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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from York County

G. Edward Welmaker, Circuit Court Judge

HASHIN ALLIE ONEIL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-02126

APPENDIX

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A. No, sir.
Q. Okay. Now I want to go back to the early morning hours of November 12th.
A. Yes, sir.
Q. I believe you testified that you arrived with Investigator George; is that correct?
A. Yes, sir.
Q. And you arrived in the same vehicle?
A No, sir.
Q. Okay. But at the same time?
A. Approximately.
Q. Okay. And there was a Crime Scene Entry Log that was kept for that morning; is that correct?
Is that correct?
A. I can't ans - I don't know.
Q. Okay. Are you familiar with a Crime Scene Entry Log?
A. Oh, yeah, yes, sir.
Q. And what's the purpose of the Crime Scene Entry Log?
A. The Crime Scene Entry Log keeps track of who's been inside the crime scene; officers, crime scene personnel, anybody that's been in or out of the crime scene.
Q. In the Crime Scene Entry Log that was kept for Ms. Caldwell's apartment that early morning of November 12th has you listed for being there from 6:10 a.m. to 6:51 a.m. Does that sound correct?

A. I can't - I can't advise, I don't remember the exact times I was there.

Q. I show you what's been marked State's Exhibit Seventy-five.

A. Yes, sir. Thank you.

Q. This is the Crime Scene Entry Log for that - the early morning of November 12th, Ms. Caldwell's apartment.

A. Okay.

Q. Now do you see your name on this Entry Log?

A. Yes, sir

Q. And your name is the last one that's entered; is that correct?

A. Yes, sir

Q. And what's the time in and the time out for you?

A. Time in and time out, 06:10 and time out is - looks like 06:51.

Q Okay. And that's military time. Right?

A. Yes, ma'am.

Q. So that would indicate 6:10 am 6:51 am. Correct?

A. Yes, ma'am.

Q. So you were at the scene for forty-one minutes.

A. Yes, sir.

Q. Did you ever see Detective Strait at the scene while you were there?

A. I don't - I don't recall.

Q. And when you were at Ms. Caldwell's apartment on November 12th - - -

A. Yes, sir.

Q. - - - did you look for a projectile?

A. We did not a projectile specifically.

Q. Did you - Did you go upstairs in the apartment?

A. Yes, sir

Q. And did you go into the bedrooms upstairs?

A. Yes, sir, to photograph.

Q. I show you what's been marked State's Exhibit Fifty-nine.

A. Yes, sir.

Q. You took the photographs on November 12th. Correct?

A. Yes, sir

Q. And did you take the photograph that's State's Exhibit Fifty-nine?

A. Yes, sir

Q. And was that a photograph you took on November 12th?

A. I can't advise. I believe so.

Q. Okay. And that photograph shows a picture of a bed and a chair at the foot of the bed. Correct?

A. Yes, sir

Q. And is there a basket in the chair?

A. Yes, ma'am.

Q. All right. And did you search the bedroom?

A. Yes.
Q. Now staying with November 12th while you were at the apartment, you didn't test - Well strike that. You didn't collect any blood samples. Correct?
A. No, sir.
Q. You didn't test any blood samples. Correct?
A. No, sir.
Q. Did you look for footprints or - I guess that's the best way to describe it - footprints on the front door?
A. Yes, sir.
Q. And those were - Those results were negative. Correct?
A. Yes, sir.
Q. Did you dust for fingerprints on the front door?
A. I believe so. Checking for a foot impression on the front door and yes.
Q. So that - In checking for that you would also check for fingerprints; is that correct?
A. Yes.
Q. Okay. If you could speak up a little bit.
A. I'm sorry.
Q. Yes or no.
A. Yes, sir
Q. Thank you. And those results were negative. Correct?
A. Yes, sir.

Q. Now going to November 15th, and just so I'm clear, you left at 6:51 am. Correct?

A. On the 12th.

Q. I'm sorry. I'm still on the 12th.

A. Oh. Yes, sir.

Q. My fault. And you - Did you close the door, the front door when you left?

A. I believe we did.

Q. Okay. Did you do anything else at that point?

A. At the residence or?

Q. After you closed the front door did you leave at that point at 6:51?

A. Yes.

Q. Okay. And three days later you came back to the apartment; is that right?

A. Yes, sir.

Q. And Ms. Collins on direct ask you about finding a projectile.

I show you State's Exhibit Seventy-four.

A. Yes, sir.

Q. And this projectile that you found was sitting on a blanket in the chair in the bedroom. Correct?

A. It was - yeah, it was on a blanket kind of - The projectile itself was kind of maybe in a fold kind of. But it was on the blanket on the chair in the bedroom.

Q. Okay. And it's sort of on the right side of the chair?

A. Yeah the blanket itself is kind of a small throw. Its over the back of the chair.

Q. I show you State's Exhibit Fifty-one. Maybe it will be a little more ---

A. Yes, sir.

Q. --- effective.

A. Yes, sir.

Q. Okay. So you described this blanket as sort of a throw over the chair. Correct?

A. Yes.

Q. And looking at that sort of pulled back perspective was this projectile sort of on the right side of that chair?

A. Yes, sir.

Q. And what side if you were looking at the foot of the bed if you sort of would picture if this were the foot of the bed, and I'm facing it.

A. Yes, sir.

Q. What side of the foot of the bed would the chair be?

A. It was toward the back of the bed like right side.

Q. Right side?

A. Yes, sir.

Q. Okay. Thank you. And so the chair is sort of on the

right side facing this way. Correct?

A. Yes, sir, it's facing - It would be facing the door.

Q. Facing the door?

A. The doorway.

Q. How far away is the door to the bedroom to the bed?

A. I can't advise.

Q. Did you take any measurements of that while you were at the ---

A. No, sir.

Q. --- apartment? And after you took - I think you testified you put the projectile in the tin.

A. Yes, sir.

Q. And you sealed the tin. Correct?

A. Yes, sir.

Q. And you put the tin in an envelop?

A. Yes, sir.

Q. And all of this occurred while you were at the apartment?

A. No, sir.

Q. When did you put the projectile in a tin?

A. The tin - The projectile itself was placed in a evidence envelop and kept in my possession until we got back to the office which is where we have the tins for the projectiles. It was then placed in a tin and sealed and then placed in the original evidence envelop and sealed up

again.

Q. Okay. And did you ever touch or gain access to the projectile after that?

A. No, sir.

Q. Did you ever send the projectile to SLED to be tested?

A. I did not.

Q. Are you aware of anybody who did that?

A. No, sir.

Q. Did you ever ascertain the caliber of the projectile?

A. I did not no, sir.

Q. Did you ever have the projectile tested for blood or DNA?

A. I did not.

Q. And sitting here today you don't know for sure that that projectile is related to the incident with Ms. Caldwell do you?

A. No, sir.

MR. MUCKENFUSS: No further questions.

SOLICITOR COLLINS: Just a few.

REDIRECT EXAMINATION

INVESTIGATOR AUDRA EDDIE BY SOLICITOR COLLINS:

Q. Ms. Eddie.

A. Yes, ma'am.

Q. Just some clarification in terms of the bag that's holding the victim's camisole here that's been marked as

State's Exhibit Eighteen.

A. Yes, ma'am.

Q. Now that's not the actual bag that you had placed the camisole in upon collection; is that right?

A. That's correct.

Q. Okay.

(PAUSE.)

SOLICITOR COLLINS: I'd like to have this marked as State's ID for purposes - just for identification Seventy-nine.

(WHEREUPON: STATE'S EXHIBIT NUMBER SEVENTY-NINE PREMARKED FOR IDENTIFICATION.)

Q. Ms. Eddie, I'm gonna hand you what's been marked for purposes of ID a State's Exhibit Seventy-nine, and ask you do you recognize that item?

A. Yes, ma'am.

Q. And what is that?

A. The bag that contained the victim's clothes.

Q. Okay. All right. And so that's the actual bag that you placed into evidence; is that right?

A. Yes, ma'am.

Q. And is there other clothing, other than the camisole that's now been placed in this manila envelop, State's Exhibit Eighteen - was there other clothing of the victim's that you collected as reflected on that bag or in that bag?

A. Yes, ma'am.

Q. And do you recall those items that were collected?

A. Yes, ma'am.

Q. All right. And some of those items as you've already testified had bodily fluid or you would put in a drying chamber; is that right?

A. That's right.

Q. Containing possibly what we call biohazard?

A. Yes, ma'am.

Q. Okay. All right. So - All right. Very good.

Ms. Eddie, I believe you've already testified, Mr. Muckenfuss ask you as to the chair's location, you know we keep referring to a blanket. Is it one of those artificial furs or fur throws?

A. Yes, ma'am.

Q. Okay. All right. And so if you're standing facing the bed, the foot of the bed ---

A. Yes, ma'am.

Q. --- if you're facing it you're saying the chair is in what direction to your --

A. It would be to the right.

Q. To the right?

A. Facing the doorway of the bedroom.

Q. All right. And so if you're facing away from the foot of the bed, the chair would be to your?

A. Left.

Q. Left. And the doorway would be to your?

A. Right.

Q. Okay. On November 12th, where was the focus of the search of the apartment on November 13th, 2010 in terms of tying to find a gun?

A. On the 12th?

Q. On the 12th. Do you recall?

A. I do not.

Q. Do you recall, did you all look for projectiles on November 12th, 2010? If you recall.

A. We did a over all search of the apartment for any evidence to include projectiles.

Q. All right. What if any area outside the apartment on November 12th was searched?

A. A vehicle that was in the parking lot that was parked in front of the residence.

Q. Was any of the exterior area of the apartment, the adjacent ground or foliage searched on November 12th, 2010?

A. Yes, ma'am.

Q. For a projectile?

A. For a projectile or a gun.

Q. Or a gun? Was anything found at that time?

A. No, ma'am.

Q. And so on November 15th, 2010, where was the focus,

where was your focus on that day in terms of trying to locate a projectile?

A. The focus was upstairs in the upstairs area of the apartment.

Q. Was it particularly in the bedroom ---

A. Yes, ma'am.

Q. --- where ultimately the projectile was found?

A. Yes, ma'am.

Q. And the focus of the gun, trying to locate the gun on November 15th, 2010, where was that focused?

A. Primarily outside in the area, the parking lot and the area adjacent to the parking lot.

Q. Is there an area there that drops off down toward the car wash?

A. Yes.

Q. Covered with kudzu?

A. Kudzu yes.

Q. Is that a area you all searched?

A. Yes, ma'am.

Q. And no gun found?

A. No, ma'am.

SOLICITOR COLLINS: Thank you, Investigator. Thank you for being here

INVESTIGATOR EDDIE: Yes, ma'am.

THE COURT: All right. Any recross?

MR. MUCKENFUSS: No further questions.

THE COURT: You can step down and be excused. We appreciate your time.

INVESTIGATOR EDDIE: Thank you.

(WITNESS LEAVING WITNESS STAND.)

THE COURT: I hope you feel better. Thank you.

INVESTIGATOR EDDIE: Thank you, sir.

THE COURT: We'll break for lunch until 2:00. It's a little before 1:00 so we'll see you back - I think I hear it raining so I don't know...

We'll see you back at 2:00.

(JURY EXITS COURTROOM FOR LUNCH RECESS @ 12:52 P.M..)

THE COURT: We'll be at ease until 2:00.

(COURT IN LUNCH RECESS @ 12:52 P.M..)

(COURT BACK IN SESSION @ 02:10 P.M..)

THE COURT: Thank you. Take your seats.

Is the State ready?

SOLICITOR COLLINS: The State's ready.

THE COURT: The defense ready?

MR. MUCKENFUSS: Ready, Your Honor.

THE COURT: All right, bring in the jury.

(JURY REENTERS COURTROOM AT 02:11 P.M..)

THE COURT: Call your next witness.

SOLICITOR COLLINS: Thank you, Your Honor.

Your Honor, at this time the State calls Ila Simmons.

I-l-a, Simmons, from SLED.

Ms. Simmons, if you'll come forward to the Bible to be sworn.

(WHEREUPON: ILA SIMMONS, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

DIRECT EXAMINATION

ILA SIMMONS BY SOLICITOR COLLINS:

Q. Would you please state your name for the record?

A. My name is Ila Simmons.

Q. And did I spell it right, I-l-a?

A. Yes, ma'am.

Q. And what's your occupation?

A. I work at the South Carolina Law Enforcement Division in the forensics laboratory trace evidence department.

Q. And what is South Carolina Law Enforcement Division often referred to as?

A. SLED.

Q. And where is that located?

A. In Columbia.

Q. Now how long have you been employed with SLED?

A. Twelve years.

Q. And you said you worked in which department?

A. In the trace evidence department.

Q. What is trace evidence?

A. It encompasses numerous areas of forensics. We

analyze gunshot residue, gun powder residue, we perform fiber, glass and paint comparisons as well as doing explosive post blastings and arson - -

Q. And have you - The years you've been at SLED have you been solely in that department or other departments?

A. Just in that department.

Q. Okay. And how many years was that again?

A. Twelve years.

Q. And can you just tell us a little bit about your background in order to allow you to perform this job for the citizens of South Carolina?

A. I received a bachelor's of Science Degree in Chemistry. After completing that I came to work at SLED. My first three years there I worked with a court qualified, SLED qualified trace evidence examiner who instructed me on how to collect and analyze trace evidence. During that time I had to take written and practical examinations in every subdiscipline that I mentioned and I had to complete them with one hundred percent efficiency. Each year in each one of those subdisciplines I had to take a proficiency test and I have to pass that with one hundred percent efficiency as well.

I'm a member of the Southern Association Forensic Science where each year we attend numerous seminars and training course and teach the training courses. And I'm a

member of the FBI's Gunshot Residue Symposium where the FBI invites people from around the world who analyze gunshot residue to set up the standards and practices that everyone will use when analyzing.

Q. Have you ever been qualified in a court of law to testify as an expert witness?

A. Yes, ma'am, in the State, Federal and Civil Court's of South Carolina over two hundred times.

Q. And what were you - What field were you qualified as an expert witness in?

A. In trace evidence.

Q. And that would include gunshot residue?

A. Yes, ma'am.

Q. How should I refer to you, as Agent Simmons or Ms. Simmons?

A. That would be fine. Either one is fine.

Q. Agent Simmons, let me just ask you, are you familiar with the case currently before the court State versus Hashin O'Neil?

A. Yes, ma'am.

Q. Did you have occasion to receive a York County Multi-Jurisdictional Forensic Unit, a gun shot residue kit?

A. Yes, ma'am.

Q. And did you analyze that kit?

A. Yes, ma'am, I did.

SOLICITOR COLLINS: Your Honor, I'm sorry, I think I got ahead of myself. At this time I do offer Ms. Simmons as an expert in the field of trace evidence.

THE COURT: Any voir dire?

MR. MUCKENFUSS: No, Your Honor. No objection.

THE COURT: I find she is qualified.

SOLICITOR COLLINS: Thank you.

Q. So you received the gunshot residue kit or GSR Kit in this case?

A. Yes, ma'am.

Q. And did you analyze what would have been collected in that gunshot residue kit?

A. Yes, ma'am, I did.

Q. Did you prepare a report from that?

A. Yes, ma'am, I did.

Q. Did you bring your original report today?

A. I did.

Q. Do you have it with you?

A. Yes, ma'am.

Q. May I have that please?

A. Yes, ma'am. I have to get it back.

Q. Okay. May I give you back a copy?

A. Yes, ma'am.

Q. All right.

SOLICITOR COLLINS: Madame Court Reporter, will you

please put a sticker on that to identify it?

(WHEREUPON: STATE'S EXHIBIT NUMBER EIGHTY PREMARKED FOR IDENTIFICATION.)

Q. I hand you what's been marked now as State's Exhibit Eighty for identification purposes and ask you, what is that document?

A. This is a report after each forensic analysis we perform at the laboratory we prepare a report and had it submitted to the agency which brought the evidence into SLED. And in this case this is my report on the gunshot residue kit that was submitted in this case.

Q. All right. What did you find, Agent Simmons, when you analyzed the gunshot residue kit that had been submitted?

A. The quantities of metals that we found did not indicate the presence of gunshot residue.

Q. So is that indicative that no metals were found or are the quantity was no indicative of gunshot residue?

A. That's correct, that quantity was not indicative of the presence of gunshot residue.

Q. Do you have an opinion to a reasonable degree of scientific certainty whether or not the results of your analysis established - Well let me back up - are consistent or inconsistent with Hashin O'Neil having fired a weapon on the day in question?

A. The evidence that I analyzed did not - I did not find

gunshot residue so that can be indicative of either someone not fired a weapon or someone having fired a weapon and the gunshot residue being removed so it could go either way.

Q. Okay. Let's talk about what could cause gunshot residue to be removed.

What if any effect does time from the incident in question to the collection of the swabbing of the palms and the back of the hands? What effect does time have on whether or not gunshot residue is still on the hands and can be collected?

A. Gunshot residue has a consistency of baby powder so it's very easily removed. So it is optimum to collect gunshot residue as quickly as possible after an incident is suspected. The farther from the incident time and the shooting, the less chance you have of finding gunshot residue simply because if someone washes their hands it's gone. If someone were to put their hands in and out of their pockets, wipe their hands on a rag, this can all wipe gunshot residue away.

Q. Is there an optimal window of time in your expert opinion in terms of the collection, the time that you can collect and expect to find gunshot residue or does it just simply depend upon the activity of the person?

A. Well it does depend upon the activity. At our laboratory we will not analyze a gunshot residue kit that

is collected more than six hours after the shooting incident and that's because we have analyzed - our own laboratory personnel will go and shoot a gun and they will try to maintain whatever is on their hands for the longest period of time they can. And after six hours we've never found gunshot residue on the hands. Even if they didn't wash their hands they weren't sweating and they tried to do as little with their hands as possible even after six hours and ever more closely four hours we won't find gunshot residue on the hands.

Q. And that's an experiment that are done when you've known the person has discharged a firearm?

A. Yes, ma'am.

Q. Are those experiments done on various caliber of bullets and with various types of guns?

A. Yes, ma'am. We've tested over a hundred types of guns and thousands of types of ammunition.

Q. And did those results hold true across the board of all types of ammunition and all types of guns?

A. Yes, ma'am.

Q. Now, you talked - You mentioned something about sweating, so sweating alone could remove quantities of gunshot residue such that none would appear?

A. Yes, ma'am. As well as the human body absorbing things through the skin you could absorbed these metals

through your skin.

Q. In your years of experience in the trace collection department or trace evidence department at SLED, how many kits have you analyzed?

A. I've probably analyzed over fifty-thousand gunshot residue samples.

Q. And are some of those analyzes taken of kits from living persons and some of those analyzes of kits taken from persons who have passed away?

A. Yes, ma'am.

Q. Of the kits that you have examined, do you have an approximate number of that, the number of kits you've examined from people that are living at the time their hands are swabbed?

