

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

ORIGINAL JURISDICTION OF THE COURT OF APPEALS

Indictment Nos.: 2013-GS-40-04051 and 04052

RECEIVED

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SC Court of Appeals

STATE OF SOUTH CAROLINA, Respondent.

v.

RYAN BRADFORD KIRBY,Appellant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

NOW comes the Appellant, by undersigned counsel, and offers the following Memorandum of Law in Support of Appellant's Motion to Suppress:

1. Appellant Ryan Bradford Kirby has been charged with Indictments Nos. 2013-GS-40-04051 and 04052 in the Court of General Sessions for the Fifth Judicial Circuit of Richland County in South Carolina; and, moves this Honorable Court to suppress the Respondent's warrantless recording of a February 28, 2013 telephone conversation initiated by the alleged victim and at the behest of the Respondent. At all times herein mentioned, the events complained of by the alleged victim occurred in or about 1994 and, at which time, the alleged victim was age seven (7); and, Appellant was age fourteen (14).

2. On July 26, 2013, Appellant filed with the Richland County Clerk of Court a Motion to Suppress Electronic Communications and for a Hearing which, on said date, was served on the Respondent, State of South Carolina. [Copy of Motion attached as

Exhibit A.] A hearing was conducted on August 28, 2013 before the Honorable Alison Renee Lee. Thereafter, on September 26, 2013, Judge Lee issued an Order denying jurisdiction to hear said Motion; and, directing the Appellant's Motion to the Court of Appeals. [See Order dated September 26, 2013 attached as Exhibit B.] Thus, the Appellant is requesting the Chief Judge of the Court of Appeals to designate a panel of three (3) judges of the South Carolina Court of Appeals to hear this matter pursuant to S. C. Code Ann. § 17-30-15(9).

SUMMARY OF ARGUMENT

3. Pursuant to the 4th Amendment of the United States Constitution and S.C. Code Ann. §17-30-110(A)(1), Appellant is an aggrieved person who hereby moves to suppress the intercepted (recorded) electronic communication described herein on the grounds that it was unlawfully created and intercepted; disclosure of the contents of the communication and all evidence derived therefrom violates S.C. Code Title 17, Chapter 30 (See S.C. Code Ann. § 17-30-65); and, further, admission of the call into evidence would violate the Appellant's 4th and 5th Amendment rights. Lastly, admission would unduly prejudice the Appellant.

4. S.C. Code Ann. §17-30-30 allows interception of electronic communications where one party consents; but, that section of our Code does not allow the Respondent to cause the consenting party to lie, mislead or defraud the non-consenting party to the intercepted conversation. S.C. Code Ann. §17-30-10 limits "interception" and use of electronic communications to the specifics of Title 17, Chapter 30. "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. S.C. Code Ann. §17-30-15.

"Intercept," thus, by this explicit definition, does not mean 'trick the recorded party' or 'invent inculpatory content' by means of lies, deception or emotional manipulation of the non-consenting recorded party.

5. Appellant hereby moves to suppress the Respondent's warrantless recording of a February 28, 2013 telephone conversation, initiated by the alleged victim and at the behest of the Respondent, under the following important circumstances: The Respondent, through Investigator Holly Wagner and/or Investigator Holdorf of the Richland County Sheriff's Department, directed the alleged victim to telephone Mr. Ryan on his cell phone number; and, the conversation was recorded at the Richland County Sheriff's Department on the Respondent's recording equipment [See Statement of Holly Wagner, dated 2/28/13, attached as Exhibit C.] Moreover, the Respondent instructed the alleged victim (i) as to what she should say throughout the conversation; and, (ii) to deny that the conversation was being recorded at three (3) separate times during the conversation.

6. It is expected that the Respondent will argue that the conversation is admissible under S.C. Code Ann. §17-30-30, because the alleged victim was a consenting party to the conversation and acted for law enforcement investigative purposes "under color of law." However, Appellant's legitimate expectation of privacy; his 4th Amendment Constitutional right to be free from unreasonable search and seizure and, his 5th Amendment privilege against self-incrimination were violated by the multiple misrepresentations made by the Respondent through its agent--the alleged victim.

