Martin and Ashley Sterling were alleged to have corruptly induced witnesses to the August 6th robbery not to testify against Kane at an upcoming trial (Counts Seven and Eight).

Kane went to trial before the Honorable Eduardo C. Robreno and a jury and was convicted on all counts on April 18, 2018. Prior to trial, Kane filed a Motion for Severance Pursuant to Fed. R. Crim. P. 8 (a) and Relief from Prejudicial Joinder Pursuant to Fed. R. Crim. P. 14. The District Court denied Kane's severance motion in an Order dated April 11, 2018. Appendix C. After the verdict, Kane filed post-trial motions for a judgment of acquittal and a new trial which were denied by the District Court in an Order dated October 25, 2018. Appendix

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robbery. Griffin was charged in Counts Five and Six, which involved the August 22, 2016 gun-point robbery of a T-Mobile store in Cheltenham, PA. An individual named Robert Christopher Gilmore, who testified at Kane's trial and admitted to being a participant in the August 6, 2016 robbery, was charged separately in a second superseding Indictment that shares the same District Court docket number.

[2] 18 U.S.C. § 1951 (a).

[3] 18 U.S.C. § 1951 (a).

[4] 18 U.S.C. § 924 (c).

[5] 18 U.S.C. § 1512 (b)(2).

D. Following the denial of post-trial motions, the District Court sentenced Kane to a total of 408 months' incarceration. Notice of appeal to the Third Circuit was timely filed on December 12, 2018.

On appeal, Kane renewed his challenge to the denial of his severance motion. Kane also challenged the decision of the District Court to admit the statement of facts read in support of the guilty plea of Lamar Griffin, one of Kane's alleged accomplices in the August 22nd robbery, as substantive evidence at Kane's trial. The Court of Appeals held that joinder was permitted under both Fed. R. Crim. P. 8(a) & 8(b). Appendix B. The Court of Appeals also held that Griffin's one-word assent to a statement of facts read by the prosecutor at his guilty plea was properly admitted as substantive evidence against Kane under Fed. R. Evid. 801(d)(1)(A). Appendix B.

B. BASIS FOR FEDERAL JURISDICTION

This litigation began as a criminal prosecution against Kane for an alleged violation of the laws of the United States. The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this prosecution. 18 U.S.C. § 3231.

The Court of Appeals for the Third Circuit had appellate jurisdiction to review the final judgment of the District Court in accordance with 18 U.S.C. § 3742(a)(1) and 28 U.S.C. § 1291.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

C. FACTS

This prosecution of Kane involved three discrete substantive criminal acts:

- the armed robbery of a T-Mobile store in West Philadelphia on August 6, 2016 (Counts Two, Three and Four);
- witness tampering of the victims of this August 6th armed robbery (Counts Seven and Eight); and

- the armed robbery of a T-Mobile store in Cheltenham, PA on August 22, 2016 (Counts Five and Six).

No evidence was produced that Kane tampered with witnesses to the August 22nd Cheltenham robbery.

The first issue addressed in this petition is whether the offenses alleged in Counts Two, Three, Four, Seven and Eight, which underlie the August 6th robbery and the witness tampering aftermath, were properly joined for a single trial under Fed. R. Crim. P. 8 with Counts Five and Six, which underlie the August 22nd robbery. Kane argued that the witness tampering charges alleged in Counts Seven and Eight, while properly joined with Counts Two, Three and Four involving the August 6th West Philadelphia robbery, were improperly joined under Rule 8 with Counts Five and Six, involving the August 22nd Cheltenham robbery, and that he was prejudiced as a result of the misjoinder. Assuming proper joinder in the first instance, Kane argued that these counts nonetheless should have been severed under Fed. R. Crim. P. 14 (a).

The second issue addressed in this petition is whether the court of appeals erred in affirming the district court's admission, as substantive evidence under Fed. R. Evid. 801 (d)(1)(A) at Kane's trial, a statement of facts read by the prosecutor at the January 16, 2018 guilty plea colloquy of Lamar Griffin, who testified contrary to those statement of facts at Kane's trial. Kane claimed in both the court of appeals and the district court that Griffin's one-word assent to the statement of facts read in support of Griffin's guilty plea was admissible as impeachment but not substantive evidence.

With these two issues in mind, Kane recites the relevant facts.