A. I don't have a definitive number in my head.

Q. Of the kits involving a living subject whose hands have been swabbed and the GSR Kit has been submitted to you for analysis, do you have an opinion to a reasonable degree of scientific certainty as to what percentage returned any residue showing the GSR from those subjects whose hands were swabbed?

MR. MUCKENFUSS: Your Honor, objection. May we approach?

(BENCH CONFERENCE OFF THE RECORD OUT OF THE HEARING OF THE JURY AT 02:20 P.M..)

SOLICITOR COLLINS: Thank you, Mr. Muckenfuss.

Q. Agent Simmons, just backing up a little bit.

You said you've analyzed during the years you've been at SLED how many GSR Kits?

A. Probably fifty-thousand samples.

Q. Okay. And can you tell us of those that you have analyzed how many have come back positive for GSR results?

MR. MUCKENFUSS: Your Honor, objection. Relevance.

THE COURT: I over rule the objection.

A. Just on the general GSR Kits without --

Q. Without distinction between live and dead person.

A. Probably about fifty percent.

Q. Okay. And how about in terms of kits that were taken from live subjects, not from deceased persons, how many of those kits have come back positive for GSR residue?

A. Maybe twenty-five to thirty percent and that's an estimation.

Q. Okay. So twenty-five to thirty percent of the kits you've analyzed that were swabbed from live subjects have come back showing some gunshot residue?

A. Yes, ma'am.

Q. Does SLED develop the kit itself and send it out to law enforcement and say here's the kit use it?

A. No. What we have done is we gotten with several companies that produce these kits and we've set up

guidelines that we would like them to have and certain types of quality assurance. In fact most of these companies send us test samples of their unused kits so that we can make sure there is no contamination or any issues that we can keep all of that on record so we definitely recommend certain kits.

Q. As far as you know is the kit that was used within those recommendations?

A. Yes, ma'am.

Q. Is part of the kit that a law enforcement officer would have a form where he files out information, he or she fills out information, as to the subjects activity or lack thereof before the kit is utilized?

A. Yes, ma'am.

Q. And do you have a copy of that form in this case that was filled out?

A. Yes, ma'am, I do.

Q. Okay. I'm sorry, I just walked right up to you and didn't even tell you what I was doing.

SOLICITOR COLLINS: Your Honor, I move State's Exhibit Eighty into evidence at this time. I believe it may already be in as a Defense Exhibit.

Do you need to see that?

THE COURT: No. But Mr. Muckenfuss does.

MR. MUCKENFUSS: I'm sorry.

SOLICITOR COLLINS: I'm sorry.

(SIDE BAR BETWEEN ATTORNEYS.)

MR. MUCKENFUSS: No objection.

SOLICITOR COLLINS: All right. Thank you.

THE COURT: In without objection.

(WHEREUPON: STATE'S EXHIBIT NUMBER EIGHTY, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

SOLICITOR COLLINS: Thank you.

Q. Now the form in this case that was utilized by law enforcement, there's questions on the form in terms of activity; is that right?

A. Yes, ma'am.

Q. And you've already testified as to some activity that can affect - I believe you testified as to whether or not a subject has washed their hands. Correct?

A. Yes, ma'am.

Q. Or simply sweat. Correct?

A. Yes, ma'am.

Q. Or put their hands in and out of their pocket?

MR. MUCKENFUSS: Objection to leading, Your Honor.

A. Yes, ma'am.

THE COURT: Just rephrase your question.

SOLICITOR COLLINS: I will.

Q. What if any impact would changing clothes of a subject have upon the potential to still have gunshot residue on

their hands after they've changed clothes?

A. If someone were to remove clothing it would be like wiping the hands. If their hands were coming in out of clothing it could remove gunshot residue.

Q. All right. How about driving a car?

A. Any type of activity where your hands are making contact with something could possibly remove gunshot residue.

Q. Packing clothes?

A. Yes, ma'am.

Q. Do you all ever test the clothing of a subject whose hands have been swabbed?

A. Yes, ma'am, we do.

Q. Is that true more so in cases with deceased persons than a live person?

A. Generally we only accept persons who are living because it is - We cannot accept clothing from people who have sustained a gunshot wound because if they are on the muzzle end of the gun they may have gotten gunshot residue on the clothing just from the shot.

Q. Okay. So following up on that testimony then, do you all test victims for their hands as to gunshot residue?

A. Yes, ma'am, we do.

Q. Victims of gunshot -

A. Yes, ma'am, we do the - we do analyze the gunshot

residue kits.

Q. But you talked about the muzzle of the gun impacting the results of the GSR Kit on a victim if they've received the shot; is that right?

A. Yes, ma'am.

Q. Do you test the victim's clothing?

A. No, ma'am. The reason we would testify we could test the kit and not the clothing is because we do two different types of testing. And on the hands it can kind of give us a general idea of how much of metals is present. And on clothing it would just be a general presence because when we analyze the swabs that are treated with a bit of dilute nitric acid that helps us determine concentration. On clothing we couldn't swab clothing because it would just absorb the nitric acid. It wouldn't be like the skin where it would pull things off. It would just absorb so we can't utilize that type of testing. We have to use a different type of testing.

Q. Okay. Let's go back to then how about the defendant's clothing? Do you test that?

A. If someone has not received the gunshot would we can test clothing yes, ma'am.

Q. Okay. The defendant or suspect?

A. Yes, ma'am. And if someone has a gunshot wound.

Q. And does that test of the veracity or validity thereof

depend upon whether or not the same clothing is being worn at the time the test is - or the clothes are submitted to you or the clothes that were worn at the time the gun went off?

A. Yes, ma'am. That is part of our protocol that they have to be - The investigators have to be able to associate the clothing with the specific incident.

Q. So you would need the clothing that the subject was wearing when the gun went off to test?

A. Yes, ma'am.

Q. And that's as to the suspect?

A. Yes, ma'am.

Q. But as to the victim you've explained in terms of not testing their clothing?

A. That's correct

Q. Does it affect the test how many times the gun went off?

A. Yes, ma'am, it can.

Q. So if the gun went off multi times, is it more or less likely that there would be gunshot residue?

A. It's more likely.

Q. And if the gun went off one time, is it more or less likely that you would recover gunshot residue?

A. Gunshot residue could still be recovered but the more times a gun is discharged the more gunshot residue is

coming out of the gun and the more that is its just going to be deposited on the hands or on any object around the gun.

Q. So would the answer be that it is less likely that its just shot off one?

A. There's gonna be a less concentration yes, ma'am.

Q. Less concentration. And that would be true whether or not you swabbed the defendant's hands or suspects hands with a one discharge scenario or if you did swab the victim; is that true?

A. Yes, ma'am. The only other thing that could come into play with someone who is received a gunshot wound is if someone is standing very close to the muzzle of the gun and they throw their hands up in a position like that.

(WITNESS DEMONSTRATED.)

A. More of the gunshot residue comes out of the muzzle and goes down range and gets back on the hands of the person shooting the gun just because ninety-eight percent goes forward and only about two percent would wrap back over the hands of the person shooting the gun so they can end up with a tremendous amount of gunshot residue on their hands from the muzzle of the gun.

Q. So if the shot is at close range, between whomever is shooting the gun and the recipient of the gun shot wound, it is more likely the gunshot residue would be recovered

from the victim or less?

A. It's more likely.

MR. MUCKENFUSS: Objection, Your Honor. Mischaracterizes the witness's testimony.

THE COURT: Rephrase the question.

SOLICITOR COLLINS: All right.

MR. MUCKENFUSS: And it's leading.

SOLICITOR COLLINS: All right.

Q. What if anything would it tell you as an expert if gunshot residue is recovered from the victim of a gunshot wound? What does that mean?

A. It can either mean that this person was in the vicinity of a weapon when it was discharged either having been fired upon. Or they could have fired the gun. It depends on the concentrations that are found.

Q. And what if anything does it tell you as an expert if there is no gunshot residue but the attempt is made but there is no gunshot residue recovered from the hands of a victim?

A. That perhaps the victim's hands were not in an area so the gunshot residue would have gotten on them or the gun was too far away and only the bullet struck the victim and not the gunshot residue because gunshot residue is only gonna travel about six feet away from a handgun where, you know, a bullet can go for an extended periods of distance.

So their hands can either be in a position where they didn't get the gunshot residue on them or they can be too far away from the gun. Or if it's there it could be removed in some way.

Q. Is it fair to say that if gunshot residue is recovered from a subjects hand, that to you as an expert witness, that would be indicative that someone had either discharged the weapon and was in the vicinity of the weapon at the time it was discharged?

A. Yes, ma'am.

MR. MUCKENFUSS: Objection to leading.

THE COURT: Rephrase the question.

BY SOLICITOR COLLINS:

Q. Do you have an opinion to a reasonable degree of medical certainty within your expert field as you've been qualified, as to whether or not if there is gunshot residue found on a subjects hand that has been in the vicinity of a gun when it is discharged, do you have an opinion as to whether that proves they discharged the gun or simply were in the vicinity?

A. I --

MR. MUCKENFUSS: Objection, Your Honor.

THE COURT: I over rule the objection.

BY SOLICITOR COLLINS:

Q. Do you have an opinion?

A. I can't say one way or the other because generally the concentration can be about the same but a gunshot residue is found on someone's hands it is consistent with them at least being in the vicinity of a weapon when it's discharged because it's specific to a weapon and not to other things.

SOLICITOR COLLINS: Ms. Simmons, thank you for coming today. Please answer any questions the defense has.

CROSS EXAMINATION

ILA SIMMONS BY MR. MUCKENFUSS:

Q. Good afternoon, ---

A. Good afternoon.

Q. --- Agent Simmons. Now to be clear you testified I think about multiple hypothetical questions. Correct?

A. Yes, sir

Q. You don't know what actually happened in this case.

A. No, sir, I do not.

Q. And you testified I think the question and you responded that of the - I think approximation - but of the GSR Kits you received from live people, twenty-five to thirty percent come back positive.

A. Yes, sir, from people who have not sustained a gunshot wound yes.

Q. Okay. For the sixty-five to seventy percent that are not positive, you don't know why they're not positive.

Correct?

A That's correct

Q. And it could be that those people simply did not handle a gun or discharge a gun.

A. That's correct

Q. Okay. And in this case are you aware of any testing of either Mr. O'Neil's or Ms. Caldwell's clothing?

A. No, sir, I'm not.

Q. Would you have been the person to do that testing?

A. Gunshot residue analysis on the clothing?

Q. Yes.

A. Yes, sir.

Q. Isn't it true that when you interpose, or there's clothing and a gunshot in the skin, or the muzzle of a gun in the skin, that can alter the appearance of a close range gunshot wound?

A. The gun - I know that the gunshot residue and the gun powder would be on the clothing and not on the skin.

Q. Okay. And that would be a reason to test the clothing in that situation?

A. Yes, sir, it can be. It can be tested to determine how far the muzzle of the weapon was from the garment when it was discharged. But in that case the weapon and the ammunition would have to be submitted as well.

Q. Okay. Would it be important of the caliber of the gun

for that?

A. We would actually have to have the exact gun and the exact ammunition.

Q. Okay. And when you test the clothing - I know you testified that you can, it's a different kind of test. Correct?

A. Yes, sir

Q. Do you check for nitrates in the clothing?

A. Yes. And the test you just were referring to we try to determine how far the muzzle was from the gun we would test for the nitrates that is present in the gun powder.

Q. And that's because the nitrates that's an element in gun powder. Correct?

A. Yes, sir.

Q. And isn't it true that many times you can't with an naked eye you can't tell if there is gun powder on clothing?

A. That's correct

Q. You would have to analyze it through a microscope?

A. That's correct

Q. And is that something you would also do ---

A. Yes, sir

Q. --- if it was submitted to you?

A. Yes, sir.

Q. And did that happen in this case?

A. I did not receive the clothing no, sir.
Q. Now, were you aware in this case that Ms. Caldwell, the person who had - allegedly had the gunshot - were you aware that her hands were bagged for a GSR - potentially a GSR analysis?
A. I wasn't aware that her hands were bagged no, sir.
Q. Okay. And did you ever receive any GSR Kit for Ms. Caldwell's hands?
A. No, sir, I did not.
Q. Now you testified - Ms. Collins had ask you about a person shooting a gun more than once. Do you recall that?
A. Yes, sir.
Q. I think you testified someone shoots a gun once there would still be - potentially there would still be residue on that person's hands. Correct?
A. That's correct
Q. And potentially you could find - you could have a positive result from a GSR analysis?
A. Yes, sir.
Q. And in fact you've had - Strike that.
If there were a struggle and two people had contact with a gun that went off, isn't it true you can potentially have gun powder residue on both those person's hands?
A. Yes, sir.
Q. And it would be important to test the gun powder

residue on both people's hands to at least determine if they had been in contact with a gun?

A. Yes, sir. For us to determine whether or not someone was in the proximity of a gun a gunshot residue kit would have be analyzed.

Q. Now Ms. Collins had ask you about sweating could alter. What time of the year did you receive this GSR Kit?

A. I received this kit in April of last year.

Q. In April of last year. Okay. Do you know the time of the year the GSR Kit was prepared?

A. Yes, sir, I do.

Q. What time of the year was that?

A. It was in November.

Q. So it was n November of that actual swabbing or whatever is done with the hands; that's when that occurred?

A. Yes, sir.

Q. And you didn't receive the kit until April?

A. Yes, sir.

Q. Do you know why there's a delay?

A. No, sir.

Q. Do you know where the kit was between November and April?

A. No, sir. It was submitted to our laboratory on April 1st of last year.

MR. MUCKENFUSS: I beg the Court's indulgence.

(PAUSE.)

MR. MUCKENFUSS: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

ILA SIMMONS BY SOLICITOR COLLINS:

Q. In your experience what if any type of activity other than the weather, I guess it would be activity, what if any activity would affect sweating?

A. I suppose if someone were --

MR. MUCKENFUSS: Your Honor, objection.

THE COURT: I sustain the objection.

BY SOLICITOR COLLINS:

Q. You were ask on cross examination in regard to the time of year that this GR - GSR Kit was taken; is that right?

A. Yes, ma'am.

Q. And you answered in November of 2010. Correct?

A. Yes, ma'am. November yes, ma'am.

Q. But you've also answered previously that sweating could impact whether or not there's still GS gunshot residue on the skin. Right?

A. Yes, ma'am.

Q. Okay. Now you answered something I'd like to talk about that a little bit more too in terms of with Mr. Muckenfuss - something about the weapon. We would have to

have a weapon submitted in order to determine proximity?

A. Yes, ma'am.

Q. Or to test clothing for proximity?

A. Yes, ma'am.

Q. And I think you said without the weapon we cannot test for that?

A. Right. We would need to analyze the clothing if the weapon and the ammunition was not submitted.

Q. So if the weapon is not available is that true of both of the victim's clothing as well as the defense clothing?

A. No, ma'am. That would only be on a someone who has sustained a gunshot wound.

Q. Okay. And so is the potential either defense or suspect clothing is there an impact on whether or not you would test that if you're unsure of what they were wearing at the time of the shot?

A. Yes, ma'am. If the clothing cannot be associated with a specific incident the clothing cannot be analyzed.

Q. You were ask about whether or not you were aware - Oh, let me back up. You were ask would you have tested in this case the victim's clothes. You were ask that. Do you remember that?

A. Yes, ma'am.

Q. But without having the gun you would not have tested

it?

A. That's correct. The exact gun used in the incident as well as the exact ammunition would also have to be submitted with the clothing.

Q. And you were ask would you have tested the defendant's clothes; is that right?

A. Yes, ma'am.

Q. Clothes know to have been worn by the defendant at the time the gun was discharged; is that right?

A. Yes, ma'am. If it was associated with that incident we could analyze the clothing.

Q. If it was associated?

A. Yes, ma'am.

Q. And finally you were ask about the victim's hands being bagged. Do you remember that question?

A. Yes, ma'am.

Q. Being bagged at the hospital. Do you remember that question?

A. Yes, ma'am.

Q. And that you did not receive a kit of the victim in this case?

A. That's correct

Q. Are you aware that the victim went to two separate hospitals?

A. No, ma'am, I did not know that.

Q. And if the victim's hands were not bagged at the first hospital but were bagged at the second would that have affected whether or not you would anticipate gunshot residue to be recovered?

A. Yes, ma'am. The bags are put on the hands to try and prevent any outside source from removing the gunshot residue. However the person's hands are still maybe sweating inside of the bags or absorbing things through the skin, so either way the time, the amount of time that passed from the incident when the person sustained the gunshot wound and the time the GSR Kit can be collected would still be very much in play there.

Q. Positively?

A. Yes.

Q. Is that right?

A. Yes, ma'am.

SOLICITOR COLLINS: Thank you. No further questions.

THE COURT: Any recross?

RECROSS EXAMINATION

ILA SIMMONS BY MR. MUCKENFUSS:

Q. Ms. Simmons, just so I'm clear, excuse me, you can perform a test on the clothing simply to find out if there are nitrates on the clothing. Correct?

A. Yes on a victim's clothing that's how we analyze it.

Q. Now I understand you said you would need the gun, I

think, to find out the exact range perhaps.

A. Yes. That is our protocol. If we don't have the gun and we don't have the ammunition we wouldn't perform the nitrate test.

Q. Right. But you could perform - without the gun you could preform a nitrate test to find out if there are nitrates in the clothing. Correct?

A. We would not be able to determine the distance so we do not analyze it no, sir.

Q. No, I understand you can't determine the distance but you can determine if there are nitrates on the clothing. Correct?

A. We could do a chemical test but we do not.

Q. Okay. Now are you aware that case officers were with Ms. Caldwell as soon as she - well shortly after she arrived at the - at Piedmont Medical Center?

A. No, sir.

Q. And - I'm sorry?

A. No, sir.

Q. Okay.

A. I didn't know that.

Q. And I think you testified you - if you were going to test her hands you would want her hands to be - that text to happen to at least - I think you testified within a couple of hours. Correct?

A. Within six hours yes.

Q. I'm sorry, within six hours.

MR. MUCKENFUSS: No further questions, Your Honor.

THE COURT: You can step down and be excused.

MS. SIMMONS: Thank you.

THE COURT: We appreciate your time. Thank you.

MS. SIMMONS: Thank you, sir.

THE COURT: Call your next witness.

SOLICITOR COLLINS: Your Honor, at this time the State rest it's case.

THE COURT: All right. Members of the jury panel, the State is resting, that is, the State is telling us it's presented it's case. Under certain circumstances the State perhaps can present other testimony but we've reached the point in the trial where I have to take up some matters outside your presence. We are not at that stage yet where you can discuss the case, or make up your own mind, but we do have some matters to take up outside your presence, so I'll let you go to the jury room.

(JURY EXITS COURTROOM AT 02:46 P.M..)