7. The alleged victim acted as a Respondent agent "under color of law" because she followed the Respondent's explicit instructions and materially misrepresented the nature and purpose of the telephone call. She lied when she said she was at home when,

in fact, she was at the Richland County Sheriff's Department. She lied three (3) separate times when she denied recording the call. She lied when asked who was with her by failing to disclose that investigators of the Richland County Sheriff's Department were present with her. She lied about wanting only "closure," "an explanation" and "an apology" when, in fact, she was actively seeking inculpatory statements for use in a criminal investigation with police. Each of these lies was a material misrepresentation; and, her actions as the Respondent's agent make her "consent" ineffective and the "search and seizure" or "interception" of the call unreasonable and, therefore, inadmissible. [See Copy of Transcript of CD of Telephone Conversation Between Ashley Jones and Kirby Ryan, Exhibit D.]

8. Appellant was tricked into apologizing for acts (which, in context, he said had occurred when he was age 14), by way of the lies listed above, compounded by emotionally manipulative statements the Respondent encouraged the Appellant to make. Upon instruction to do so by the Respondent, the alleged victim stated, among other things, "I just want closure"; "I just want to know why"; "I want to move on"; "I'm looking for an apology"; "[m]y therapist said this would help"; "This is hard on me"; "[t]hat is my nightmare"; "I see it every day"; and, other statements specifically scripted by the Respondent. The Respondent's instruction and control over the alleged victim is patently evident in the notes made by the Respondent during the conversation. [See "Discovery Checklist" item number 9, "Handwritten Notes, 3 pages" attached as Exhibit E.] These notes constitute the Respondent's surreptitious and written instructions to the alleged victim as to what to say.

4TH AND 5TH AMENDMENT GROUNDS TO SUPPRESS

9. When a criminal Appellant moves to suppress evidence on 4th Amendment grounds, the trial court must first determine whether the Appellant has a legitimate expectation of privacy. See *State v. Crane*, 296 S.C. 336, 341, 372 S.E.2d 587, 589 (1988); *State v. Bruce*, 402 S.C. 621, 741 S.E.2d 590, 592 (Ct. App. 2013). Application of the 4th Amendment depends on whether the person invoking its protection can claim a “legitimate expectation of privacy” that has been invaded by government action. This inquiry normally embraces two questions: first, whether the individual has exhibited an actual (subjective) expectation of privacy; and, second, whether his expectation is one that society is prepared to recognize as “reasonable.” *Katz¹ v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967); *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577 (1979).

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” In determining whether a particular form of government-initiated electronic surveillance is a “search” within the meaning of the Fourth Amendment, our lodestar is *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In *Katz*, Government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a “search” can occur only when there has been a “physical intrusion” into a “constitutionally protected area,” noting that the Fourth Amendment “protects people, not places.” *Id.*, at 351–353, 88 S.Ct., at 511–512. Because the Government’s monitoring of Katz’ conversation “violated the privacy upon which he justifiably relied while using the telephone booth,” the Court held that it “constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.” *Id.*, at 353, 88 S.Ct., at 512.

Smith v. Maryland, 442 U.S. 735, 739-40, 99 S. Ct. 2577, 2579-80 (1979).

10. Here, Mr. Ryan had a recognized legitimate expectation of privacy in his

¹ Superseded by statute on another ground as Respondent in *United States v. Koyomejian* 946 F.2d 1450, 1455 (1991).

personal cellular telephone communication. During the call, he asked the alleged victim three (3) separate times whether the conversation was being recorded; and, three (3) separate times, she emphatically answered "no," thus supporting his reasonable expectation that the call was private and as reflected in his statement that "it should be like talking person to person." [Exhibit D, p.3, lines 7-8] He further addressed that their conversation was "something like you should talk about face to face." [Id. at p. 2, line 13] Repeatedly, the Appellant sought and expected privacy as he said he would "prefer in private." [Id. at p. 4, line 18]

11. Once the trial court finds the Appellant had a legitimate expectation of privacy, it must, then, determine whether the police violated his 4th Amendment rights. *States v. Bruce*, 402 S.C. 621, 741 S.E.2d 590, 592 (Ct. App. 2013). Appellant contends that the Respondent violated his 4th and 5th Amendment rights here, even though our Code appears to allow intercepted calls where one party consents. In fact, Chapter 30 of our Code closely tracks the federal equivalent act, which provides, in part:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception **unless such communication is intercepted for the purpose of committing any criminal or tortious act** in violation of the Constitution or laws of the United States or of any state..