On August 6, 2016 just before 9:00 AM, two men and a woman entered a T-Mobile cell phone store in West Philadelphia and herded the three employees, at point of two guns possessed

by the males, into a back room where the cell phones were stored. The female, who was dressed in Muslim garb, was observed by the employees and captured in a surveillance camera video, with stuffing 25 Apple iPhones into an Adidas duffel bag she had brought with her. Kane was identified by the three employees, both in separate photo spreads and at trial, as the individual who directed the female confederate, later identified as Tanaya Martin, to stuff the iPhones into the bag. The identification by the three victim employees was corroborated by a surveillance video of Kane entering the front door of the T-Mobile store just prior to the robbery and the testimony of Robert Christopher Gilmore, who testified that he was the second man who committed the robbery with Kane and Martin. Amber Alexander, a neighbor of Kane, testified that in early August 2016, Kane gave her a batch of cell phones he said he had obtained from his cousin's store, which Alexander sold to an individual named Elmo in a Walmart parking lot while Kane was present.

After Kane's September 7, 2016 arrest for the August 6th robbery, Kane made telephone calls from the Federal Detention Center (FDC) in Philadelphia, where he was housed pending trial, to Martin and Ashley Sterling, the mother of three of Kane's six children[6] and whose car Kane used to go to and from the West Philadelphia robbery. Some of these phone calls, relevant to this petition, were designed to implement a plan Kane had concocted to dissuade the three August 6th robbery victims from testifying against him at trial. Kane's plan culminated with Sterling, on December 2, 2016, entering the T-Mobile store in West Philadelphia in an effort to convince J.R., one of the three victims, not to testify against Kane. A second attempt at witness tampering was undertaken by Martin and Sterling on January 9, 2017 when they called the West

[6]Kane is also the father of Martin's child.

Philadelphia T-Mobile store in an effort to dissuade D.S., one of the two female victims of the robbery, from testifying against Kane.

During Kane's incarceration at the FDC, special agents of the FBI continued their investigation of the August 22, 2016 robbery of the T-Mobile store in Cheltenham, which had been unsolved at the time of Kane's September 2016 arrest. At approximately 8:00 PM on that date, three men, one in possession of a firearm, entered the store and forced the two employees to a back room where one of the employees was ordered to put cell phones and other electronic devices into two gym bags provided by one of the men. Kane's name first cropped up in connection with this robbery with the arrest of Lamar Griffin in December 2017 who, in a post-arrest video interview with FBI agents, identified an individual named "Killa," a nickname Kane used, and a photograph of Kane, as one of the robbers. Griffin's identification of Kane led to the issuance of the Fourth Superseding Indictment on December 7, 2017, which charged Kane and Griffin with the August 22, 2016 Cheltenham robbery and the extant charges underlying the August 6th robbery and the witness tampering counts that flowed from it.

At trial, Griffin testified that Kane was not one of the individuals who robbed the Cheltenham T-Mobile store on August 22nd. Griffin testified that he had lied to the FBI when he identified Kane in his post-arrest video statement[7]. The prosecutor then read the entire statement of facts in support of Griffin's January 16, 2018 guilty plea colloquy and Griffin's one-word assent to the statement of facts, in which the prosecutor repeatedly identified Kane as one of the robbers.

[7]Griffin testified that he also had lied in other statements he gave to the FBI and prosecutor in prep sessions before Kane's trial.

The prosecutor moved to admit Griffin's one-word assent to the factual basis of his guilty plea as substantive evidence pursuant to Fed. R. Evid. 801 (d)(1)(A)[8]. Kane argued that the statement of facts, even though it was under oath at his guilty plea hearing, was admissible only as impeachment, not substantive evidence. The District Court ultimately admitted the statement of facts as substantive evidence and explained its rational in an Order denying Kane's post-trial motion for a new trial pursuant Fed. Crim. P. 33. Appendix D.

Neither of the two victims of the August 22nd robbery identified Kane as one of the robbers. Surveillance of video of the robbery, although distinct enough to identify the presence of three robbers, was not distinct enough to personalize the identities of the three robbers. No evidence was presented that Kane concocted a plan to tamper with the two victims of the August 22nd robbery. Amber Alexander testified that Kane gave her a second batch of cell phones after contacting her on August 23, 2016 without telling her where he had obtained them from.

D. REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in upholding the District Court's joinder of Counts Two, Three, Four, Seven and Eight, which involved the August 6th West Philadelphia robbery and the witness tampering aftermath, from Counts Five and Six, which involved the August 22nd Cheltenham robbery.