THE COURT: Anything from the State at this point?

SOLICITOR COLLINS: Not at this time.

THE COURT: Mr. Muckenfuss.

MR. MUCKENFUSS: Your Honor, we would move for a directed verdict at this time.

If I may be heard?

Your Honor, I think that there is simply zero physical evidence in this case for the attempted murder charge or for the possession of a firearm charge. And what we're left with is Ms. Caldwell's statement. And I understand the jury took the pleading to determine credibility with those issues but I would submit, Your Honor, that there has not - In cross examination I think it has not been established based on the statement that she gave to the police and her inconsistent statement to the hospital staff that Mr. O'Neil actually pulled the gun and shot her. I think the wounds are inconsistent with her statement. The wounds that she testified would not - I think would not support the argument, would not support the theory, that Mr. O'Neil stood at the door and shot her. So we would contend, Your Honor, with that being the only evidence I would submit in this case, and without any other physical evidence that's insufficient on the charges against Mr. O'Neil.

THE COURT: I deny the motion. I believe there is - Of course credibility as you observed is for the jury and not for the court at this stage of the trial. I believe there is sufficient direct evidence, there is the testimony of the witness that this happened, was - there was evidence that she was shot, the bullet went through her hind

quarter, and that she had to seek medical attention, and I therefore find that there is substantial or sufficient direct evidence from which the jury could reach a conclusion that Mr. O'Neil did commit this offense.

MR. MUCKENFUSS: Thank you, Your Honor.

THE COURT: Mr. O'Neil, can you hear me?

MR. O'NEIL: Yes.

THE COURT: We've reached the point in the trial where you have a right to present a case if you wish. You don't have to. You might recall that I told the jury you were presumed, or are presumed innocent and continue at this moment to be presumed innocent of this charge, and I will tell them the presumption of innocence exist even as they deliberate. But you are presumed innocent you do not have to prove you're innocent but you must prove - You don't have to prove anything. The State has to prove your guilty beyond a reasonable doubt before this jury could convict you.

You have a right to call witnesses if you wish, you also have a right to testify or remain silent. If you testify the State would be able to ask you about your prior felony regarding your believability. That is if you testify and the State brings before the jury the fact that you have a felony on your record I would tell the jury that they can consider that only regarding whether to believe

you or not, not as any evidence that you committed this offense.

If you exercise your right to remain silent I will tell the jury that you have exercised your constitutional right to remain silent. And I will tell the jury that they cannot consider that in any fashion regarding their reaching a verdict in this case. That they cannot in their own mind or collectively use this against you in anyway whatsoever. When I say, it, or this, I mean your exercise of your constitutional right to remain silent.

Do you understand all of that?

MR. O'NEIL: Yes I do.

THE COURT: Do you have any questions about that?

MR. O'NEIL: No I do not.

THE COURT: All right. The decision to testify or not is yours; it's not your attorneys, it's not mine, it's not of course the State's, but it's solely your decision. Do you understand that?

MR. O'NEIL: Yes, sir.

THE COURT: All right. Do you intend to exercise your right to remain silent or testify?

MR. O'NEIL: Not to testify.

THE COURT: What did he say?

MR. MUCKENFUSS: He doesn't, Your Honor.

THE COURT: All right. And you have one witness?

MR. MUCKENFUSS: Your Honor, we will have no witnesses.

THE COURT: All right. Well you want - have any request to charge?

MR. MUCKENFUSS: Yes, Your Honor.

THE COURT: All right. You want to hand them up?

MR. MUCKENFUSS: Your Honor, may we -

THE COURT: We'll take a break. We'll take a short break and let's have a chambers conference about the charge.

MR. MUCKENFUSS: Thank you, Your Honor.

(COURT IN RECESS AT 02:50 P.M..)

(COURT BACK IN SESSION AT 03:39 P.M..)

THE COURT: Thank you, take your seats.

We'll get Mr. O'Neil in.

(DEFENDANT REENTERS COURTROOM.)

THE COURT: Both - The State has rested and the Defense has indicated that they are not going to go forward with any evidence, so we've reached the point in the trial where we will now go into arguments and charge.

If you would like, Mr. Muckenfuss, to rest in front of the jury when they come in and then we'll go to arguments and charge. The State has waived opening and will make closing remarks last - have the last argument since the Defense has presented no evidence. Anything we need to

discuss we've discussed in chambers the charge. I've got the inference language. As soon as my clerk gets in I'll read it out loud for you. It just says it's an inference that it's an evidentiary fact that they can take into consideration along with the other facts in the case. But I'll read it as soon as he gets in with it.

We determined that the possession of a firearm during the commission of a violent crime only applied to the attempted murder charge based on the allegations of the indictment, even though assault and battery of a high and aggravated nature qualifies as a violent crime. That's not encompassed in the indictment giving him the benefit of the doubt. When I charge the lesser included's I will - I will make it plain to the jury that if they find him not guilty of attempted murder they cannot find him guilty of count two.

Anything else that needs to go on the record before we get the jury back in?

SOLICITOR COLLINS: Not from the State.

THE COURT: Mr. Muckenfuss:

MR. MUCKENFUSS: Not from the Defense, Your Honor.

THE COURT: Let's think just a minute.

(PAUSE.)

MR. MUCKENFUSS: Your Honor, I don't know if this would be the time, may we - We would ask for the record a

charge of accident. I know we talked about it in chambers.

THE COURT: I'm not inclined to charge accident. I don't know, what would be accidental in this? There is no evidence other than - The only evidence - and it's a question of credibility - is that the defendant armed with a pistol shot the victim from a distance. So I don't see anything. If there was evidence - Well I can think of a lot of examples that it could be an accident but I don't see anything in the facts of the case as they exist in the record that would warrant an accident charge.

MR. MUCKENFUSS: Thank you, Your Honor.

THE COURT: "If the defendant was acting lawfully and that reasonable care was used in handling of a weapon"...

I don't see that in here. To begin with, I'm not sure he was acting lawfully in possessing a gun when he wasn't supposed to because of his past record. That's not in this record but it is a fact. Anyway, I'm not going to charge that.

MR. MUCKENFUSS: Thank you, Your Honor.

THE COURT: Bring in the jury.

(JURY REENTERS COURTROOM AT 03:44 P.M..)

THE COURT: Mr. Muckenfuss.

MR. MUCKENFUSS: Your Honor.

May it please the Court.

THE COURT: Does - The State - Do you -

MR. MUCKENFUSS: I'm sorry, Your Honor, the Defense rest.

THE COURT: All right. When you went out the State had rested. The Defense has indicated that they are not going to present any evidence so they have also rested so you will now hear the arguments of the attorneys, then my charge, and then we will have the case placed in your hands for your consideration.

All right. Now.

MR. MUCKENFUSS: May it please the Court.

THE COURT: Yes, sir.

MR. MUCKENFUSS: Solicitor.

Good afternoon. What happened on the night or the early morning of November 12th? As I stated in my opening the State of South Carolina in this case had the sole burden of proving beyond a reasonable doubt every element of the crime charged in this case.

Let's start with the physical evidence. Let's start with the evidence that the police collected; let's start with the testimony of the police officers, and the things that were observed when they arrived at Ms. Caldwell's apartment on November 12th.

Now the first thing that happened is the police officers, who you heard the testimony of Detective Strait, they arrived at Piedmont Medical Center on November 12th,

in the early morning hours. They spoke with Ms. Caldwell. What did she tell them? She told them that she was walking out of the house, the front door, and she heard a noise and she felt something. What did she tell the doctor's at Piedmont Medical Center? She told them something different. She said she had been out jogging, walking, and heard a noise and felt something.

What did the police do with that? And that's all the police knew. They heard that statement, Detective Strait - Then they had Ms. Caldwell call Mr. O'Neil. And I will get into Ms. Caldwell's statements later, but Mr. O'Neil who had driven Ms. Caldwell to the hospital came back to the hospital and they placed him under arrest. There is no other evidence at that point. They had Ms. Caldwell's statement that she had walked out of the front door, she heard a shot. She said she didn't know who shot her, she didn't see who shot her. But the police had just made up their mind, the police weren't concerned about the physical evidence in this case. They just decided that Hashin O'Neil had done it. They put him under arrest. It was after he was under arrest that only then they sent two detectives, investigators, to Ms. Caldwell's apartment to actually look at her apartment, the place where this incident occurred.

And you heard from Investigator George and

Investigator Eddie about what they did at Ms. Caldwell's apartment. When they got there what did they do? And these were forensic investigators, this was their job. They collect forensic evidence and they make decisions about whether to send it to SLED or somewhere else to have it tested. Now at this point Investigator Eddie and Investigator George, and Detective Strait, who later went to the apartment, what do they know when they're going through the apartment?

Well they know - the only thing they know is that Ms. Caldwell had walked out the front door, or was on her way outside, and heard a noise, heard a shot. That's what they know. So they arrive at the apartment and Investigator Eddie and George testified that Investigator Eddie went into the apartment first to take pictures. And she was on the first floor and she went upstairs. And you've seen some of the pictures of the apartment of that early morning hours. And then Detective - Investigator George went into the apartment after that. And they testified they searched the apartment. Now they testified, they said they saw blood, they saw blood on the wall. They saw blood on a comforter, they saw blood on different parts of the apartment.

Now, again, they - the only information they have is something happened in the front part of the front door of

the apartment. They claim they see blood on the wall going up the stairs. They said they saw blood in the bedroom. And what do they do? They don't collect any blood samples, they don't swab for the blood, and they're the forensic officers. That's what they're there to do, to take samples and have it tested. And you heard Investigator George, he didn't take any samples. They don't know if the blood was there for weeks, for days, for hours. They had no idea. They don't know whose blood it is. They didn't find a weapon on November 12th. They tested for fingerprints on the front door and that's what they - that's the only information they knew. They tested for footprints on the front door. They didn't find anything. No fingerprints. No fingerprints of Mr. O'Neil on the front door. No fingerprints upstairs, no fingerprints anywhere - nothing.

And so they have a crime scene and you have multiple officers at the crime scene. And you heard testimony from other officers who went to Ms. Caldwell's apartment to secure the apartment. You heard about the entry logs security sheet where the officers log in when they show up. Investigator Eddie and George were there for forty-one minutes from 6:10 to 6:51. And they testified that when they left the closed the door. They didn't log it. This was a crime scene. I mean this isn't, you know, at this point from the police perspective this is an attempted

murder crime scene. And this is not a petty crime. They shut the door and they leave.

Ms. Martin testified who is the apartment manager. If you recall she showed up. And she testified she got there around 9:00 am., and she saw some police cars, she went by, yeah she's the apartment manager, she's doing the right thing she's checking it out, she doesn't know what's going on. And she testified that roughly for a five or six hour period from late morning until she went to actually go into the apartment with Ms. Caldwell and her family, that nobody was there. At least she didn't see anybody there in the apartment. And we know from the police testimony they had already left. So five or six hours this apartment is unlocked. This crime scene is not secured. You can walk into the front door, walk out. There is a back patio with a sliding door, could come in and out of that back patio. The police never testified that they secured the back patio sliding door. They didn't even go back there, didn't even look there.

So Ms. Caldwell came back with her family, two people, they went into the apartment on November 12th with Ms. Martin. She testified that she went upstairs to her bedroom, she got a bag, she got curlers I think is what she said. So this is a person who had been shot hours earlier had gotten out of the hospital and the first thing she did

she came back and she said she got some clothes and curlers specifically from the bedroom. And she actually testified that Ms. Martin went in with her. So again, you have a crime scene, people are running in and out after the police had left. And Ms. Martin is the one who actually repaired the bolt and locked it. Ms. Caldwell had a key. She can enter the apartment and the apartment was left and three days go by.

Suddenly the police come back on Monday three days later. Investigator Eddie and Detective Strait go back to the apartment. And amazingly there is a bullet, a projectile, sitting on a chair in the bedroom. You know I'm blowing this up and I know you've heard references to these pictures, you haven't actually seen them close up.

(PHOTOS PUT ON OVER HEAD, PUBLISHED TO THE JURY.)

MR. MUCKENFUSS: This is one of the pictures. A close up picture of the projectile, the bullet, that on Monday, November 15th, that the police officers recovered just sitting on this chair. And I'll show you in a second a different perspective so you can see the room and where this projectile is. And actually I'll so that now so you can see.

(PHOTO PUT ON OVER HEAD, PUBLISHED TO THE JURY.)

MR. MUCKENFUSS: So you saw the close up of the projectile. This is another one that the police officers

entered into the bedroom on November 15th, three days after this incident. And to give you some perspective this is the chair, this is the blanket that hopefully everybody can see that, that this projectile was sitting on. It's sort of propped up there on the right side of the chair. And you heard police officers state that he had moved this basket from the chair. And you heard Ms. Caldwell, there is a yellow bag here on the dresser, she had taken that. And the comforter, you heard the testimony about the comforter being pulled back.

Well, magically there's a bullet in this room that they recovered three days later with Ms. Caldwell having access to the room, it not being secure, the police left it unlocked. And the State wants to use this as evidence against Mr. O'Neil in this case. Well what did they do with the bullet? I mean this is the bullet, the State wants to say this is it, this is the bullet, we got it. What did they do with it? Nothing. Nothing. You heard the police officers. They can send it to SLED, you can test it for blood. If it passes through the human body there's blood, there's DNA on the bullet. It's not hard. They could have tested it to say this is the bullet that went through Ms. Caldwell's body. They didn't do it.

Why? They made their minds up, they arrested Mr. O'Neil after Ms. Caldwell simply told them I walked out the

front door and I heard a shot. They weren't interested in finding out what actually happened in that room.

They don't know the caliber of the bullet. You heard testimony from the police officers the caliber is the diameter of the bullet. They could have sent that to SLED, take measurements, figure out the caliber. They don't know the caliber of the gun. They don't know what kind of gun.

Now if you recall they sent a whole team of police officers to search for a gun. And I think it was the kudzu, the woods, whatever you want to call it, I call it wooded area. There were K9 Units, multiple officers scouring outside the apartment three days later. They don't even know what they're looking for. They don't know what kind of gun they're looking for. Rifle, pistol, .22. What are they looking for? They don't find anything - nothing. There is no gun, the bullet they find three days later and I believe you heard Investigator Eddie when I ask her can you even tie this bullet, this projectile, to what happened to Ms. Caldwell? And she said no. It's evidence of nothing.

What else did they do that night to try to figure out what happened? Well you heard about the GSR analysis. This is where they take swabs of the hand to determine if there is gun powder residue and you heard Agent Simmons testify about that. Well they tested Mr. O'Neil for gun

powder residue. It was negative. What's amazing is the State wants to actually take that negative test and suggest to you that actually can mean he may have shot the gun. Well there's no evidence of that. And the test they did, the only test they did, of Mr. O'Neil on his hands came back negative. And you heard Agent Simmons state she doesn't know what he did that night. She doesn't know whether he washed his hands or didn't. The State actually suggested on questioning that maybe he sweated. It was - And keep in mind the time of the year. This is early morning hours in November.

They had contact with Ms. Caldwell at the hospital. You heard about that. Detective Strait went immediately and the other detectives to talk with her. They didn't bag her hands at Piedmont Medical Center. They did that later we know at CMC. They didn't do - The officers didn't ask to do that, the medical personnel didn't do it. They weren't interested in questioning her really or figuring out of she were somehow involved in the shooting.

And you heard about the clothing. They took Ms. Caldwell's clothing at the hospital. And repeatedly the police officers in my questioning admitted they never tested the clothing for anything. They didn't test for any gun powder residue. Nitrates: You heard about that. They didn't test it for blood. But clearly Ms. Caldwell had an

injury. She had been shot and she was bleeding. We don't dispute that. But wouldn't the police be somewhat interested to figure out how did it happen? They didn't do anything with the clothing and you heard Investigator Eddie testify, and you heard the other police officers testify. They put her clothes in a bag, they sealed it, they dried it actually. They dried it because it had blood and some other fluids on it and they stuffed it away in the evidence room. And there it sat until today. But there was no other testing - nothing.

They've presented no evidence at all that Mr. O'Neil owns a gun, ever had a gun. And I'll get to Ms. Caldwell's statements in a second, but beyond that they haven't shown any other evidence, independent evidence, reliable evidence, anything to show that he ever had a gun, owned a gun, shot a gun, nothing. The GSR Kit is negative, there's nothing. There is no physical evidence in this case - nothing.

The projectory of the bullet. They weren't interested in figuring out the projectory of the bullet, or where the range of the bullet. And what was the testimony about that, about the wound? And you saw a picture of Ms. Caldwell's back that was taken recently, the scars. Ms. Caldwell testified that she received the wound on the right flank, low, and there was an exit wound slightly higher on her

left flank. Now I want you to picture this. And she testified she was standing at the foot of the bed here.

(MR. MUCKENFUSS INDICATED ON EXHIBIT.)

MR. MUCKENFUSS: So if you can imagine this is the bed, she's here. She testified that she was bending down like this ---

(MR. MUCKENFUSS INDICATED.)

MR. MUCKENFUSS: --- to get jeans. So imagine she's bending down to get jeans. She testified that Mr. O'Neil was standing at the door which is where this picture is taken from. I apologize if I'm blocking.

She testified that Mr. O'Neil was standing at that door. So he's standing away from her, she's at the foot of the bed and she made - If you remember she made a gesture that she was shot like this. Well how is it that Mr. O'Neil is standing up here pointing a gun, shoots her on the right side and the bullet goes in at a lower angle and comes out at a higher angle in her back? How does that happen? Does the bullet go down and then go up? It's impossible. The police didn't test that. They didn't try to figure that out. And you heard the doctors. Doctor Sudararaman. He testified, he was at PMC, he thought the entry wound was on the left side. He testified when you look at the wounds that the entry wound was actually the one on the left flank, the slightly smaller wound. And the

exit wound was on the right which makes sense sometimes. And I think he testified that exit wounds are slightly larger. And I believe there is a fragment on the right side which would be further potential evidence that it was a left to right angle. Well how does that make sense?

She testified she's standing at the bed bending down, Mr. O'Neil is here, if it's a left to right shot the bullet would have to go around her and come back and go from left to right. It's impossible. What happened?

Let's talk about Ms. Caldwell's testimony. Now she testified that the night this happened into the early morning hours. She was at work, she came home around 5:00, 6:00 p.m.., briefly. She had a hair dresser appointment and she was at home briefly and then went to the hair dresser appointment, if you recall. And everything was fine. Mr. O'Neil she testified was a little loud. Now, she stated that when she came home though at some point Mr. O'Neil was sitting on the steps and he had a gun. And if you recall when I cross-examined her, if you recall this, she had given a statement to the police four days after the incident, okay. And I'll get to - get to that - but four days after this happened she gave a statement to the police different than the statement, the two statements she had given doctors and the police previously. And for the first time she told the police that Mr. O'Neil shot her. But she

never tells the police that he had a gun earlier that night and was sitting on the steps and that's why she was afraid of him. She never told that. That's a big fact to leave out. The first time we hear that is in this courtroom in this trial.