8 U.S.C §2511(2)(d). Emphasis added. Even when one party to the communication consents to the interception, if it is "intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution of laws of the United States or of any state, see 18 U.S.C. § 2511(2)(d), the interception will still be considered unlawful." *United*

States v. Jiau, 794 F. Supp. 2d 484, 486 S.D.N.Y. 2011).

12. Appellant contends that the circumstances under which the conversation was intercepted; and, the manipulation in which the Respondent engaged so as to obtain self-incriminating statements by the Appellant, constitute the crime of manufacturing false or misleading evidence and the tort of constructive fraud. Whether viewed in light of the South Carolina statute or the federal statute which parallel each other, these circumstances – deceit and lies – violate Mr. Ryan's 4th and 5th Amendment rights. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 359, 88 S. Ct. 507, 515, 19 L. Ed. 2d 576 (1967).

13. Indeed, the contents of the call are clearly inadmissible as the product of the Respondent's affirmative acts of deceit (through its agent, the alleged victim) by lying about the purpose of the call; who was present; where the caller was physically located; and, whether the call was being recorded. The touchstone of the suppression inquiry in the deception context is whether law enforcements made an affirmative misrepresentation. "A consent search is unreasonable under the 4th Amendment if the consent was induced by the deceit, trickery or misrepresentation[.]" *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977). Ineffective consent comes from affirmative acts by the agent that materially misrepresent the nature of the inquiry. *United States v. Dawson*, 486 F.2d 1326, 1329 (5th Cir. 1973); *United States v. Prudden*, 424 F.2d 1021, 1032-33 (5th Cir.), cert. denied, 400 U.S. 831, 91 S.Ct. 62 (1970). See also *United States v. Goss*, 650 F.2d 1336, 1348-49 (5th Cir. 1981); *United States v. Wuagneux*, 683 F.2d 1343, 1347 (11th Cir.

1982).

14. Analysis of case law decided in the context of a 4th Amendment search and seizure claim extends to statements made in violation of the 5th Amendment privilege against self-incrimination. See *United States v. Walker*, 760 F.2d 144 (7th Cir.1985). Since all claimed violations depend upon a showing of the existence of fraud, deceit or trickery, it is not necessary to discuss each constitutional claim separately. *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970). South Carolina precedent on the issue could not be found, but the federal court opinions cited throughout this memorandum, from around the nation, "recognize that fraud, deceit or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable[.]" *Prudden*, 424 F.2d at 1032.

15. For this reason, the recording and any evidence derived from it should be suppressed.

THE CONTENTS OF THE CALL ARE UNFAIRLY PREJUDICIAL

16. Additionally, the Court should suppress the surreptitiously recorded conversation because its contents would confuse the jury and unfairly prejudice the Appellant. Rule 403, SCRE states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

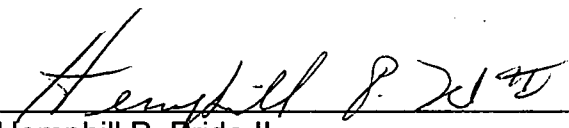
17. In the recorded conversation at issue, the speaker describing the illegal acts is clearly the alleged victim. In response, the Appellant stated that he was 14 years old at

the time and he apologized. However, his exculpatory statement of his age (accompanied by his apologies), is likely to be misconstrued as an admission of all the acts, even though they are described only by the complaining witness during the call. His exculpatory statement is likely to be overshadowed in the minds of jurors by the alleged victim's descriptions of illegal acts and their effect on her. Thus, admission of the intercepted conversation into evidence will very likely influence and confuse the jury and unfairly prejudice the Appellant. It should be suppressed on that basis. See, *United State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (S.C. Ct. App. 2012), reh'g denied (Sept. 20, 2012) ("To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof.")