The Court of Appeals held that all counts were properly joined both under Fed. R. Crim. P. 8. (a) and (b), the text of which can be found *supra at 2*. Appendix B at 3, n. 2. Technically speaking, Kane agrees that Counts Two, Three and Four, which pertain to the August 6th robbery, were properly joined pursuant to Fed. R. Crim. P. 8 (a) with Counts Five and Six, which pertain to the August 22nd robbery, because they are "of the same or similar character;" i.e, Hobbs Act

[8]Griffin testified at Kane's trial that he had lied to the District Court at his guilty plea colloquy when he uttered his one-work assent.

robbery offenses. Kane also agrees that Counts Seven and Eight, which involve witness tampering offenses stemming from the August 6th robbery, were properly joined with Counts Two, Three, Four because "they are connected with or constitute parts of a common scheme or plan."

With that said, the witness tampering charges alleged in counts Seven and Eight were improperly joined pursuant to Rule 8 with the events of August 22nd because they are not of the same or similar character, nor based on the same act or transaction, nor connected with or part of a common scheme or plan. Courts have held that it is error to join unrelated crimes in the same indictment without any nexus between the offenses. See e.g. United States v. Mackins, 315 F.3d 399, 413 (4th Cir. 2003) (joinder of counterfeiting and drug conspiracy charges was improper because the indictment contained no allegation of a connection between the charges); United States v. Chavis, 296 F.3d 450, 458 (6th Cir. 2002) (joinder of offenses of causing another to make false statements to federally licensed firearms' dealer, and simple possession of in excess of five grams of cocaine base improper where there was no evidence that defendant's possession of cocaine base part of the same act or transaction as the illegal handgun purchase by making false statements, or that the two offenses were otherwise connected or constituted parts of common scheme or plan); United States v. Singh, 261 F.3d 530, 533 (5th Cir. 2001) (joinder of felon in possession firearm counts with counts charging harboring aliens for commercial gain was improper because the government had presented no significant evidence that defendant used the gun described in the indictment to intimidate the aliens).

Here, there is no nexus between the witness tampering charges involving the victims of the August 6th robbery and the events underlying the August 22nd robbery. Simply because the

August 6th and August 22nd robberies are properly joined in the first instance doesn't convert otherwise unrelated offenses into properly joined offenses under Rule 8 because there is no nexus between the witness tampering charges and the August 22nd robbery to allow these two discrete and unrelated set of charges to be tried at the same time.

Even though joinder of counts in an indictment may be in technical compliance with Fed. R. Crim. P. 8, they may be severed under Fed. R. Crim. P. 14[9] where the defendant is prejudiced by the joinder. The mis-joinder of the witness tampering charges with the events underlying the unrelated August 22nd robbery opened the door to the jury viewing Kane as a violent individual in its evaluation of the events of August 22nd for which there was a paucity of evidence. Second, the joint trial on Counts Five and Six pertaining to the August 22nd robbery and the remaining counts dealing with the August 6th robbery showed only that Kane had a propensity to commit Hobbs Act robbery, in violation of Fed. R. Evid. 404(b)(1). Third, even assuming that evidence of the two robberies is admissible for a proper purpose under Fed. R. Evid. 404(b)(2), admission at a single trial of evidence pertaining to both the August 6th robbery, and the witness tampering aftermath, and the August 22nd robbery substantially prejudiced Kane under Fed. R. Evid. 403 and did not save court resources given the absence of overlap of witnesses necessary to prove the two robberies.

Even if the two robberies were properly joined, the limited savings of judicial resources by trying the two robberies and witness tampering charges together is substantially outweighed,

[9]The text of which can be found *supra at 2.*

under Fed. R. Evid. 403[10], by the unfair prejudice Kane suffered by the consolidation of these charges in one trial; particularly where the witness tampering charges alleged in counts Seven and Eight had nothing to do with the August 22nd robbery and were not properly joined under Rule 8(a) in the first instance. Accordingly, Kane should have been tried on the counts arising out of the August 6th robbery and the witness tampering aftermath separately from the August 22nd robbery.

The Court of Appeals erred in upholding the District Court's admission of the statement of facts read by the prosecutor at Lamar Griffin's guilty plea hearing as substantive evidence at Kane's trial.

The only substantive identification evidence linking Kane to the August 22nd Cheltenham robbery is the one-word affirmance muttered by Lamar Griffin to a statement of facts read by the prosecutor at Griffin's change of plea hearing held four months before Kane's trial. Over objection, the government was allowed to introduce Griffin's assent to the statement of facts read by the prosecutor as substantive evidence under Fed. R. Evid. 801(d)(1)(A)[11] because, the government argued, it was given under oath and inconsistent with his testimony at trial. The District Court allowed the government to introduce, as substantive evidence, Griffin's one-word

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[10]"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

[11](d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

Fed. R. Evid. 801 (d)(1)(A).

assent to the prosecutor's rendition of the statement of facts which identified Kane as one of the robbers when Griffin testified inconsistently with the statement of facts at Kane's trial.