And what did she do? There is a man in her house she's engaged to, she claims has a gun sitting on her steps. She left and went to the KMart, she testified she was scared, she was scared. She had called her friend, she called her mother, she met with her friend. She didn't go to her mother's house, she didn't go back home with her friend, she didn't go to her friend's house. And she testified that when she left Mr. O'Neil was still in her apartment with his son and his son's girlfriend. And what does she do? She went back to the house. So there is a man she claims with a gun in her house and she went back alone to the house. Now she testified that the reason she went back is she was afraid for her stuff. She's worried about the stuff in her apartment. I would submit if there is man in your apartment with a gun you don't go back. But she did not knowing if Mr. O'Neil was there or not. And what happened? In the statement she gave the police she stated that when she got - she went straight home. And when she got straight home she had a conversation with Hashin's son.

Now in her statement she said she went straight home and had the conversation. She testified at trial she had this conversation on the phone while she was in the car. Either way she admitted that Hashin's son told her "Ha, give me the diamond ring, I'll take it to my dad." What does she do? She told him "No, I'm not going to give you the diamond ring, I'll give it to your dad myself." So here's a man she claims has a gun, is loud, is a problem, throwing things, she claimed he choked her. She's gonna give the diamond ring back to him herself. She's not afraid of Mr. O'Neil, that's not what's going on. Obviously their fighting. They were engaged, they were having a fight.

This is not a situation where Mr. O'Neil is threatening her with a gun, choking her. She's upset, she's mad. She's gonna confront Mr. O'Neil about this engagement ring. She doesn't want to give it back. She could have given it back, she could have given it back when she was at the house at the apartment with him. She didn't. If all she wanted to do was give it back and be done with it she had plenty of opportunity to do that. She wanted to confront him.

Now she also testified that she kept telling everybody the ring was in the console of my car. The rings in the console of my car. She was in her car most of the night

and into the early morning. She testified as you recall that she was driving, strolling KMart, she drove to see her friend. She drove back to her apartment and was still in her car. After she had the conversation with Mr. O'Neil's son, she drove around the block some more. And she kept telling Hashin's son, everybody, just come get it out of the console of my car. Well if you're afraid of Mr. O'Neil who has a gun, why do you have to tell them to come get the ring out of your car? You're in your car, you're driving around in your car. Why don't you leave it in your apartment, let him get it, leave, everybody go your separate ways? She didn't want to give it back to him, she wanted to confront him.

Now just briefly she testified that Mr. O'Neil choked her. As you recall in the medical records that you will have in front of you when you go back to deliberate about this case, the doctor's noted, the nurses, the note the staff noted, that she had no injuries to her neck. In fact they noted no other injuries and she complained of no other injuries other than the gunshot wound. She was calm and sedate at the hospital.

So Ms. Caldwell testified that she went back to the apartment again, not knowing if Mr. O'Neil was there. And this time he was there. She claims that they continued to argue and at that point he pulled a gun, held it to his

head, and put it in his mouth. Well in the statement that she gave the police she stated that after he did that - now she put on her night clothes I think she testified and then he did that. In her statement to the police she stated that she went to sleep after that. And then he woke her up. That doesn't make sense. Somebody just held a gun to their head and in their mouth, they're threatening you, and you go to sleep. That's what she told the police.

Then later he wakes her up. And it was at that point apparently that she walks to the foot of her bed, stands in front of her bed, bends down to put on jeans, and that's when she got shot in the right side. And a bullet that magically goes from here, down, and then up. And then magically appears on the chair three days later. That's not what happened.

What about the jeans? I mean this is chaotic you would expect. Right? I mean a man is threatening her with a gun and shoots her as she's trying to put on the jeans. Where are the jeans? There are a pair of jeans folded neatly under the bed like they'd been placed there. If somebody - if you - if somebody was just shot trying to put on jeans you would expect the jeans to just be laying there. That's a chaotic situation. The jeans are folded neatly under the bed. That's awkward. If they were there when she was reaching for them how did that happen? That's

not what happened.

What do we do know? Mr. O'Neil drove Ms. Caldwell to the hospital. He didn't run out of the apartment after this happened. He didn't leave. He drove her to the hospital. And Ms. Caldwell testified that he left after that. She testified that he drove her in her car. He had a key to her car. She testified she had given him a key to the car. And he had a key to the house. And in fact had the keys to her car at the time that he drove her to the hospital. He left to switch cars and he came back. Ms. Caldwell called him and said "I"m being transferred to Charlotte, I want you to come back." And he came back. He answered the phone and he came back. And it was at that point he was arrested. He was arrested after Ms. Caldwell told the police that she didn't know who shot her. "I was walking out the front of my apartment and I heard a noise and got shot." That's when Mr. O'Neil got arrested.

The State of South Carolina has the burden of proof beyond a reasonable doubt every element of the crimes in this case. The judge will instruct you on those elements at the conclusion of this case. This is a case with not a single shred of physical evidence connecting Mr. O'Neil to this crime -nothing. The forensic officers who collected evidence they did nothing with it. They could have but they didn't. You the jury have - are in the unique role

and the only role to test the credibility of the witnesses in this case. No one else in this case can do that, only you. You have the ability to test the credibility, the believability of Ms. Caldwell's statement. Could she have been shot by Mr. O'Neil standing at the door, bending over at the foot of her bed, a shot that enters the right and leaves her body higher on her left at an angle like that and then the bullet ends up on the chair resting neatly on the chair? A bullet they found three days later in an apartment that Ms. Caldwell had access to through the whole weekend, she and her family.

They were fighting that night, there's no question about that. But there is simply no evidence, there is no proof at all that Mr. O'Neil committed the crime of attempted murder. And what does attempted murder require? The State must prove that Mr. O'Neil acted with malice aforethought. Now that's a legal term and the judge will instruct you on that.

Mr. O'Neil - There has been no evidence in this case, no believable evidence that Mr. O'Neil intended to shoot and kill Ms. Caldwell, nothing. The only thing they have is the testimony of Ms. Caldwell. Everything else, there is no physical evidence, there is nothing. There is just Ms. Caldwell's statement which we have - I have gone through and it's not believable, it doesn't make sense.

She couldn't have been shot from the left side. And I would submit to you the doctor who testified who has no reason in this case to lie obviously, he said in his professional opinion the entry wound is on the left side. If its on the left side, there is no way a person is standing at the doorway with her facing away from the bed and shooting her. That cannot happen.

The State of South Carolina has not proven remotely close any of the elements of these crimes. Not even remotely close. I would ask that you find Mr. O'Neil not guilty of these crimes. Thank you.

THE COURT: All right.

SOLICITOR COLLINS: May it please the Court.

Sometimes trials have been called a war of words. And I submit to you that all the words that have been used in this courtroom in the course of this trial, there is one word that applies to this case more than any other. And that word is not given. That's the word courage. Sometimes courage takes the form of a young soldier stepping off of a field of battle knowing that he might not step back on that day. Sometimes courage takes the form of a patient that has a terminal illness such as cancer - what a cruel disease that is - who has to face everyday and fight for the quality of life and quantity of life. And sometimes, sometimes, courage takes the form of a young

woman that walks into a courtroom and has to testify. Has to testify before strangers, has to testify before a judge, has to testify before a man who has shot her, who has attempted to kill her and who has said now I'll have to kill you and sit here and listen to every word.

I submit to you that some other words that are interesting in this case are four words. The four words that the defendant ended his interview with, with Detective Strait, "Whatever she said happened." "Whatever she said happened." Ask yourself how smart was that? I submit to you that was brilliant because at that point the defendant did not know what she had said happened.

Detective Strait testified at that time he had not told the victim - I'm sorry, the defendant what she said had happened. He knew he'd be placed under arrest for attempted murder. He waived his right to remain silent. Agreed to talk and agreed to tell Detective Strait what happened and he walked him up to the crucial point, admits they had an argument, and then concludes his statement with "Whatever she said happened" because he didn't know what she said. Because he didn't know if his threat to kill her if she didn't stick to the story was still working. He didn't know. He didn't know, and so what did he do? He stopped with "Whatever she said happened".

Detective Strait testified - I lost my glasses - "the

defendant waived his rights and agreed to speak with him."

Signed the waiver of rights, that he said "that he and Crystal began to argue when she came home from getting her hair done." Said that "He was watching a movie and talking loudly with his son." And this was around 6:00 p.m.. Said, "she ask him to be quite and went upstairs for a while. She came back down and left the residence."

The defendant told Detective Strait, he stated, "He did not know where she went or what time this was." He did state "they talked on the phone a few times while she was gone." He told Detective Strait "when Crystal came back home they began to argue about the ring he had given her." Hashin states, "He had decided the relationship was off and ask for the ring back and was going to leave the residence." That Hashin then packed his belongings per his statement to Detective Strait in his car and was preparing to leave when he got the ring back. She told him it was in the console of her car and this is where he found it. He stated, "He then left in his car and drove around a while and then came back to the residence."

Now what do we know as Mr. Muckenfuss said? We sure know who was on the receiving end of this gun. We sure know who got shot and we sure know who went to the hospital, and we sure know who was not shot. We know that. We also know who took Ms. Caldwell to the hospital. She

has testified that he had took her there and he then left. So we've talked about these four words "Whatever she said happened". Talked about the argument, talked about the ring, talked about right up to the point of packing.

Where is that sheet?

Another four words I ask you to consider is "Why did he leave"? Why did he leave? This is a man that uprooted his life for a woman. Had a job working at Skeetchers at the Tanger Outlet in Myrtle Beach or Horry County - the Horry County area, met this young lady. The testimony is they fell in love and he moved up here and gave her a ring, what appears to have been a very lovely, very special ring.

So this woman that you've moved up here for, that you've uprooted your life for, that you've given a ring that symbolizes eternity to is shot and she's bleeding and she's hurt and you take her to the hospital, and then you leave. Why did he leave? Now granted he came back. He came back sometime later. Another four words. What did he do between - I don't think that's four words. What did he do between? Five words. What did he do in the interim? But at the police request she calls him and says "I'm being transferred to CMC, I'm scared, will you come back?" And he did. He did. Well why did he leave? Why did he leave?

When he came back the police officer comes up and he's

placed under arrest, and the gunshot residue kit is utilized. Now you've heard about the strengths of that kit and the right thereof and we'll talk about that. So since Mr. O'Neil told Detective Strait "Whatever she said happened" I would like for us to visit that. Let's visit what she said happened.

If only the incident itself would play out as slowly as some of these questions and answers do, as slowly and hopefully do provide a sum of the statements made by the attorneys. But I submit to you this was not a slow evolution of events. I submit to you this was a chaotic spiral that culminated in what era is the ring as he's holding the gun and the victim is shot and that this had been building through their argument. She's there, she leaves, he says he's there and he leaves, comes back for the ring and how does it end? Doctor Swanson testified that this case could have had a very different ending. That very likely she could have died from this incident, from this wound. But luckily we're not here with that as she was able to testify.

Now the power of juries in America is that you are selected and His Honor will instruct you that while he is the judge of the law and he will instruct you as to the law to be considered that you apply the law as he instructs it to the facts as you find them. That you are also wearing a

robe today. You are the judges of the facts. You determine from the evidence before you what you think happened.

And I submit to you that the evidence you heard - and this is all evidence too - this is forensic evidence - the physical evidence - the projectile - but evidence from the witness stand taken under oath is direct evidence of what happened. And we've got Ms. Caldwell put her hand on the Bible and having the courage - remember that word - to take this stand and tell you about it. And again being the judges of the fact come from all walks of life. His Honor will instruct that you determine the credibility of the witness.

Now, ladies and gentlemen, I know that each of you are considering very carefully Ms. Caldwell as she testified. You saw her demeanor. You saw her relive that night before your eyes. Was it a calm night where - You remember her testimony on direct. She was telling you what happened. The defendant didn't, you know if so, Brad Pitt and Angelina Jolie better watch out because we got a new actress in town. I submit to you that she lived that, she survived that, and she told you about that. And now we come in and we want to pick it apart and parch the words how are you bending? How did you reach? And I submit she did not testify she had reached the point where she was

actually putting on the jeans. And the jeans at the foot of the bed consistent with what she said and we want to say that this physical evidence doesn't fit what you're saying. Is it right, is it left, left right? Doctor Swanson said he couldn't even say. He said "I don't go there." He said "We don't determine that." He did say "yeah there's a fragment on the right flank." Of course the other doctor, Doctor Sundararaman, and that's hard to say, from Piedmont Medical Center, the first one you say, said that the left side has two injuries. The bottom one appeared to be from a fragment. Okay. So if the bullet enters from the left, to the right, which the statement was - and you'll have the picture. Her right hip has the bigger scar.

Let's talk about the scar tissue first. You remember I ask the doctor "Do some scars heal?" And you'll have all these pictures back in the jury room. "Do some scars heal bigger such that there are keloid scars where the tissue continues that you can't tell how large the wound itself was?" And he testified to that, that that was the case. So this one itself will show you what you do have there is no question "two over here on the left and one on the right." So if the entrance is from the left she's either shot twice which clearly there is no testimony of that. Or did the fragment get off a bullet before it entered the soft tissue of this woman's body? How could there be a

fragment scar on the left if it enters the soft tissue first from the left and goes out the right?

Now Doctor Swanson testified you do expect the exit wound to be larger than the entrance wound. And I believe testimony was elicited - And you will also have all the medical records to go through - but testimony I believe was elicited from Doctor Swanson that measuring the wounds themselves before we get the scars and all that the right hip, the right side, was larger than the left. But remember how also Doctor Swanson said the radiology film showed that on the right side was a fragment. Got a projectory on the right side fragment, so if the bullet entered the right side and you've got a fragment on the right side it would be immediately separated. It's not the course of where you then have this one coming out. Doctor Swanson said we don't even go there. We don't even go there.

But there's no question she got shot. There's no question the defendant was not shot. The bottom line is whether its right to left or left to right. Both doctors agree on one thing. A bullet in the torso is a bad bad thing. And they said - and I don't use such eloquent terms during this, I think I just reduced to some stuff today I said - but they said what's torso mean? And it includes the pelvic area. So while we might talk about hips and the

buttocks and the flanks and this and that, they said this bullet is within what we consider the torso area, and any injury to the head, the neck or the torso area, which they said this wound is, falls within - remember that magic language we ask about, to a reasonable degree of medical certainty? Their testimony was - And you'll have that back if you want to read that too - whether or not - I'm looking at the language again - and His Honor will instruct you to the law to be considered - whether or not there is a substantial risk of death. A substantial risk of death. It doesn't say actually died. Again that would be - thank God we're not there - a murder case - a substantial risk of death or which causes serious disfigurement and he'll talk to you about those terms.

And then also they testified in terms that yes to a reasonable degree of medical certainty the act is accomplished by means likely to produce death or great bodily injury. So I submit to you, what do we know? We know the victim was shot. We know the defendant was not shot. We know that that injury certainly could result in the victim's death.

You know it's interesting is not just what the defendant knew or didn't know at the time he was talking to Detective Strait and giving his statement. What's interesting is what Ms. Caldwell knew or didn't know at the

time she's talking to Detective Strait at Piedmont Medical Center, to medical personnel at Piedmont Medical Center, and the medical personnel at Carolinas Medical Center. What does she know? She doesn't know that at that point has the defendant been arrested. She doesn't know at that point is the defendant in custody. She doesn't know at that point is she safe. Oh they make a big deal about Oh, he wasn't in there. That's right, he wasn't in there. And she was there, she was safe and she was worked on, and then, again, if only things were as calm and progresses as we then parse them out today as we've dissected them here in this operating room and we apologize too.

She didn't know. She knew the police officer had ask her what happened. She knew if she told Detective Strait at that time "I was walking out to take exercise, we were the only two people there, I didn't see who shot me, he was the only other person there." And she knew the Detective ask her "Get him on your phone and ask him if he'll come on back to the hospital." And she does that. And then the detective says he goes downstairs and he's dealing with the defendant outside. She in the meantime is getting worked on and getting transported to CMC for them to access what level of care she needs at this Level One trauma center that we have fortunately up in Charlotte. She didn't know.

So all these questions about well she didn't tell the

nurse, at that point she didn't know where the defendant was. She saw him throw the gun she said in the bushes. She didn't know if he hadn't gone back and gotten the gun. She's didn't know when he was coming back, she didn't know if he had been apprehended, she didn't know if he had been charged. Same thing at CMC. Same thing at Carolinas Medical Center. She didn't know because she had her own battle going on at that time. She had her own battle going on at that time. And at that point I submit to you she was battling for her life.

But then the defense makes this issue of well it's not until she's released from the hospital that she calls Detective Strait back and says "He did shoot me, it didn't happen outside, it happened in the upstairs bedroom." Describe the bedroom, they go back and look for the projectile. And Mr. Muckenfuss has argued that low and behold the projectile magically appears on Monday. Well you heard the testimony of the forensic services. They weren't even looking for a projectile up at that point. At that point the information law enforcement had as testified to by Detective Strait was that the victim was going outside at 3:00 a.m., to take exercise, to take a walk, and that she had been shot.

I submit you that it came as no surprise to Detective Strait when she called him on Monday. And her testimony

was she - Why did she say that because at that point she knew. Her testimony was "I knew then he was in jail, I knew that he was continuing to be in jail and so I told you what really happened, where to look for the gun and they go back and look for the gun. Is the defense really suggesting that the victim after going through this on Friday, November 13th, 2010, that had gotten with her family, got a gun, got a bullet, put the bullet in the gun, shot it, got the projectile took it back to the apartment, stood there - Where are - Okay - and put it there on the basket. Is that what the defense is suggesting to you? And if so, I've got four words to that. Do you but it? Do you buy it?

So the victim calls Detective Strait back from her testimony and says "this is what happened." And I submit to you again you have all these photographs but if you look at them there are two bedrooms at the top of the stairs.

Now look at this bedroom that's green, the green bedspread. Forensics testified that in this room there are male items in the closet and male clothing on the bed. And you can see what I submit the jumbled clothing there is in front. You will have all of these back to look at closely and carefully as long as you want to. And then you got that where the blood was found and you will have that too. And then you got pictures of the stairs where shoes are

dropped and strewn all over the stairs. And the defense wants to say the prosecution suggested that he might be sweating in November in the early morning hours. Oh yes, I ask that question. Because I submit to you a man that has shot someone first of all, threaten to kill them, now gonna have to kill yah, puts her in the car and goes down with her to the car, drives to the hospital, yells for help after saying "where is that ring, put it in my hand?" "Put it in my hand." And then calls for help, leaves her there and he goes and drives off. I submit to go back in and change clothing and get additional property, if he even had packed before, and these clothes are just falling down, is there any wonder that one bullet from the gun as the agent testified from SLED, one bullet much less likely to leave any residue, isn't wiped off and is there any thought that his man who would be doing this would not be sweating? How cold could that be?