CONCLUSION

18. On the basis of all of the above and foregoing, it is respectfully requested that this Honorable Court grant Appellant's motion to suppress the recorded telephone conversation itemized as "11. One CD – phone call" on the Respondent's Discovery checklist and any and all evidence resulting from it.

(SIGNATURE BLOCK NEXT PAGE)

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ATTORNEYS FOR APPELLANT

October 9, 2013.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FIFTH JUDICIAL CIRCUIT

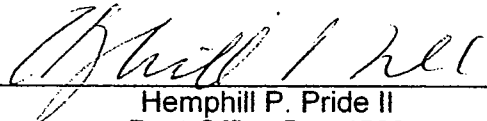
STATE OF SOUTH CAROLINA,)
v.)
RYAN BRADFORD KIRBY,)
Defendant.)

**MOTION TO SUPPRESS
ELECTRONIC COMMUNICATIONS
AND
FOR A HEARING**

**Warrant Nos. 2013A4010600165
2013A4010600166**

COMES now the Defendant, by and through his undersigned counsel, and respectfully moves this Honorable Court for an Order, pursuant to the 4th and 5th Amendments of the United States Constitution and South Carolina Code §17-30-110(1), to suppress the intercepted (recorded) electronic communication of the Defendant; and, all evidence derived therefrom on the grounds that it is in violation the Defendant's 4th and 5th Amendment rights as well as South Carolina Code Ann., §17-30-65.

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ATTORNEY FOR DEFENDANT

July 23 2013.

2013 JUL 26 AM 10:36
JEANETTE W. McBRIDE
C.C.P. & G.S.

RICHLAND COURT
FILED

EXHIBIT A

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
FOR THE FIFTH JUDICIAL CIRCUIT

State of South Carolina,)
)
Plaintiff,)

Indictment Nos.: 2013-GS-40-04051 & 04052

v.)

ORDER

Ryan Bradford Kirby,)
)
Defendant.)

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COURT OF GENERAL SESSIONS
C.C.P. & C.S.

This matter comes before the Court by motion filed by Defendant Ryan Bradford Kirby to suppress intercepted electronic communication of the Defendant obtained in violation of S.C. Code Ann. § 17-30-65 and in violation of his Fourth and Fifth Amendment rights under the U.S. Constitution. A hearing was conducted on the motion on August 28, 2013 during which the parties argued their positions. Present at the hearing were Hemphill P. Pride II, Esquire, attorney for Defendant, and Margaret Fent Bodman, Esquire, Assistant Solicitor for the State of South Carolina. At the conclusion of the hearing, the Court allowed the State to provide a legal memorandum fully explaining its position and in response to the memorandum filed by the Defendant at the hearing. Defendant provided a memorandum in reply.

The State's argument is that the circuit court is without jurisdiction to hear the motion to suppress on the basis that S.C. Code Ann. Section 17-30-110 gives the sole and exclusive jurisdiction over a motion to suppress to the South Carolina Court of Appeals. Section 17-30-110 states, in part, that prior to any trial, hearing or proceeding, the "aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom The motion must be made before the trial, hearing or proceeding The motion must be made before the reviewing authority and must be decided on an expedited basis." *Id.* "Reviewing authority" is defined as "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. § 17-30-15(9).

In *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012), the trial court granted the defendant's motion to suppress a recorded telephone conversation. The State filed an appeal pursuant to the Wiretap Act.


EXHIBIT B

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C.C.P. & C.S.
RICHLAND COUNTY
SOUTH CAROLINA
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Act¹, which was granted. The Supreme Court stated, "The court of appeals correctly granted the State's motion to vacate and found that the trial court lacked subject matter jurisdiction because the Wiretap Act requires that a motion to suppress be made before a panel of judges of the court of appeals." 399 S.C. at 551, 732 S.E.2d at 863. Additionally, in *State v. Guerrero-Flores*, No. 2013-03-06-01, 2013 WL 1197752 (S.C. Ct. App. Mar. 6, 2013), the Court of Appeals reiterated and confirmed the statutory provisions requiring the Court of Appeals to hear the motion to suppress.