By admitting Griffin's one-word assent to the statement of facts read by prosecutor as substantive evidence, the District Court improperly allowed the jury consider Griffin's guilty plea as substantive evidence of Kane's guilt. However, neither a witness' guilty plea nor the plea agreement may be considered as evidence of the defendant's guilt. United States v. Universal Rehabilitation Services, Inc., 205 F.3d 657, 668 (3d Cir. 2000) (*en banc*).

The District Court ruled[12], and the Court of Appeals agreed[13], that the statement of facts read by the prosecutor was admissible as substantive evidence because Griffin was under oath at the time he gave his one-word assent. While the statement of facts read at Griffin's change of plea hearing may have been admissible as substantive evidence against *Griffin* at some other proceeding, it was not admissible against Kane as substantive evidence. Every criminal defendant who pleads guilty is placed under oath before the colloquy takes place. The guilty plea colloquy of Lamar Griffin was no different. After Griffin was placed under oath, the District Court questioned him extensively about the plea agreement after the prosecutor read certain portions of it into the record. This did not thereafter render the substance of Griffin's plea agreement or the guilty plea itself admissible as substantive evidence. The guilty plea, the guilty plea agreement and the statement of facts underlying the guilty plea are all "statement[s]" under Fed. R. Evid.

[12]Appendix D at 3-5.

[13]Appendix B at 6-7.

801 (a)[14]. Since Griffin's guilty plea and guilty plea agreement were not admissible as substantive evidence at Kane's trial, even though under oath, it follows that the statement of facts underlying Griffin's guilty plea likewise was not admissible as substantive evidence against Kane at Kane's trial. To put it another way, if Griffin's guilty plea and plea agreement, acknowledged and adopted under oath, were admissible only as impeachment evidence at Kane's trial, the statement of facts underlying the guilty plea likewise was admissible only as impeachment evidence at Kane's trial. Kane, like every defendant, had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else. United States v. Toner, 173 F.2d 140 (3d Cir.1949). The bald introduction of a witness's guilty plea concerning facts or events similar to that for which the defendant is on trial could have the prejudicial effect of suggesting to the trier of fact that the defendant should be found guilty merely because of the witness's guilty plea. United States v. Universal Rehab. Servs. (PA), Inc., 205 F.3d at 668.

This rational holds true in the instant case. Neither a guilty plea or plea agreement is admissible as substantive evidence even though the witness who testifies against the defendant acknowledges the existence and validity of the plea under oath. Griffin was under oath when he plead guilty and adopted the validity of his plea agreement. Under the rationale of the District Court and Court of Appeals, if Griffin's statement of facts, given under oath during the plea colloquy, was admissible as substantive evidence under Rule 801 (d)(1)(A), then the guilty plea and plea agreement would also have been admissible as substantive evidence under that rule.

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[14](a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
Fed. R. Evid. 801 (a).

While the statement of facts may have been admissible *against Griffin* as substantive evidence, it was admissible *against Kane* only as impeachment evidence consistent with this Court's rationale in Universal.

The admission of Griffin's statement of facts as substantive evidence at Kane's trial was not harmless error. The test for harmless error is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18 (1967). In the instant case none of the victims of the August 22nd robbery identified Kane. Kane never gave a post-arrest statement admitting to participating in the August 22nd robbery. No evidence was presented that Kane attempted to tamper with the witnesses of the August 22nd robbery. The identity of the robbers cannot be determined in surveillance video of August 22nd robbery. Alexander's testimony that she fenced cell phones given to her by Kane after an August 23rd phone call is insufficient to prove Kane's guilt of the August 22nd Cheltenham robbery where Kane was not identified as one of the robbers. Thus, the Court of Appeals erred in upholding the District Court's admission of the statement of facts read at Griffin's change of plea hearing against Kane as substantive evidence.

CONCLUSION

WHEREFORE, Petitioner respectfully prays for the issuance of a writ of certiorari for the reasons stated herein.

Respectfully submitted,

/s/ Mark S. Greenberg

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MARK S. GREENBERG, ESQUIRE
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

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CERTIFICATE OF SERVICE

In accordance with the Supreme Court Rule 29.5(b), this is to certify that service has been made upon the following parties of the Petition for Writ of Certiorari by first class mail at the addresses noted below:

Solicitor General of the United States
Department of Justice
Washington, DC 20530

AUSA Tom Zaleski, Esquire,
Office of United States Attorney,
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on the date below.

/s/ Mark S. Greenberg

MARK S. GREENBERG, ESQUIRE
Attorney for Petitioner
SHAMIR KANE

DATED: January 29, 2020