I submit to you, you can look in that apartment and you can see the chaos that culminated in this moment and it's not this measuredly order thing that we end up asking about and talking about in these courts of law, in this court of law.

So why did he leave the hospital? Why did he leave? What did he do in the interim? How did that impact the effort to take the gunshot residue kit? And again how

brilliant because at that at that point just don't know. At that point he told the detective "Whatever she said happened". Maybe she - maybe she hadn't said it. Maybe she said a little bit but not everything. But I am sitting here wrestling. Maybe she said it all. Look at the detective, "Whatever she said happened". And I submit to you at that point a three word phrase is rolling around in his mind, "Play it safe." "Play it safe."

The defense said she wanted to confront him about the ring. Well Ms. Caldwell's testimony was "He indicated he didn't trust his son, I want to make sure he got the ring back." She didn't say I want to confront him about the ring. The defendant said - The defense attorney says the victim was calm and sedated at the hospital. And there's some language of that in the medical records by Brent Boheler the RN who saw her.

But remember Doctor Sundararaman who said she was hyperventilating and upset when he saw her. She wasn't calm and sedated. I submit anyone that's had the shock, the trauma of being shot, the shock and trauma of being shot at the hands of someone that you planned to live your life with; the shock and trauma of having your life almost taken away by that very person. I bet there were moments when she was sitting there stunned. Calm? I think not. Shocked, silent, but not calm. And as the doctor said

she's hyperventilating, when I'm talking to her she's very upset. So the only evidence you have, the direct evidence from this witness chair under oath is what she said happened. That chair. And all this is submitted in terms of well, what do we have in terms of that to corroborate or not. She testified that this clothing that's in property at the detention center, that he was arrested in and then changed out for prison garb, was not the clothing he had on when he shot her; that he was dressed very nicely to go out to dinner with her and his son, and that the jeans were remarkably different, that he had on some kind of - I think she said a brown or khaki or tan polo. This isn't them. So again what did he do in the interim?

I submit he changed clothes. What did he do in the interim? There's the hands as he's taking off the stuff getting wiped. And they question well why weren't the clothes tested? You heard the testimony from the witness's lips, those weren't the clothes he had on. And you heard Agent Simmons say "we only test the clothing, we know they can be linked to him at the time the gun was discharged. We don't even test the victim's clothing at all unless we have the weapon, unless we have the weapon to compare it to."

You will see the pajama pants the victim had on. You've got a copy of the picture of the underwear, you can

look at it. You heard testimony that there was bodily fluid on it and it had to be dried out in the drying chamber before placing it into evidence. And you've got photographs of that for you to consider. But for the camisole you've actually got the camisole. And that's in evidence and she testified that that's what she had on and that it was cut off of her at the hospital. And Audra Eddie said she took it into custody as she did the other items that we got pictures of. Now you will have this and we'll make gloves available if you want to take it out and look at it.

The ladies may be familiar with what some in the swimsuit industry call kind of a shelf bra, kind of a inner lining of fabric with the elastic under it to give some support to the ladies breast. And you will see it from the front and you see in the back and you've got where the label is, so that helps a little bit in terms of trying to figure out which is the front and which is the back and what's inside out and what is not so. And you saw when it was held up by one of the witnesses, and you can see blood, so you can utilize those gloves, where it appeared to be two holes, and that was shown earlier, and you will have this back there.

Two holes on the left side. Two holes on the same side. Now what would that mean? And I submit to you

respectfully - I'm not going to lay this out on the carpet - but if I were to lay it on the carpet flat and describe something going through something, and if the item is still as they talk about this sterile atmosphere that we're indicating everything transpired, not moving, one bullet is as clearly being consistently testified to, makes one hole on the same side. So, hum. Either I would submit as someone is bending over the right side of the cami - and you will see there is not one at all on the right - is lifted up a little bit. And two - consistent with the two scars on the left - blew them up - fragment go out the left side. Or, perhaps because we're talking about, not mannequins in a store, we're talking about people who are, thank goodness, are alive and moving around, perhaps is wrinkled and folded over and there's one injury. Perhaps. We don't know.

The doctor's couldn't agree which side is which. But I show that to you to make a point which first of all again you will have it in evidence. Its not just laid out, its not just something we can say I've got a mathematic equation A plus B equals C. This is where this was, this is frozen in time, this was a moving static chaotic situation culminating in a violent act. And we want to stand here and question a victim who's survived this about, "are you bending like this to get the jeans" jeans you can

see clearly see are on the floor and they want to suggest now they were placed there at a later time. Really? And yet their shown in the photographs on November 12th while she's at the hospital, suggesting their neatly folded again. She never testified she actually was able to reach them. And we want to say "were you bending like this, were you bending like this, what was going on? What was going on?"

Why would she lie? That's four words. That's another four word phrase we can talk about. Why would she lie? If someone else shot her outside and she knows the defendant didn't do it, wouldn't Crystal Caldwell have an intense interest on seeing that this man here takes his cuffs and puts them on the wrist of the person who did it? Not a person she's had a fight with over a ring. The ring. Let's talk about the lie. What's so important now? Wouldn't her interest be find him? He's in the apartment wouldn't that be her response instead of calling and saying he's still in jail. Pretend this is a telephone.

(SOLICITOR PICKED UP COURTROOM TELEPHONE.)

SOLICITOR COLLINS: He's still in jail, I feel comfortable now telling you he did shoot me. He shot me in the upstairs bedroom. Why would she lie? And if she's lying - someone else shot her because there's no question she was the one that was shot and that person is still

walking around - and she's testified that the defendant shot her. Does that make sense? You saw the witness's demeanor. You saw the witness's demeanor.

Remember when I ask the victim - and I know I ask a lot of questions of a lot of witnesses. Thank you for your patience. Remember when I ask Ms. Caldwell "are you right handed or left handed?" And she testified she was right handed. If you don't recall that again you can have her testimony played back if you need to. The judge will talk about that. And I ask was the defendant right handed or left handed and she said well he used both. So if the other idea that's tried to be planted by the defense argument - and now I've lost my wounds - but again you will have them - here we go.

If the other idea is well she shot herself she set me up for this, well if it's on the left side which it sounds like the defense would indicate to you because the testimony ask of Doctor Swanson by them was that this was a smaller wound she would have to take her right hand and then the bullet and shot herself in the left hip. Maybe. Is that what they're suggesting and then concoct this story that the defense - the defendant did this and then scurry back to the apartment after you get out of the hospital after shooting off and getting a projectile and planting it in the chair and folding the jeans. You saw the demeanor

of Ms. Caldwell, you heard her testimony, and you will have that to consider.

The only evidence you have before you is that the victim got shot, she was on the receiving end of that bullet, and that they had been arguing beforehand. And that after the shot the defendant said "Now I'll have to kill you." And she begged him not to do that and begged him to take her to the hospital which he did and then left.

You know, both doctors said and the defense said, "you know, if you believe it came in on the right side - remember we talked about which one's higher, which one's lower. He said, "okay, well then it did some crazy things, it moved around." You will have again the testimony but I submit to you both doctors testified that bullets do crazy things inside the body. Again it's not the scientific draw a line from point A to point B and insert like a pool stick or a ruler straight line. Bullets do crazy things inside the body. Obviously at some point they splinter off. By the defense theory about coming in on the left and splinter before it even hit anything, hitting her skin and splintering down there about an inch or two below.

Why is one higher and why is one lower? Again the victim testified she was leaning over to go get the ring out of the console because he was like "you get that ring". She was leaning over to get her jeans to get dressed and he

shot her right there.

His Honor will instruct you as to the law to be applied and certainly you should listen to him - His Honor and not me. But I submit to you that some of the charge that you will be hearing goes through the various charges you will have to consider because in addition to a charge of attempted murder, there are what we call lesser included offenses that you can also consider. But in considering attempted murder His Honor will instruct you that attempted murder is when someone who with intent to kill "attempts to kill" "with intent to kill" - attempts to kill another person with malice aforethought either expressed or implied. He will talk to you about that. He is going to charge you that you may infer, you don't have to infer, but you may infer what we call permissive inference. You may infer that from the use of a deadly weapon to accomplish the act that malice existed.

And he's going to tell you there is no requirement that malice exist for any particular period of time before the act; that malice can be like that.

(SOLICITOR SNAPPED HER FINGERS.)

SOLICITOR COLLINS: Malice can be like that.

(SOLICITOR SNAPPED HER FINGERS.)

SOLICITOR COLLINS: "Get the ring." "Get the ring."

And he will charge you at to the law to be considered

on the lesser offenses and I submit to you, you will hear the language that was being talked about by the doctors in terms of whether or not there was a substantial likelihood that this could have ended the victim's life.

I'm almost through. You've been very patient and I thank you for that. His Honor will instruct that the second count of the indictment, the possession of a firearm during the commission of a violent crime, applies when during the act of a violent crime - and he will instruct you as to that - that attempted murder falls within that category under the law, that someone uses a firearm in the course of that action constituting that offense.

Bottom line: The only evidence is that one person was shot. The only evidence is that that person was Crystal Caldwell. And that's the evidence that law enforcement had when they went to process that scene. Is the defense suggesting that the victim had blood on the stairs and just left it there for weeks, for months on end?

Words, a war of words. Three words. Three words that we learned as school children. "Justice for all." "Justice for all." And I submit to you that those three words really boil down in this case to one word. Your word because you have the final word in this case, and that word is guilty. And I ask that you use it twice. Guilty of attempted murder. Guilty of possession of a firearm during

the commission of a violent crime. Thank you.

THE COURT: Do we need a break before I do my charges? Okay. We do need a little break?

All right, we'll take about a ten minute break, when we come back we'll have the charge. Don't start deliberating yet. You are not in that position.

Take a ten minute fresher break.

(JURY EXITS COURTROOM AT 05:06 P.M..)

(COURT IN RECESS AT 05:06 P.M..)

(COURT BACK IN SESSION AT 05:16 P.M..)

THE COURT: Thank you. Take your seats.

All right, bring in the jury.

I'm sorry, wait just one second.

(DEFENDANT REENTERS COURTROOM.).

(JURY REENTERS COURTROOM AT 05:17 P.M..)

THE COURT: Members of the jury panel, I appreciate the attention you've given everyone to this point and I am now going to ask you to give me your attention as I am going to charge you the law which you are to apply to the facts that you determine them to be in this case.

The indictment that you will have in the jury room with you contains two charges against Mr. O'Neil. One is attempted murder and one is possession of a weapon, firearm, during the commission of a violent crime. I will explain the elements of those charges to you in a few

minutes. I want to tell you at this time though the indictment is not evidence, it is simply the paperwork by way of which this case is processed through our court system and it contains the charge, the allegation, what the State says happened, but it is not evidence. It is also where the unanimous verdict will ultimately be enrolled in this case.

The fact that Mr. O'Neil is on trial, that is a fact that he was arrested, the fact that he was charged, the fact that he was indicted, is not evidence either. That is just again the way our system works. If someone is thought they committed an offense they are charged, they are arrested, their case is processed and they come to trial. So that is not any evidence that he committed these offenses, that's just the way our system works. Each of these charges are separate charges and you are to consider the facts and the law as to attempted murder and then possession of a firearm during the commission of a violent crime separately as to each except for - except for this.

As mentioned by one of the attorneys I will talk to you later about what are called lesser included offenses; that is, offenses which fall under attempted murder but are less serious than attempted murder.

Attempted murder is a violent crime and I will tell you more about that later. If for some reason - If you

determine that the State has failed to prove Mr. O'Neil guilty as charged but you find him guilty of a lesser included offense, then you wouldn't consider that count two. The count two only applies if you find him guilty of a violent crime and that would be finding him guilty of attempted murder. So I'll differentiate more about that in a moment. Basically the State has to prove each of these charges under the facts and the law as to each.

Mr. O'Neil is presumed innocent of these charges. Anyone charged with any offense in our system, no matter how minor or how serious, is presumed innocent under our law. This presumption of innocence is a substantial right. It is not a mere legal theory or a mere statement, it is a substantial right. The presumption of innocence adheres to an individual at the time they are arrested, it remains with them as their case is processed through our court system; it remains in Mr. O'Neil's favor at this moment. Mr. O'Neil at this moment is presumed innocent and is even presumed innocent as you deliberate. The presumption in his favor is removed if and when and only if and when you determine that the State has proven his guilt beyond a reasonable doubt.

Now the State does not have to prove his guilt beyond all or beyond every doubt. We know that there are very few things in life that we can know with absolute certainty and

absolute certainty is not required in a case such as this. Our courts have defined a reasonable doubt as the kind of doubt that would cause a reasonable person to hesitate to act. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of a person's guilt. As I said there are very few things that are known by us in our world with absolute certainty and our law does not require proof that over comes every possible doubt. If based on your consideration of the evidence you are firmly convinced that Mr. O'Neil is guilty of an offense, you would find him so. On the other hand if you find there is a real possibility that he is not guilty, you would give him the benefit of that reasonable doubt and find him not guilty. He is entitled to all reasonable doubt that you find in regard to the charge, the lesser included charges, and the elements of each.

I remind you that I am the sole judge of the law in this case. You must take accept and apply the law as I charge it. This is true even if you think I charge the law in error or even if you think the law should be different. Your oath requires you to take, accept and apply the law as I charge it. You are not to infer from anything I have said or done or anything I now say or do as indicating an opinion of mine on the facts. Our law does not allow a trial judge to formulate or express to a jury any opinion

By law in this case there are several steps down. Now before you could consider and determine Mr. O'Neil guilty of any of these lesser offenses, or the main offense from which he is charged, you would have to be convinced by the State's evidence that they have proved his guilt beyond a reasonable doubt.

He is charged with attempted murder. That's the highest step. Attempted murder is when a person who, with intent to kill, attempts to kill another person with malice aforethought. Malice is either expressed or implied.

Malice is hatred, ill will, or hostility towards anther person. Malice is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent. Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be expressed or inferred. These terms do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Express malice

is shown when a person speaks words which express hatred or ill will for another person or when the person prepared beforehand to do the act which was later accomplished.

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise with the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm including a handgun. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. This inference, that is, the inference of malice with use of a deadly weapon is simply that, it is simply an evidentiary fact to be taken into consideration by you, along with the other evidence in the case, and it is to be given such weight as you determine it should have.

An attempt is an effort to accomplish a crime which does not succeed. An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended. The State must show more than mere preparation and intent. There must be some overt act committed in an effort to commit the crime.

Intent means intending results which actually incurred. If something is intentional it is not accidental or involuntary. Intent may be shown by acts and conduct of the defendant and from other circumstances from which you

may naturally and reasonably infer intent.

Now as to this charge the State must, as I said, prove his guilt, Mr. O'Neil, beyond a reasonable doubt. That is they must prove as I have read it to you and I charge you that he committed the offense of attempted murder and must prove that beyond a reasonable doubt.

Now we step down to the next step which is assault and battery of a high and aggravated nature. As to assault and battery of a high and aggravated nature and then there are three more lesser included's under that, and I'll talk to you more about that in a moment. But in discussing these and charging you the law on these lesser included assault and batteries, I will use two terms I need to define for you.

The first is the term "Great bodily injury". Great bodily injury is defined as bodily injury which causes a substantial risk of death, or, which causes a serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

The second phrase is "Moderate bodily injury." I just defined great bodily injury. Now I'm defining "Moderate bodily injury."

Moderate bodily injury is defined as physical injury requiring treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body,

expect when there is penetration of the skin, muscles, and connective tissues that require surgical repair of a complex nature or when treatment of the injuries requires the use of regional or general anesthesia.

Now I need to define two more words for you, "Assault and battery." And coupled, of course, they are assault and battery. An assault occurs when a person unlawfully or attempts or offers to commit a violent injury upon another person and has the present ability to complete the attempted injury. An assault is the intentional creation of a reasonable fear of immediate bodily harm. It is not necessary that the attempted injury or harm actually take place.

The example I always use is that if I am in striking distance of you and I rear back my fist angerly, and I am close enough to come forward and hit you, I have assaulted you. A battery is the unlawful touching another person by one who has committed an assault. An unlawful touching can be caused by a part of the accused's body or by any object in which the accused has put in motion.

A battery is the completion of the assault by using or applying force to another person however slight in a rude and angry or resentful manner without legal justification for doing so. Following my example, if I assault you by bringing my fist back angrily and then I come forward and

hit you, even if ever so slight, I have committed a battery. The assault and then the battery.

Now the first of the lesser included charges, the second step down, is assault and battery of a high and aggravated nature. If you find the State has failed to prove beyond a reasonable doubt that Mr. O'Neil committed attempted murder, you must then determine whether the State has proven beyond a reasonable doubt whether he committed the lesser offense of assault and battery of a high and aggravated nature.

To prove assault and battery of a high and aggravated nature the State must prove beyond a reasonable doubt that the defendant unlawfully injured another person, and the State must also prove beyond a reasonable doubt that either great bodily injury resulted, or, that the act was accomplished by means likely to produce death, or great bodily injury. The State must prove those elements beyond a reasonable doubt before you could find Mr. O'Neil guilty of the lesser included offense of assault and battery of a high and aggravated nature.

The next step down would be assault and battery in the first degree. If you find the State has failed to prove Mr. O'Neil guilty of the other two, attempted murder, assault and battery of a high and aggravated nature, you would consider whether the State has proven beyond a

reasonable doubt that he committed assault and battery in the first degree. To prove assault and battery in the first degree, the State must prove beyond a reasonable doubt that Mr. O'Neil either unlawfully injured another person, or, attempted to injure another person with the present ability to do so, and, that the act was accomplished by means likely to produce death, or great bodily injury, or, that the act occurred - I'm sorry - they must prove in addition to the assault and battery they must prove it was an attempt - Let me go back.

If the State has failed to prove either of those offenses which I've already gone over you may consider whether the State has proven beyond a reasonable doubt that Mr. O'Neil committed the offense of assault and battery in the first degree. Here the State must prove beyond a reasonable doubt that Mr. O'Neil injured another person and that it was done by an act that was likely to produce death or a great bodily injury. The State must prove that beyond a reasonable doubt before you could find him guilty of that lesser included.

The next step down would be assault and battery in the second degree. To prove assault and battery in the second degree the State must prove beyond a reasonable doubt that the defendant unlawfully injured another person, and the State must prove beyond a reasonable doubt that the - that

moderate bodily injury to anther person resulted or moderate bodily injury to another person could have resulted. 'First degree - is great bodily injury second degree is moderate bodily injury.