For the foregoing reasons, the circuit court is without jurisdiction to hear Defendant's Motion to Suppress Electronic Communication. The Court of Appeals is the reviewing authority pursuant to the South Carolina Homeland Security Act, codified at S.C. Code Ann. § 17-30-10 et seq. As the circuit court is without jurisdiction, Defendant's additional arguments were not considered.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
September 26, 2013

¹ The South Carolina Homeland Security Act was referred to as the Wiretap Act in *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012).

6/11/13
#2

2/28/2013 1500

Inv. Holdorf and I met with Ashley Jones and her mother at HQ. Ashley called Ryan and the phone went to voicemail. A few minutes later Ryan Kirby called back and Ashley answered. When Ashley ask Ryan if he remembered the sexual abuse from their past he got very quiet. Kirby wanted to meet with Ashley and talk with her face to face. Ashley continued to talk with Kirby telling him she could not meet him and just wanted to know why the abuse took place and ask for an apology. Kirby was very shaken by the call. He pulls off the road to talk with her. Eventually Kirby apologizes to Ashley. While he is telling Ashley how he feels about the abuse her phone goes dead. I downloaded the conversation off of the recorder and let Ashley take the recorder in case Ryan calls back after she charges her phone. The recorded phone conversation is attached to this case in ACISS. The notes from the phone call are also attached to this case in ACISS.

3/6/2013

Ryan Kirby was arrested by the fugitive team. While being read the warrants he made an excited utterance that he was not 18-20. He said that happened when he was a child himself.

I met Inv. Bell at the sally port. I spoke briefly with Ryan Kirby. I decided Kirby was too emotionally distraught to be interviewed at this time. He repeated the excited utterance, saying this didn't happen when he was adult. Ryan said he was 14-16. I told Kirby to call me when he gets out if he and his attorney want to sit down and talk.

Case closed by arrest CJ

EXHIBIT C

TRANSCRIPT OF CD

TELEPHONE CONVERSATION BETWEEN ASHLEY JONES AND KIRBY RYAN

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ASHLEY: Hello.

RYAN: Yes, hello.

ASHLEY: Hello, hey, is this Ryan

RYAN: Yea, this is Ryan.

ASHLEY: Hey Ryan, this is Ashley, um, I was calling just to talk to you for a few minutes. Are you busy?

RYAN: Um, just clocked out from work.

ASHLEY: Oh, um, well I just kind of just wanted to tell you a few things and um just kind of ask you some questions.

RYAN: Okay, uh, this is Ashley?

ASHLEY: Yeah, um, Shawn's sister.

RYAN: Oh, Ashley, Oh.

ASHLEY: Yeah.

RYAN: Okay. How are you doing?

ASHLEY: Fine. I'm okay. I'm, I just wanted to ask you, do you um remember anything about our past, about like the sexual abuse or anything like that?

RYAN: INAUDIBLE.

ASHLEY: No? Hello, Hello.

RYAN: Hello.

ASHLEY: Yeah, I'm here.

EXHIBIT D

RYAN: Oh, okay (pause). Where are you right now?

ASHLEY: I'm at home.

RYAN: Okay. I should be there in a minute though. I'm going to my grandma's house

JEANETTE W. McBRIDE
C.C.P. & G.S.
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1. ASHLEY: Um, I mean you don't, you don't have to come over. I'm just, I'm just um just
2. wanted to talk now if you had a few minutes. Just, do you remember it at all?

3. RYAN: I mean its uh, I should be home in about a few minutes though

4. ASHLEY: I mean, I rather talk now. I don't want to see you, this, I mean this has been
5. kind of hard for me. That's why I want to talk to you about it. I'm actually um in counseling
6. now and stuff and its easier if I just talk with you over the phone. Is that okay?

7. RYAN: ... You got me really kind of caught off guard here. Uh.

8. ASHLEY: I kind of just wanted to know why? Like, why did the abuse happen or did you
9. mean it to hurt me? (PAUSE) Hello.

10. RYAN: Yeah, ... I'll be home in a little bit this is real heavy on me calling me on the
11. phone. (INAUDIBLE) I'll be home in a little bit.