Lastly the third, the next step down is assault and battery in the third degree. If you find the State has failed to prove any of those higher degree of offenses beyond a reasonable doubt you would consider whether that the State has proven Mr. O'Neil guilty of assault and battery in the third degree. To prove assault and battery in the third degree the State must prove beyond a reasonable doubt that Mr. O'Neil injured another person with the - injured them - that is, no great bodily injury - no moderate injury, simply injury. Before you could find Mr. O'Neil guilty of any of those offenses the State must prove those offenses, or that offense, beyond a reasonable doubt.

Now if you find Mr. O'Neil guilty of attempted murder you would move to the second charge. If you find him not guilty of attempted murder, you would find him guilty of the lesser included's. Only if you found him guilty of attempted murder would you consider count two; that is, possession of a weapon during the commission of a violent crime.

Mr. O'Neil is charged with possessing a weapon during

the commission of or attempt to commit a violent crime. The State must prove beyond a reasonable doubt that Mr. O'Neil, at the time, was in possession of a firearm. A firearm includes a revolver, a pistol, or any weapon which is designed to, or made, to expel a projectile. In order to find Mr. O'Neil guilty of possession of a weapon during the commission of a violent crime, you must find that he committed a violent crime, and violent crimes include attempted murder, and that at that time he in fact possessed a firearm. The State must prove that beyond a reasonable doubt.

Now your verdict in this case must be unanimous. All twelve jurors must agree on your verdict. Your verdict cannot be based on sympathy, passion, prejudice, public opinion, or matters outside the record. In South Carolina we do not send in any written charge on the law. If you wish me to go over any part or all of the law, let me know and I'll bring you back and here in open court I will recharge you what you need me to charge you.

If you want to have testimony replayed we can do that. Let us know and we'll bring you back in here and in open court and replay testimony. If you have any questions while you're deliberating, write them down, knock on the door, give them to the bailiff the bailiff will bring them to me. We're not starting another trial so I will be able

to confer promptly with the attorneys and respond. It may be that I can write an answer on the note. When I do that, keep the note and turn it in with the evidence because it has to be a part of the record. It may be that I will have to bring you here in open court and answer the question here in open court.

When you've reached the verdict knock on the door, tell the bailiff, and again we're not going to be starting any other work so we should be able to send for you promptly. Once you go into the jury room, now at this time, still do not start deliberating. I'm not going to instruct you to do that at this time because I have to go over with the attorneys my charge. If I have made an error in the charge, I will have to bring you back in and correct it. If I have not made an error, and do not have to bring you back in, the bailiff will bring in to you the exhibits, the verdict form which I'm going to go over in just a moment, and will instruct you to start deliberating. But do not start deliberating until we reach that point, until you get that information.

Now on the verdict form we have the two counts broken down and I have on the - under attempted murder all of those - the charge of attempted murder on the first line, and then, cascading down or stepping down, each of the possible lesser included offenses. The order these are in

is of no importance. I have to put them in some order and I always put them in this order. So the fact that one precedes the other does not mean its to be given any weight or greater consideration by you. If you find Mr. O'Neil guilty of attempted murder, or, one of the lesser included offenses, that is, the State has proven that - his guilt to that offense beyond a reasonable doubt you would simply put an X or a check in front of the line that applies. Attempted murder, assault and battery of a high and aggravated nature, assault and battery first, second and third degree.

If you find that the State has failed to prove his guilt beyond a reasonable doubt you would use the bottom line that says "We find the defendant not guilty". Then I have a sentence here that says "If you have found Mr. O'Neil not guilty of attempted murder." Stop, because you would not consider possession of weapon during a violent crime unless you find him guilty of the violent crime of attempted murder. So even if you find him guilty of the lesser included offense, you would not go forward as to court two unless you have found him guilty of attempted murder.

Now, Ms. Anderson and Mr. DeFrancisco, if you will just stay in here at this time I will let the jury go to the jury room, but do not start deliberating.

(JURY EXITS COURTROOM AT 05:46 P.M..)

THE COURT: Anything from the State?

SOLICITOR COLLINS: No, Your Honor. Thank you.

THE COURT: Anything from the Defense?

MR. MUCKENFUSS: No, Your Honor.

THE COURT: All right. Now if you'll check the verdict forms and the exhibits and send them back then the bailiff will tell them to start deliberating.

Ms. Henderson, Mr. DeFrancisco, we are through for the week. You can stay around if you want and see what the verdict is but you can leave and you do not have to call back. We appreciate your help during this week and thank you.

All right. We will be at ease.

(COURT IN RECESS @ 05:50 P.M..)

(COURT BACK IN SESSION @ 08:50 P.M..)

THE COURT: Have a seat.

We got Mr. O'Neil present. We've got a note asking for a recharge, says on the later charge. I presume they mean the lesser included but to keep it in perspective I'm going to go through the charges on the attempted murder. Of course there were no lesser included on possession of a violent crime. I probably won't charge that other than to point out that they have to find the violent crime.

Anything before the jury comes in?

SOLICITOR COLLINS: No, Your Honor.

THE COURT: Anything?

MR. MUCKENFUSS: No, Your Honor.

(JURY REENTERS COURTROOM AT 08:52 P.M..)

THE COURT: Members of the jury panel, I received your note and I think the best way for me to do this is to go through starting with the charge and go down the steps as I called them because you've ask about - because the later charges are in layman's terms. I will try to break it down in a little more in layman's terms but these are statutory offenses. They are offenses that the language is created by our legislature and they are the ones who say what the elements of these offenses are. And if I try to start deviating and explaining too much I - for me to go outside the legislature said so I will try to be a little more - I'll try my best.

First, he is charged, Mr. O'Neil is, with attempted murder. Attempted murder occurs when a person who with intent to kill, attempts to kill, attempts to kill another person with malice aforethought, either expressed or inferred.

Malice: The term malice is hatred, ill will, or hostility towards another person. Malice is the intentional doing of a wrongful act without just cause or excuse, and with the intent to inflict injury, or under

circumstances from which the law will infer an evil intent. Malice aforethought does not require that malice exist for any particular time before the act is committed, but the malice must exist in the mind of the defendant just before, and, at the time the act is committed. There must be a combination of previous evil intent and the act itself. Malice may be expressed or inferred. These terms do not mean different kinds of malice but merely the manner in which malice may be shown to exist, that is, either by direct evidence or by inference from the facts and circumstances which have been proven.

Expressed malice is shown when a person speaks words which express hatred or ill will toward another, or, when the person, the defendant, prepared beforehand to do the act which was later accomplished. Malice may be inferred in conduct showing a total disregard for human life. Inferred malice may also arise when the deed, the act, is done with a deadly weapon. A deadly weapon is any article, instrument, or substance, which is likely to cause death or great bodily harm including a handgun. This inference from the use of a deadly weapon is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and it is to be given such weight as you decide it should have.

Now, an attempt, because this is an attempted murder,

attempt is an effort to accomplish a crime which does not succeed. An attempt includes specific intent to do a particular criminal act along with an act falling short of the intended act. The State must show more than mere preparation and intent, there must be some overt act committed in an effort to commit the crime. Intent means intending the results which actually occurred. Something that is intentional is not accidental or involuntary. Intent may be shown by acts and conducts of a defendant and from other circumstances from which you may naturally and reasonably infer intent. Now to find Mr. O'Neil guilty of attempted murder the State must prove those elements beyond a reasonable doubt.

Then we start down the stairs, that's the top.

These all deal with assault and batteries. Now I told you that assault occurs when a person unlawfully attempts or offers to commit a violent injury to another - on another person and has the present ability to do so. An assault is the intentional creation of reasonable fear of immediate bodily harm. It is not necessary that the attempted injury or harm actually take place.

And I use my example of rearing back angrily and close enough to strike you but do not.

A battery is the unlawful touching of another person by a person who has committed an assault. An unlawful

touching can be caused by a part of an accused body, or, by any object the accused puts in motion. A battery is the completion of the assault by using or applying force to another person, however slight, in a rude, angry or resentful manner without legal justification for doing so.

As I said earlier, I rear back and I assault you and I follow though with my battery and strike you, following through with my fist and strike you, that then is a battery.

The first step down is assault and battery of a high and aggravated nature. To prove assault and battery of a high and aggravated nature the State must first prove beyond a reasonable doubt that the defendant unlawfully injured another person.

Next the State must prove beyond a reasonable doubt that either great bodily injury resulted, or that the act was accomplished by means likely to produce death, or, great bodily injuries. And I define - I begin to define the term great bodily injury because it was used in that definition. Great bodily injury is defined as bodily injury which causes a substantial risk of death, or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ. That is the definition of great bodily injury and that must be proven beyond a reasonable doubt that the battery

occurred, assault and battery occurred, and that it occurred with - that it resulted in either great bodily injury, or was accomplished by means likely to produce death or great bodily injury. That's assault and battery of a high and aggravated nature.

One more step down is assault and battery in the first degree. To prove assault and battery in the first degree the State must prove beyond a reasonable doubt that the defendant offered or attempted to injure another person with the present ability to do so, and, that the act was accomplished by means likely to produce death, or, likely to produce great bodily injury. So assault and battery in the first degree sounds very similar to assault and battery of a high and aggravated nature and assault in the first degree requires - Excuse me - An attempt or an injury and it being accomplished by means likely to produce death or great bodily injury.

We step down one more step to second degree assault and battery, assault and battery in the second degree. Here the State must prove beyond a reasonable doubt that the defendant unlawfully injured another person, or offered or attempted to injure another person with the present ability to do so, and that moderate bodily injury resulted, or could have resulted. I define moderate bodily injury as a physical injury requiring treatment to an organ system of

the body other than the skin, muscles and connective tissues of the body, except when the penetration of the skin, muscles and connective tissues that require surgical repair of a complex nature or a treatment of the injuries require the use of a regional or general anesthesia. So assault and battery in the second degree requires moderate bodily injury.

Assault and battery in the third degree, the last on the step down, simply requires the State to prove beyond a reasonable doubt that there was an assault and battery by Mr. O'Neil, and that in that, he unlawfully injured another person or offered or attempted to injure another person with the present ability to do so.

So those are the steps in the process and as to count two, the possession of a firearm during the commission of or an attempt to commit a violent crime I told you that, that only applies if you find Mr. O'Neil guilty of attempted murder. If you find him not guilty of that, and if you find him not guilty all the way, or if you find him guilty of one of the lesser includes, then you would not even address the possession of a weapon during the commission of a violent crime.

I hope that helps.

(JURY EXITS COURTROOM AT 09:02 P.M..)

THE COURT: Anything from the State?

SOLICITOR EPTING: Nothing from the State.

THE COURT: Anything from the Defense?

MR. MUCKENFUSS: No, Your Honor, nothing.

THE COURT: Just - we can go off the record.

(COURT AT EASE AT 09:04 P.M..)

(WHEREUPON: COURT'S EXHIBITS ONE - SIX RECEIVED INTO EVIDENCE.)

(COURT BACK IN SESSION AT 10:23 P.M..)

THE COURT: Take your seats.

I understand the jury has reached a verdict.

Anything from the State before we get the jury brought in?

SOLICITOR COLLINS: No, Your Honor.

THE COURT: Anything from the Defense?

MR. MUCKENFUSS: No, Your Honor.

THE COURT: All right, bring in the jury.

(JURY REENTERS COURTROOM AT 10:23 P.M..)

THE COURT: Mr. Foreman, I understand the jury has reached a verdict.

MR. FOREMAN: Yes, sir, we do.

THE COURT: Hand it to the bailiff he will hand it up to me.

(VERDICT RECEIVED UP BY THE COURT.)

MADAME CLERK: In the State of South Carolina versus Hashin Alli O'Neil with Indictment 2011-GS-46-0-0-9-7-7 and

2011-GS-46-0-0-9-7-7(A) for attempted murder and possession of a weapon during the commission of a violent crime, for the attempted murder charge we find the defendant guilty of a lesser included offense of assault and battery first degree.

THE COURT: That means they don't have to make a finding on the second.

MADAME CLERK: If this so be your verdict so say you all by raising your right hand.

(ALL JURORS AFFIRMED.)

MADAME CLERK: Let the record show all affirmed.

THE COURT: Anything from the State before the jury is dismissed?

SOLICITOR COLLINS: We respectfully request that the jury be polled.

THE COURT: Anything from the Defense?

MR. MUCKENFUSS: No, Your Honor.

THE COURT: The Clerk is going to ask each of you a specific question to affirm your verdict.

MADAME CLERK: Ladies and gentlemen of the jury please stand.

(ALL JURORS COMPLIED.)

MADAME CLERK: Once I've called your number and you have spoken, you can have a seat.

I'll start with the Foreperson.

Number Twenty-seven, is this your verdict?

JUROR TWENTY-SEVEN: Yes it is.

MADAME CLERK: Is this still your verdict?

JUROR TWENTY-SEVEN: Yes it is.

MADAME CLERK: You may have a seat.

Number One Thirty-six, is this your verdict?

JUROR ONE THIRTY-SIX: Yes, ma'am.

MADAME CLERK: Is this still your verdict?

JUROR ONE THIRTY-SIX: Yes, ma'am.

MADAME CLERK: You may have a seat.

Number Two Ten, is this your verdict?

JUROR TWO TEN: Yes it is.

MADAME CLERK: Is this still your verdict?

JUROR TWO TEN: Yes it is.

MADAME CLERK: Number One Twenty-eight, is this your verdict?

JUROR ONE TWENTY-EIGHT: Yes it is.

MADAME CLERK: Is this still your verdict?

JUROR ONE TWENTY-EIGHT: Yes, ma'am.

MADAME CLERK: You may have a seat.

Number Two Forty-four?

JUROR TWO FORTY-FOUR: Yes, ma'am.

MADAME CLERK: Is this your verdict?

JUROR TWO FORTY-FOUR: Yes, ma'am.

MADAME CLERK: Is this still your verdict?

JUROR TWO FORTY-FOUR: Yes, ma'am.
MADAME CLERK: You may have a seat.
Number One Fifty-three.
JUROR ONE FIFTY-THREE: Yes, ma'am.
MADAME CLERK: Is this your verdict?
JUROR ONE FIFTY-THREE: Yes, ma'am.
MADAME CLERK: Still your verdict?
JUROR ONE FIFTY-THREE: Yes, ma'am.
MADAME CLERK: You may have a seat.
One Forty-eight, is this your verdict?
JUROR ONE FORTY-EIGHT: Yes, ma'am.
MADAME CLERK: Still your verdict?
MADAME CLERK: You may have a seat.
Number Two Thirteen, is this your verdict?
JUROR TWO THIRTEEN: Yes it is.
MADAME CLERK: Is it still your verdict?
JUROR TWO THIRTEEN: Yes, it is.
MADAME CLERK: You may have a seat.
One Eighty-two.
JUROR ONE EIGHTY-TWO: Yes, ma'am.
MADAME CLERK: Is this your verdict?
JUROR ONE EIGHTY-TWO: Yes, ma'am.
MADAME CLERK: Still your verdict?
JUROR ONE EIGHTY-TWO: Yes, ma'am.
MADAME CLERK: You may have a seat.

Seventy-nine, is this your verdict?

JUROR SEVENTY-NINE: Yes it is.

MADAME CLERK: Still your verdict?

JUROR SEVENTY-NINE: Yes.

MADAME CLERK: You may have a seat.

Number One, is this your verdict?

JUROR ONE: Yes, ma'am.

MADAME CLERK: Still your verdict?

JUROR ONE: Yes, ma'am.

MADAME CLERK: You may have a seat.

Number One Fifty-seven, this your verdict?

JUROR ONE FIFTY-SEVEN: Yes.

MADAME CLERK: Still your verdict?

JUROR ONE FIFTY-SEVEN: Yes, ma'am.

MADAME CLERK: You may have a seat.

THE COURT: Anything else from the State?

SOLICITOR COLLINS: No, Your Honor. Thank you.

THE COURT: Anything from the Defense?

MR. MUCKENFUSS: No, Your Honor, thank you.

THE COURT: Members of the jury panel, I appreciate your help. Its been a long day. I thought this case would go into tomorrow but since we were able to finish it now you're through for the week, so, we appreciate your help. You will be mailed a check. I don't ask jurors to stay around; we have a little bit more to do as far as

sentencing, make post-trial motions, and I don't make you stay for that. You've been here long enough. But if you wanted to you could come in when you go out and the bailiffs will show you how if you want to come in and hear what goes on afterwards you certainly can, just come in and set on that back row. We appreciate your help.

Mr. Foreman, we got to get you to sign the original indictment and the verdict form. If you'll just step over to the library with the Clerk and the rest of you can be excused. Thank you so very much.

(JURY DISMISSED AT 10:25 P.M..)

THE COURT: Before we get into sentencing, anything from the State?

SOLICITOR COLLINS: Not as to us, Your Honor.

THE COURT: Anything from the Defense?

MR. MUCKENFUSS: No, Your Honor.

THE COURT: All right. If you'll bring the defendant around for sentencing. And if the victim would like to say anything else I'll certainly hear from her. I knew at one time what his record was but I can't remember.

SOLICITOR COLLINS: Your Honor, his only prior conviction is in 1993 in North Carolina for second degree murder, he received a life sentence at that time. He was paroled ultimately after several years in the Department of Corrections there, and they have now placed a hold on him

to address his parole situation once this charge is completed, or once this case is handled. So that is his only prior record.

THE COURT: Do you have a sentencing sheet?

SOLICITOR COLLINS: I do. I have it. When we were filling it out we checked an error and put lesser included offense on it. I don't know if you want to initial it, but we will hand that up.

THE COURT: Does the victim want to say anything?

SOLICITOR COLLINS: The victim did not wish to address the Court, Your Honor.

THE COURT: All right. Anything - Be glad now to hear from you Mr. Muckenfuss, with regard to your client.

And, Mr. O'Neil, I'll then be glad to hear from you.

MR. MUCKENFUSS: Thank you, Your Honor.

Obviously, Your Honor, you heard through the trial the facts of this case. Mr. O'Neil I believe has spent over a year in jail, if I'm correct by that.

Your Honor, obviously the jury found something less than attempted murder. We would ask, Your Honor, that if your Honor ordered this that any sentence imposed here would be concurrent with any sentence imposed for any additional sentence imposed by the State of North Carolina, once that is dealt with in North Carolina.

THE COURT: Mr. O'Neil, anything you want to say?

MR. O'NEIL: I'll wait till my - trial.

THE COURT: Thank you.

The sentence is ten years and I'm not going - with the North Carolina I want it to run - It's life so I don't know how I would run it concurrent with what - I don't know what they're gonna do, piece meal it or whatever. I'm going to let this one stand alone. Ten year sentence. Credit for any time you've served. Thank you.

SOLICITOR COLLINS: Thank you, Your Honor.

Your Honor, do I need to sign on the docket sheet for the other charge or is that something the Court will do as to the --

THE COURT: This is the tracking sheet.

SOLICITOR COLLINS: I will nol pros the one that's before and I will state I'm going to nol pros the other offense, Mr. Muckenfuss. I will nol pros the one we did not go forward on that we --

THE COURT: Possession of a weapon during the - by an individual who has another record.

SOLICITOR COLLINS: I will. And as to the other one I will sign off on that...

THE COURT: Counsel, I want to thank everybody for their courtesies for the way they conducted themselves during the trial. Both sides did a stellar job so I enjoyed working with you and hope to see you again. Thank

you all, and the staff too.

(COURT ADJOURNED IN THE MATTER OF STATE V. HASHIN A. O'NEIL WEDNESDAY, APRIL 18, 2012 AT 10:30 P.M..)

CERTIFICATE OF REPORTER

State of South Carolina)

)

County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 16th and 17th and 18th days of April, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: _____/_____

YORK COUNTY SHERIFF'S OFFICE Incident Report No: _____

Waiver of Rights

YOUR RIGHTS

BEFORE I ASK YOU ANY QUESTIONS, I WANT TO ADVISE YOU OF YOUR RIGHTS.

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a Court of Law.
3. You have the right to talk to an attorney and have him/her present with you while you are being questioned.
4. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning, if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Do you understand each of these rights I have explained to you? Yes: ✓ No: _____

[redacted]

Signature

11/12/10
Date

WAIVER OF RIGHTS

I am willing to talk to police and answer questions. I do not want an attorney at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure of any kind has been placed upon me.

Witness

11/12/10
Date

Signature

11/12/10
Date

Interviewee: H. Shim O'Neil Date of Birth: [redacted] Age: 40

Education Level: 12th Read: (Yes) No *(Circle one)* Write: (Yes) No *(Circle one)*

Place of Interview: MSC Time: 11/12/10

Interviewer: Eddie Shaft Date: 6:29 Am

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STATE'S EXHIBIT
LG
05:10
Message (32/254)
Fr: Hishem
(843-254-1363)
I love you too baby.
Nov 11, 6:04 pm
Reply
Options

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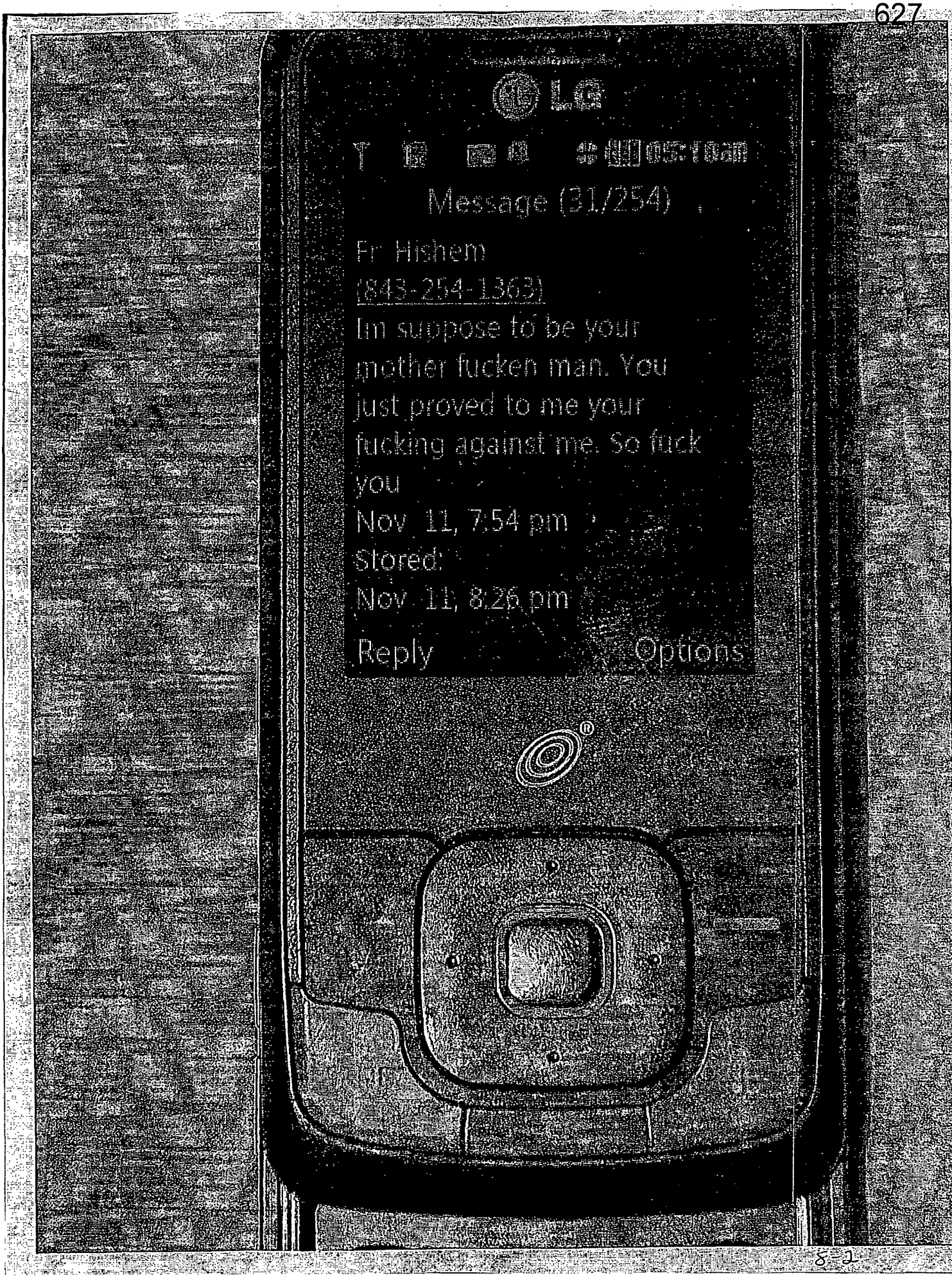
LG
Message (31/254)
Fr: Hishem
(843-254-1363)
Im suppose to be your mother fucken man. You just proved to me your fucking against me. So fuck you
Nov 11, 7:54 pm
Stored:
Nov 11, 8:26 pm
Reply
Options

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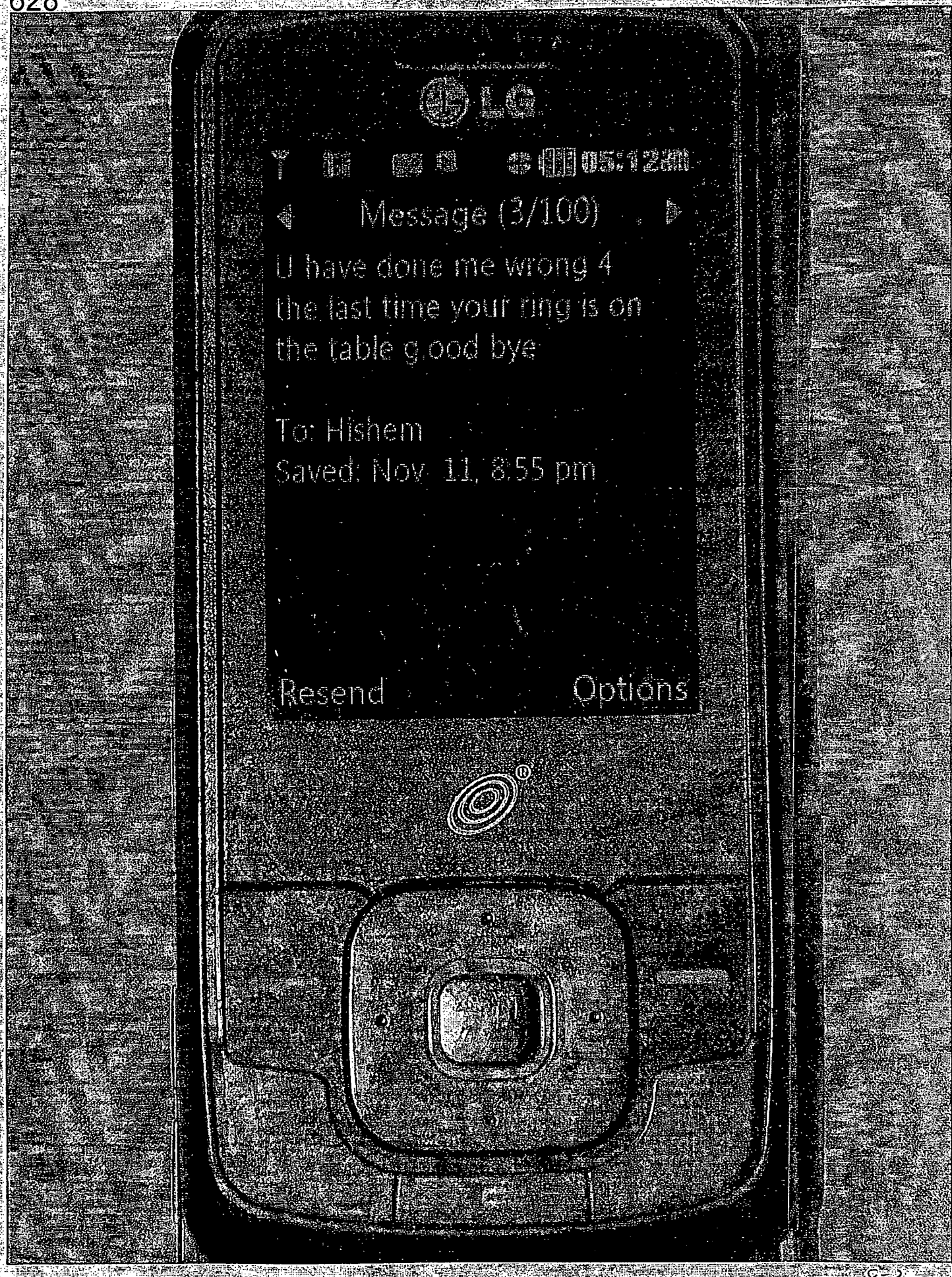
LG
05:12pm
Message (3/100)
U have done me wrong 4
the last time your ring is on
the table g.ood bye
To: Hishem
Saved: Nov 11, 8:55 pm
Resend
Options

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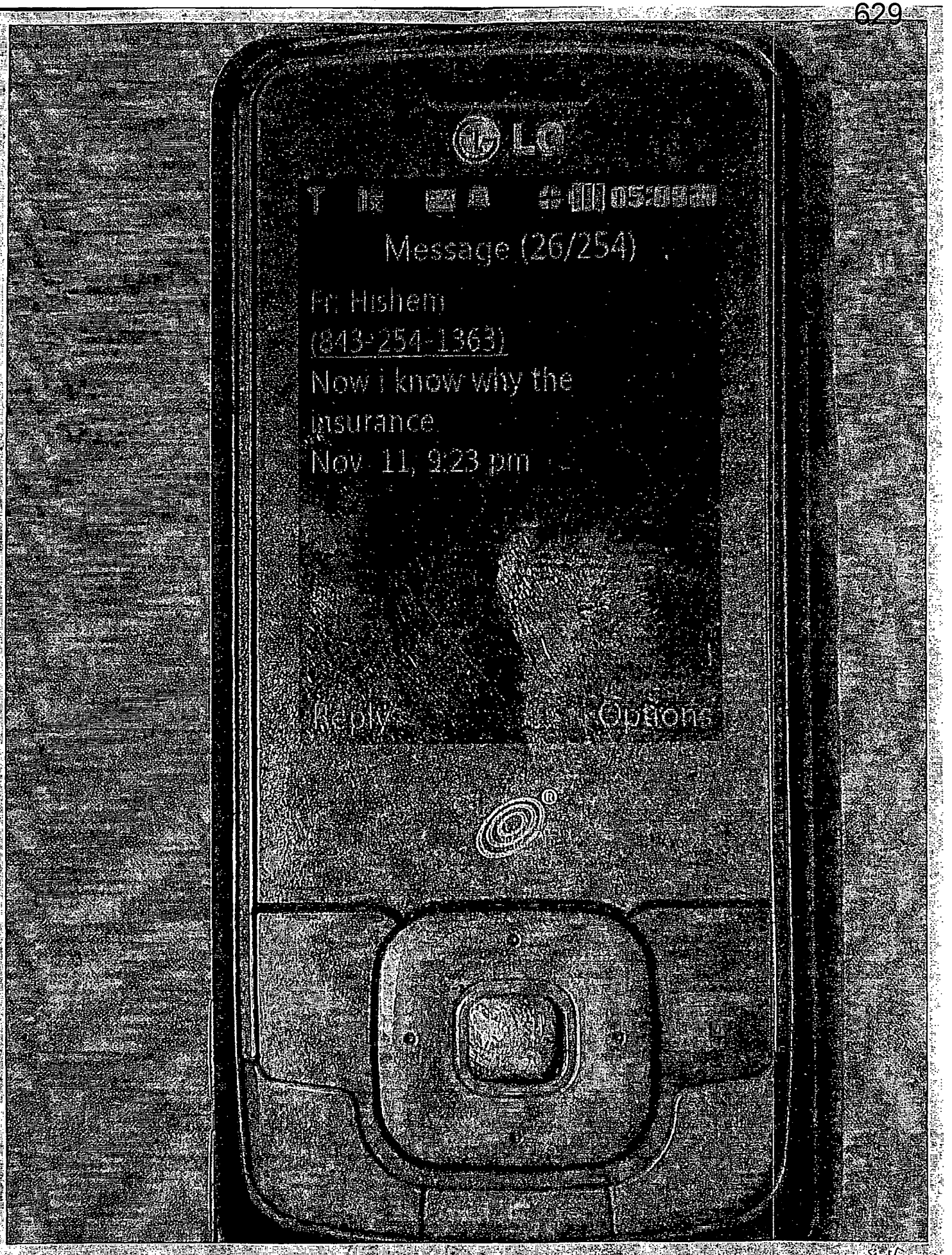
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Message (26/254)
Fr: Hishem
(843-254-1363)
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insurance
Nov 11, 9:23 pm
Reply
Options

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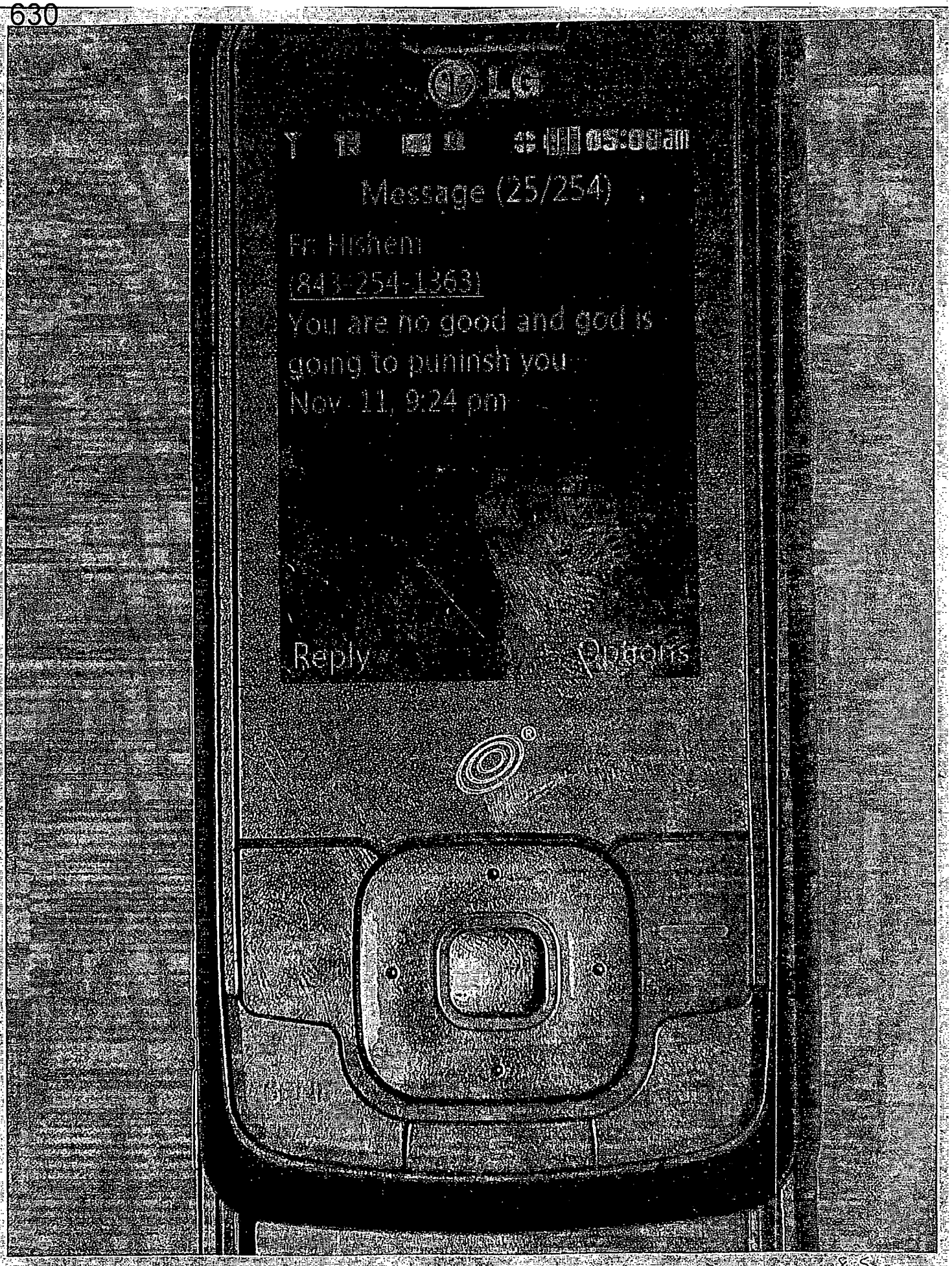
LG
05:08 am
Message (25/254)
Fr: Hishem
(843-254-1363)
You are no good and god is
going to puninsh you
Nov 11, 9:24 pm
Reply
Options