12. ASHLEY: Did you care?

13. RYAN: That's something like you should talk about face to face, you know.

14. ASHLEY: Yeah, but I'm really, I'd, just rather do it over the phone. I cannot, I mean, I
15. rather not see you. It's like really, really hard. But, I mean do you, do you remember it, like
16. the things that you use to do to do to me? I mean, I've been in counseling on and off for
17. years and, I mean, just calling is hard. But, I'd rather do it over the phone.

18. RYAN: Who is at your house now? I mean

19. ASHLEY: I mean

20. RYAN: Who's, who's at your house now? I mean

21. ASHLEY: I mean

22. RYAN: Are you like, I mean, are you like recording this? That's the thing.

23. ASHLEY: I'm just, I am not able to see you, I mean, I'd rather not see you. (PAUSE)
24. Hello.

25. RYAN: Yeah, I'm here.

1. ASHLEY: I just want closure so that I can move on with my life. That's all. I just want
2. either an apology or you to admit it, or tell me why it happened. I mean, you were, like, my
3. brother's best friend. I just want to know, like, why?

4. RYAN: I'm, I'm, like literally in the car on the way home right now. Give me like ten
5. minutes.

6. ASHLEY: I cannot see you. My therapist said this would help out a lot and —

7. RYAN: This is the thing, that, over the phone, I don't, it's kind of like, it should be like
8. talking person to person.

9. ASHLEY: I mean its hard, I promise you it's harder on me than it is for you. I am the one
10. who, like, who has been suffering for years and in and out of counseling. I just, can I at least
11. get an apology for the abuse or even an acknowledgment?

12. RYAN: I'm on the way home. Okay? Just give me, you'll just see me, like, pull up in
13. a few minutes.

14. ASHLEY: I can't, but I can't see you.

15. RYAN: But, I, I have seen you several times since you have been out of the army,
16. several times.

17. ASHLEY: I've

18. RYAN: Several times and you still at next door, several times.

19. ASHLEY: And, it's been very, very hard for me each time, very, very hard. And, I just,
20. I mean, I just need closure.

21. RYAN: I, I definitely understand.

22. ASHLEY: I just, I mean I really just want to know why. Can you just give me a reason why
23. and an apology?

24. RYAN: I'll be home in a minute and I'd rather do this like, it's just like I understand
25. where you are coming from but, I mean, it's just like, okay, I get a call like, okay, slow down,

1. slow down, I understand. I'm on the way home, okay?
2. ASHLEY: I'm not ready for that. I was really just calling to see if we could have just an
3. adult conversation about things that took place years ago.
4. RYAN: Yes, we are, we are, but --
5. ASHLEY: Um, I mean we were kids. Hello.
6. RYAN: Yeah, I'm here
7. ASHLEY: I mean, can I at least just get a reason why? Even if its not a reason why, just
8. an apology so that I can have closure and move on with my life?
9. RYAN: I mean, are you, is this a recording, I mean --
10. ASHLEY: No.
11. RYAN: Who is home with you right now. I mean--
12. ASHLEY: What's wrong with me?
13. RYAN: Who is home with you right now?
14. ASHLEY: I can't understand what you are saying.
15. RYAN: Who is home with you right now?
16. ASHLEY: My mom, my mom is home with me. I mean
17. RYAN: That's, I mean that's different. do I want to speak with you? Absolutely, but I
18. prefer in private.
19. ASHLEY: I mean, I, I can't
20. RYAN: (INAUDIBLE) . . . over the phone.
21. ASHLEY: I not, I'm really, really not ready for that. And, my mom doesn't want you at the
22. house. I'm just doing this because I was encouraged by my therapist and she said that would
23. help me to move on. (PAUSE) This has been a struggle for me for years. I mean I thought
24. maybe that you could at lease explain to me why it took place or even apologize to me. I
25. want to move on with my life. Could I at least get that? (PAUSE) Hello.

1. RYAN: I'm here.
2. ASHLEY: I mean, what are you thinking like an apology?
3. RYAN: A million different things like –
4. ASHLEY: All I want is closure; like I'm not, that all I want is to move on with my life, I feel
5. like an apology would definitely help with that or even an explanation. Do you understand
6. what I'm saying? (Pause) Hello.
7. RYAN: I feel like I'm about to pass out, like –
8. ASHLEY: I just want to hear you are sorry for what you did to me. That's it. I mean, it
9. caused me years and years of pain and in and out of counseling and just trauma. I just want
10. an apology.
11. RYAN: Let me, let me pull over. Let me pull over. (PAUSE) Hold it, give me one
12. second. (PAUSE)
13. ASHLEY: Hello.
14. RYAN: Yeah, I'm back. (INAUDIBLE) I am really scared right now.
15. ASHLEY: Are you sorry? (PAUSE) Hello.
16. RYAN: Is this, you said this isn't a recording? I mean
17. ASHLEY: No, it's not, I'm at home.
18. RYAN: Is this your phone? Your cell phone?
19. ASHLEY: Yes. (PAUSE) I mean, are you, are you sorry for what you did to me?
20. RYAN: (INAUDIBLE) I mean, I (PAUSE)
21. ASHLEY: This is harder for me. Does it, does it matter to you what happened at all?
22. RYAN: Can I, can I get a one moment, I'm like, oh God, Ashley, I –
23. ASHLEY: I mean, I just really looked up to you as one of almost like my brothers; and, I
24. just really want closure and move on with my life. I lived in years of pain, and
25. RYAN: (INAUDIBLE) I never imagined anything like that or wanted it to happen. I

1. I don't what happened. I mean, it been - we were 14 or 15. We were at Little Mike's house
2. or Melvin's or somebody's house at a cookout and you had sat on my lap just out of the blue.
3. I was - you were young. You didn't mean any harm. I didn't think that nothing would happen.
4. I don't know, AND IT WAS --

5. ASHLEY: I mean, are you, are you sorry for the other stuff that took place?

6. RYAN: I didn't intend for any of that to happen. Absolutely. I thought about that
7. and repented tremendous times.

8. ASHLEY: Why did you keep doing it over and over. I mean, at my house, your
9. grandmother's house, like over and over. (PAUSE) I fear every day, every day of my life.
10. (PAUSE) I just want closure. I mean, are you --

11. RYAN: I definitely apologize. I am totally, truly, truly indebted to you. I am sorry, Ashley
12. Jones. It was not -- It was like --

13. ASHLEY: I mean, was anyone else touched like the way I was?

14. RYAN: No, no, absolutely not. No, oh God.

15. ASHLEY: Did you care?

16. RYAN: I knew, it was just, I don't know.

17. ASHLEY: I mean, I just want to know why, really, just why. (PAUSE) Hello.

18. RYAN: Yeah, I'm here.

19. ASHLEY: I accept your apology.

20. RYAN: I'm trying to calm down, like (PAUSE) I can't tell you how many times I, like,
21. wanted to stop, but, it was just, that was just evil -

22. ASHLEY: So you wanted to stop touching me but you just couldn't? (PAUSE) Hello.

23. RYAN: I'm here, I'm

24. ASHLEY: So you just couldn't stop touching me? (PAUSE) I know this is hard, but it's
25. um, I mean, it's much harder for me. I, mean like, I just need closer, like an explanation. I

1. accept your apology.
2. RYAN: This is something I dealt with at the back of my mind. Ashley, I'm not going to
3. lie to you. I had a dream about two (2) years ago. I would have to kind of talk with you about
4. that. I just don't know when.
5. ASHLEY: What was it about?
6. RYAN: It was, literally, you were older and the dream was like affectionate and, when
7. I saw it, I knew exactly what it was about. I said oh my goodness I, I -
8. ASHLEY: About the abuse that took place? (PAUSE) Hello.
9. RYAN: Yeah, I'm here.
10. ASHLEY: Yeah, that's what the dream was about.
11. RYAN: That, that I was (PAUSE)
12. ASHLEY: That is my nightmare, it's not a dream for me at all. It's still a nightmare.
13. (PAUSE) I just want an explanation. (PAUSE) I just want to know why. (PAUSE) Well, um,
14. I guess I'm just not worth an apology. So, um -
15. RYAN: I, I apologize to you -
16. ASHLEY: Well, I guess I'll just try and figure out why myself. I am going to um -
17. RYAN: Wait, wait, wait (PAUSE)
18. ASHLEY: I mean, I know this may be hard for you, but I've been in counseling for years,
19. years, and years of counseling to just try and move pass it. And, I think if I just knew why that
20. would help me with the closure so I can move on with my life. (PAUSE) Is there a reason
21. why?
22. RYAN: Like I said, the only thing I can think of is you, I'm, I'm literally telling you how
23. It happened, how it started, you had sat on my lap at Melvin's house (INAUDIBLE) and I got
24. aroused; and you were, literally before anything happened, moving very kind of like in a
25. a sexual type manner, um, and every since that you were just automatically wanted to set

1. on my lap ever since then and I kind of let you. The more you did that the more I wanted you
2. to continue to sit on my lap. I knew that was wrong, I don't know why, I, I, don't feel it was
3. cute or innocent, but it was leading up to a lot of stuff that just shouldn't have happened. I,
4. literally, remembered that moment when that happened. It was like a gate way (INAUDIBLE).

5. ASHLEY: How did it progress from there, like an innocent child sitting on your lap to years
6. of sexual abuse? (PAUSE)

7. RYAN: I don't think, it was just kind of, once you (INAUDIBLE) something, its almost
8. kind of like you never can get enough. That's with anything, what your call a habit, a bad one
9. or a good one. From that moment, it just, it just continued.

10. ASHLEY: Was it just so you could get off?

11. RYAN: Even at that age, I had never been with a woman, never, never had sex. I was
12. fourteen (14) or so, never had intercourse, not with one woman, not then, not til later in life,
13. literally my senior year in high school.

14. ASHLEY: I was a girl, a little girl, a child – (PAUSE) Hello.

15. RYAN: I just would apologize, I, I –

16. ASHLEY: Thank you.

17. RYAN: I'm really, I mean like with all sincerity admire you. I, I from the bottom of my
18. heart to the depths of my soul, it is just , it is just some things I've learned since then that I
19. would not wish on anybody, not, I just hate it all took place being that you had to deal with that,
20. especially someone that was friends of my older siblings. I, I, disrespected you; I
21. disrespected my family that outside of God means everything. My integrity wasn't there; I was
22. very immature just not thinking and just like going with the flow. It was just wild behavior that
23. I buried extremely. You know what, I'm going to be real with you right now. In all of my 33
24. years of living that is probably the worst. I wish I could take it back. That right there is the
25. epitome of just absolute devilish and devious behavior, not only that, it was satanic. That's

1. how -

2. (Persons talking in background.)

3. **END OF TRANSCRIPTION**

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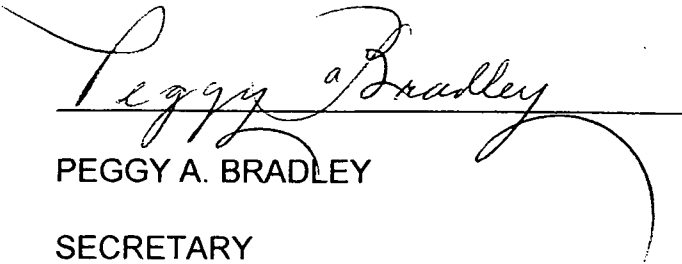
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CERTIFICATE

I, THE UNDERSIGNED PEGGY A. BRADLEY, SECRETARY FOR THE LAW OFFICE OF HEMPHILL P. PRIDE II, LLC, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF THE TELEPHONE CONVERSATION BETWEEN RYAN KIRBY AND ASHLEY JONES.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.


PEGGY A. BRADLEY
SECRETARY

COLUMBIA, SOUTH CAROLINA

AUGUST 23, 2013.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 28th DAY OF AUGUST 2013



NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES 8/9/2022

EXHIBIT E

Any one else?

I accept
your apology

I want

closure

My therapist

said this would

help.

This is hard
on me

Why did you
keep doing it
I see it every
day

That is
my nightmare

was it just
so you could
get off

Did you
care
I can not
see you

I just want
to know why
Did you mean
to hurt me

Are you
sorry.
Does it matter to
you
I looked up to you

I want to
move on

This
has been
a struggle

Why didn't
you