8.5

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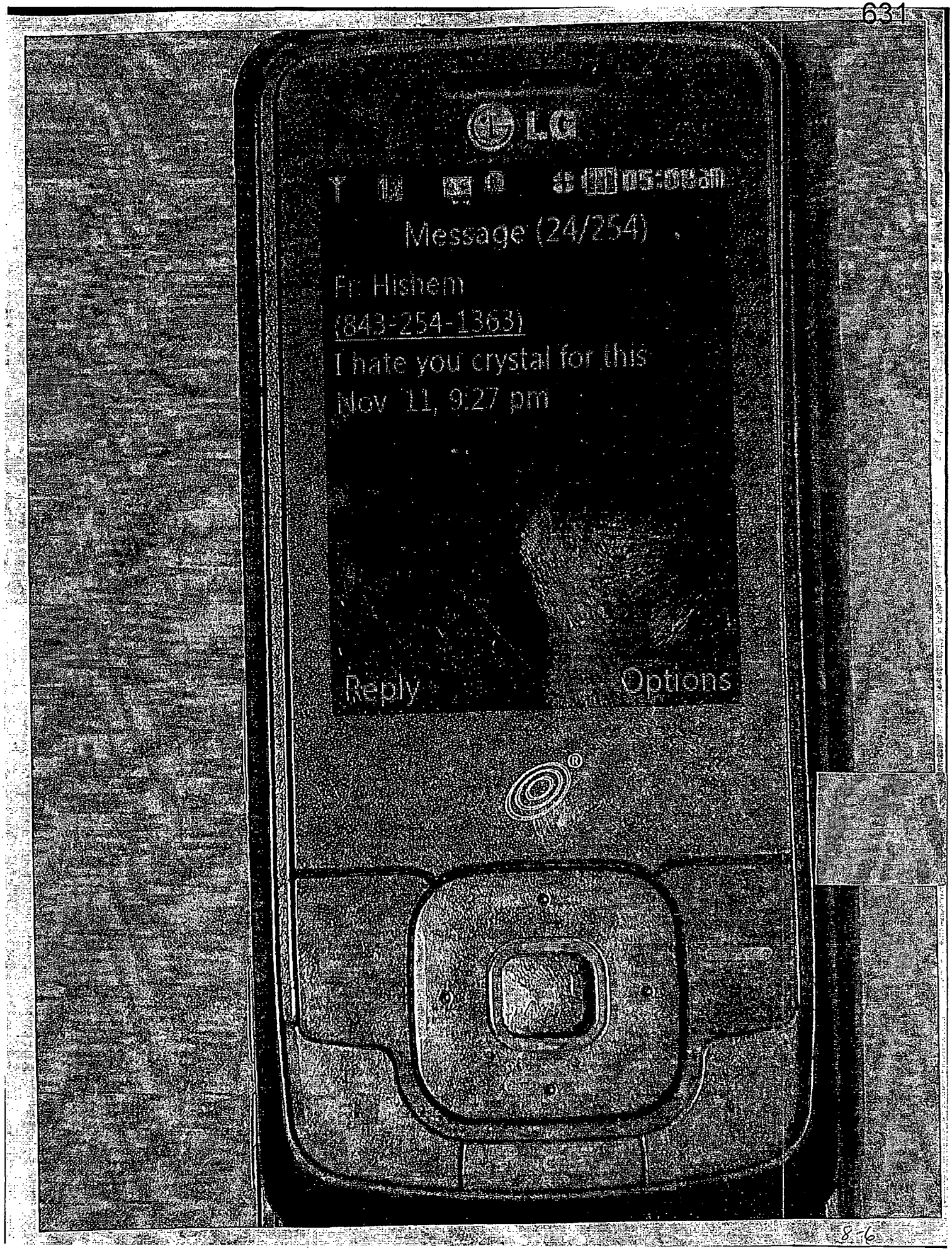
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Message (24/254)
Fr: Hishem
(843-254-1363)
I hate you crystal for this
Nov 11, 9:27 pm
Reply
Options

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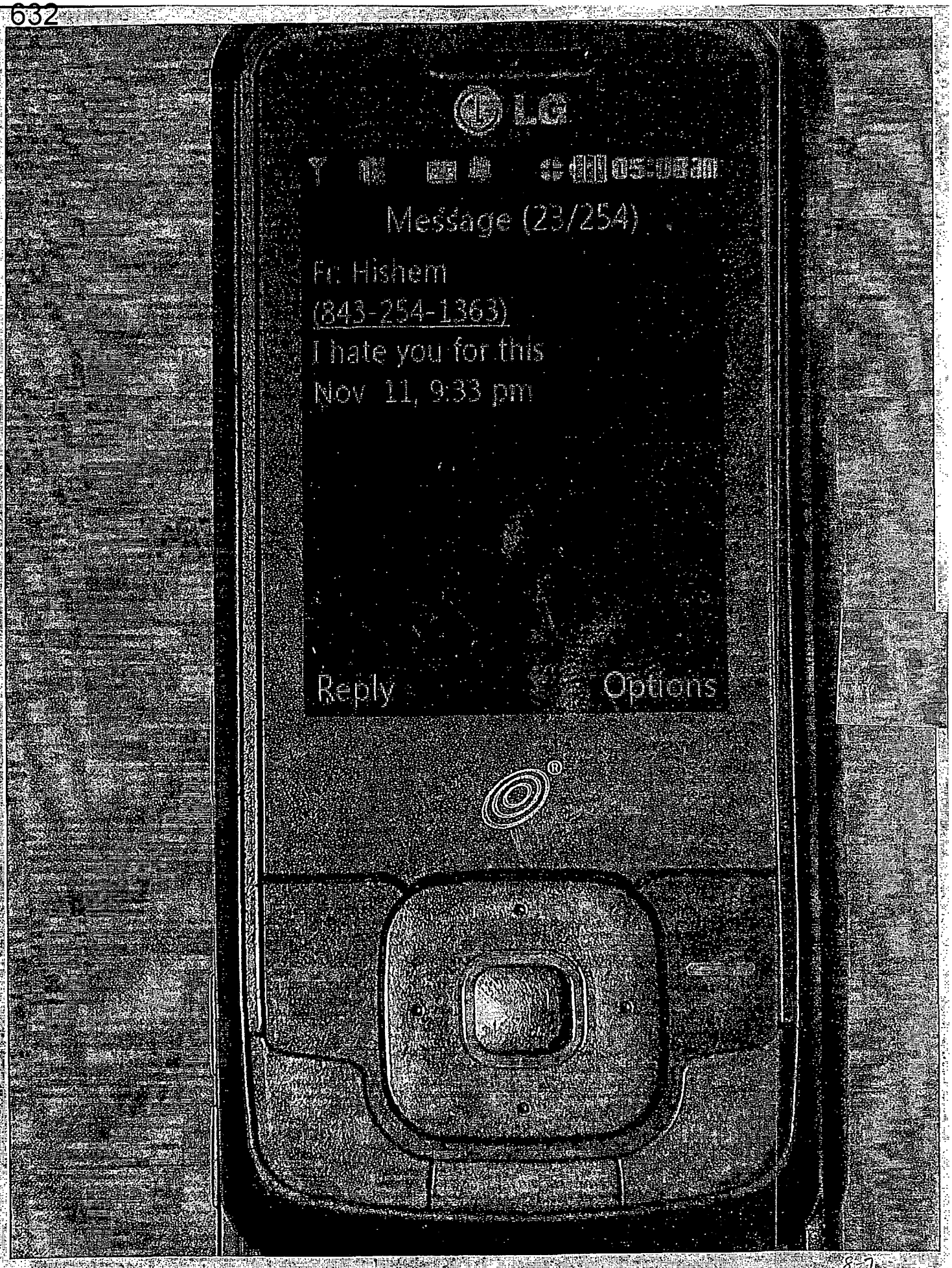
LG
Message (23/254)
Fr: Hishem
(843-254-1363)
I hate you for this
Nov 11, 9:33 pm
Reply
Options

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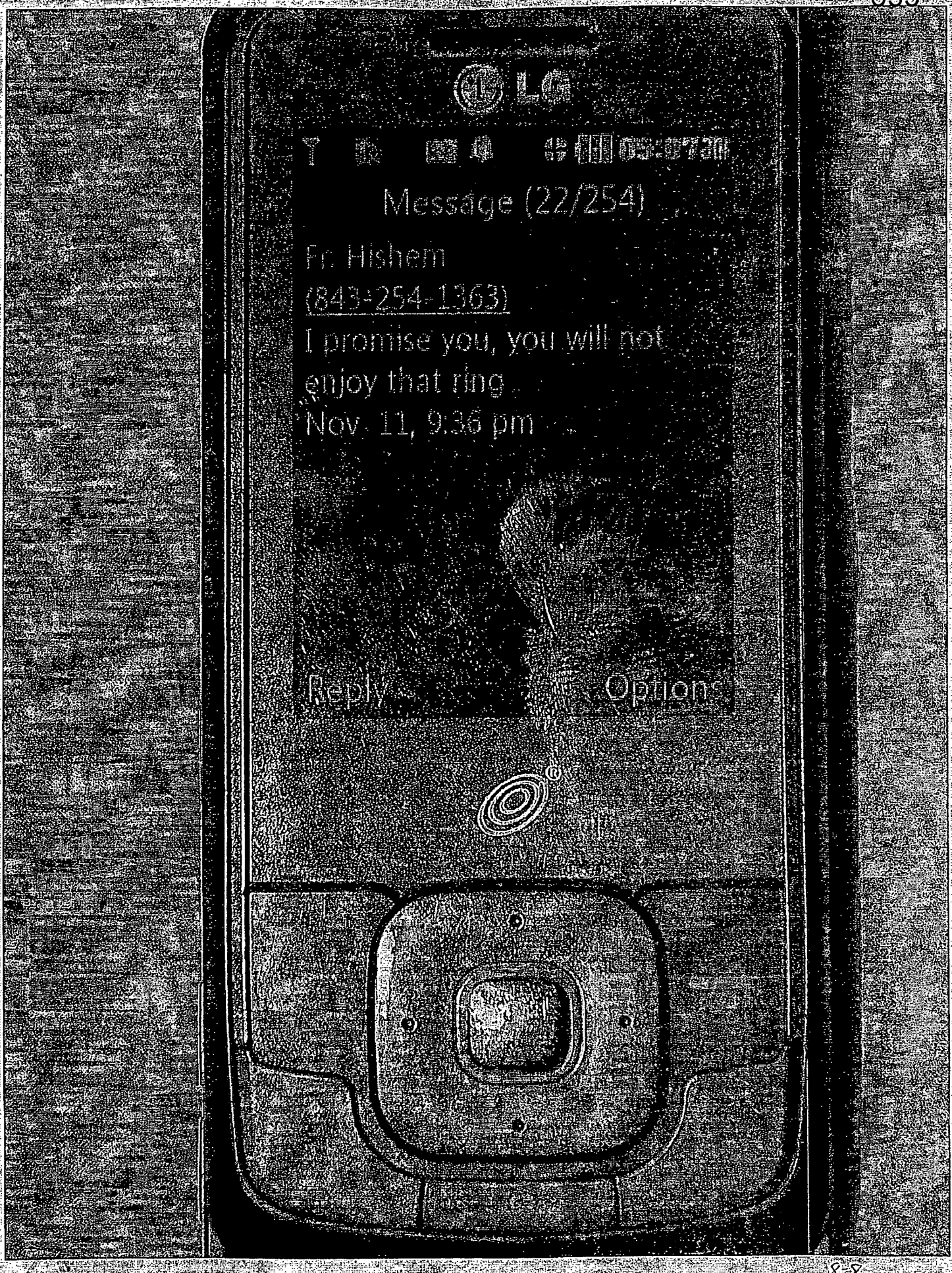
LG
Message (22/254)
Fr. Hishem
(843-254-1363)
I promise you, you will not enjoy that ring.
Nov. 11, 9:36 pm
Reply
Options

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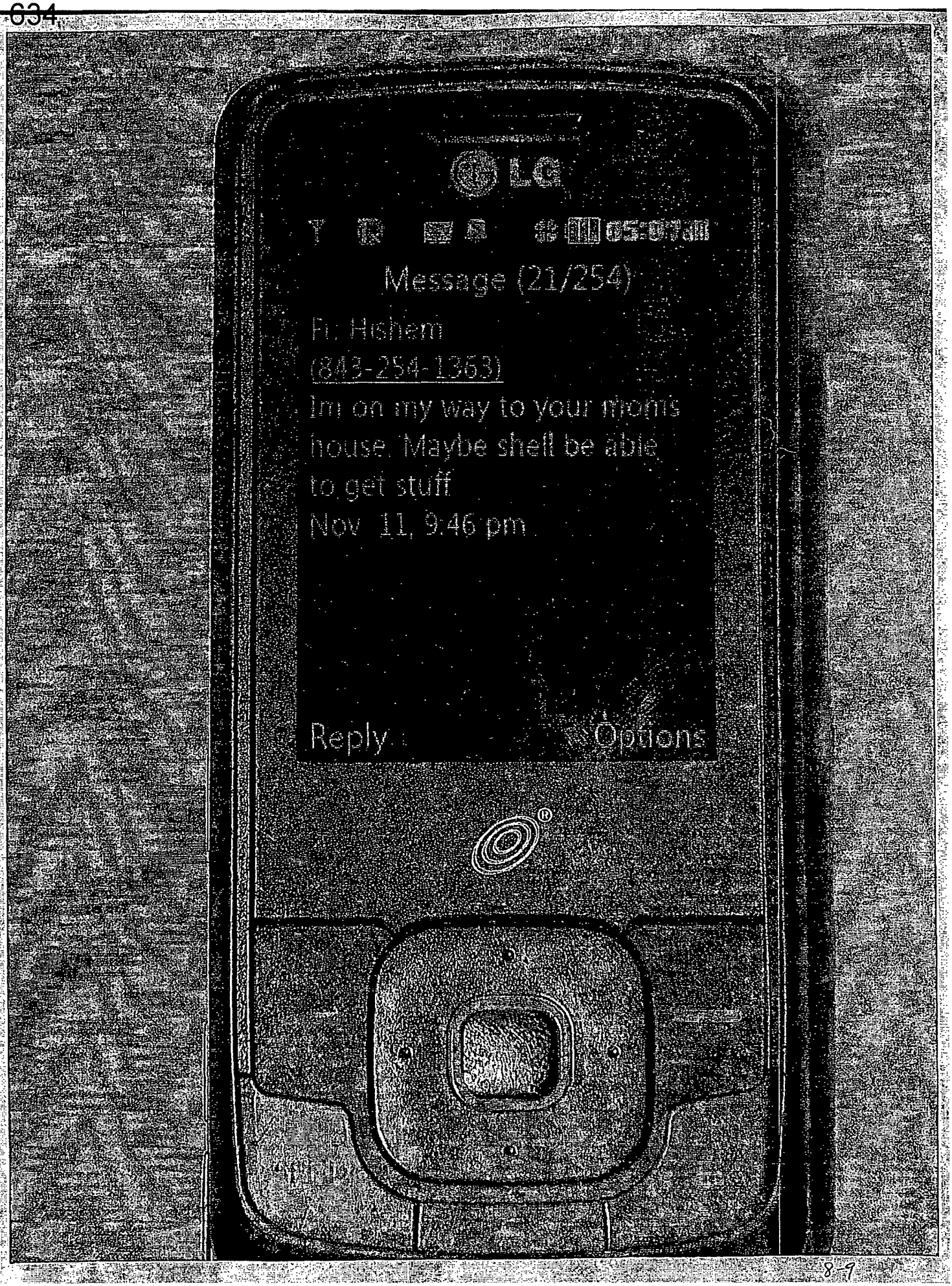
LG
Message (21/254)
R: Hishem
(848-254-1363)
Im on my way to your moms
house. Maybe shell be able
to get stuff
Nov 11, 9:46 pm
Reply
Options

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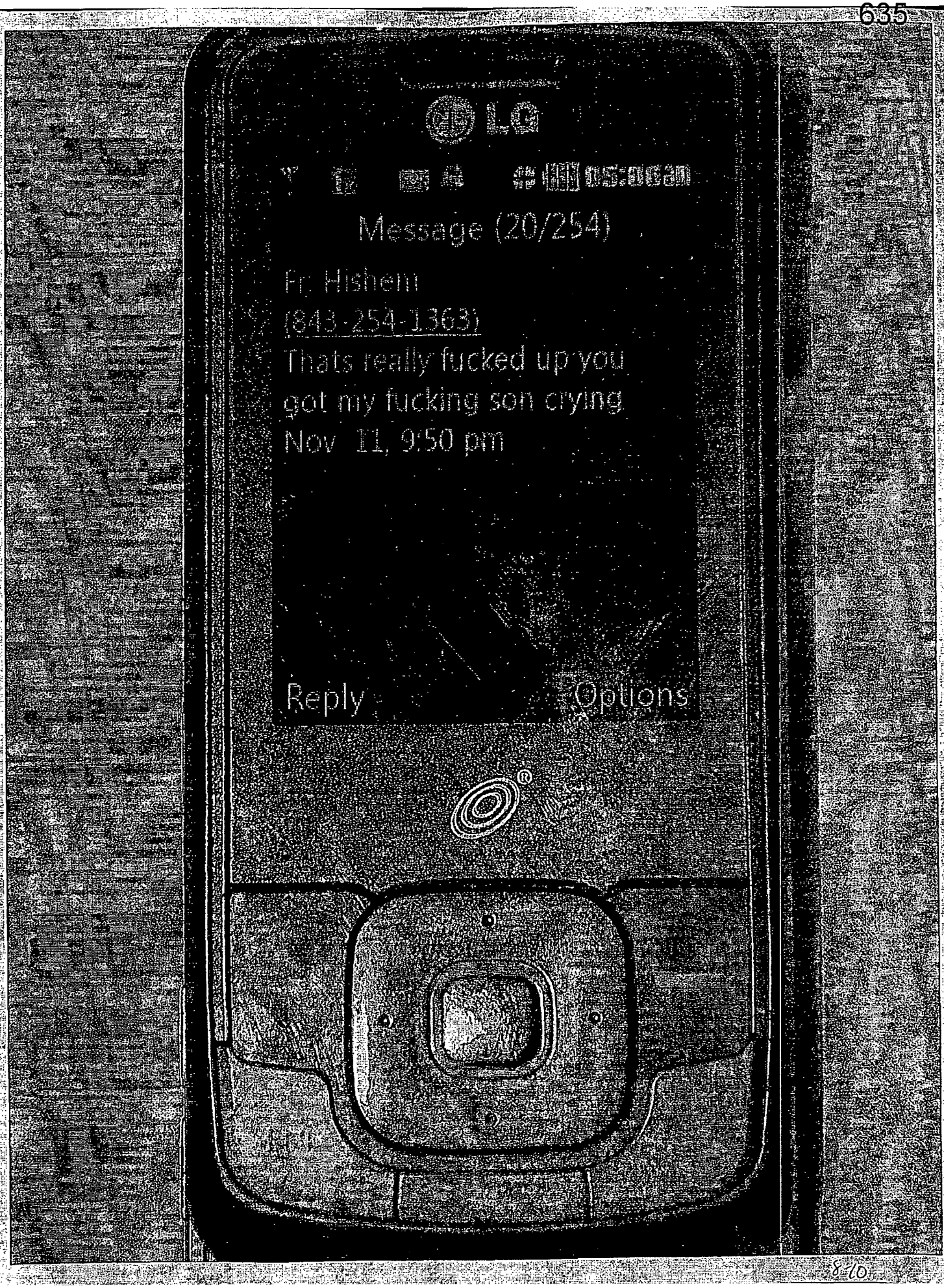
LG
05:00am
Message (20/254)
Fr: Hishem
(843-254-1363)
Thats really fucked up you
got my fucking son crying
Nov 11, 9:50 pm
Reply
Options

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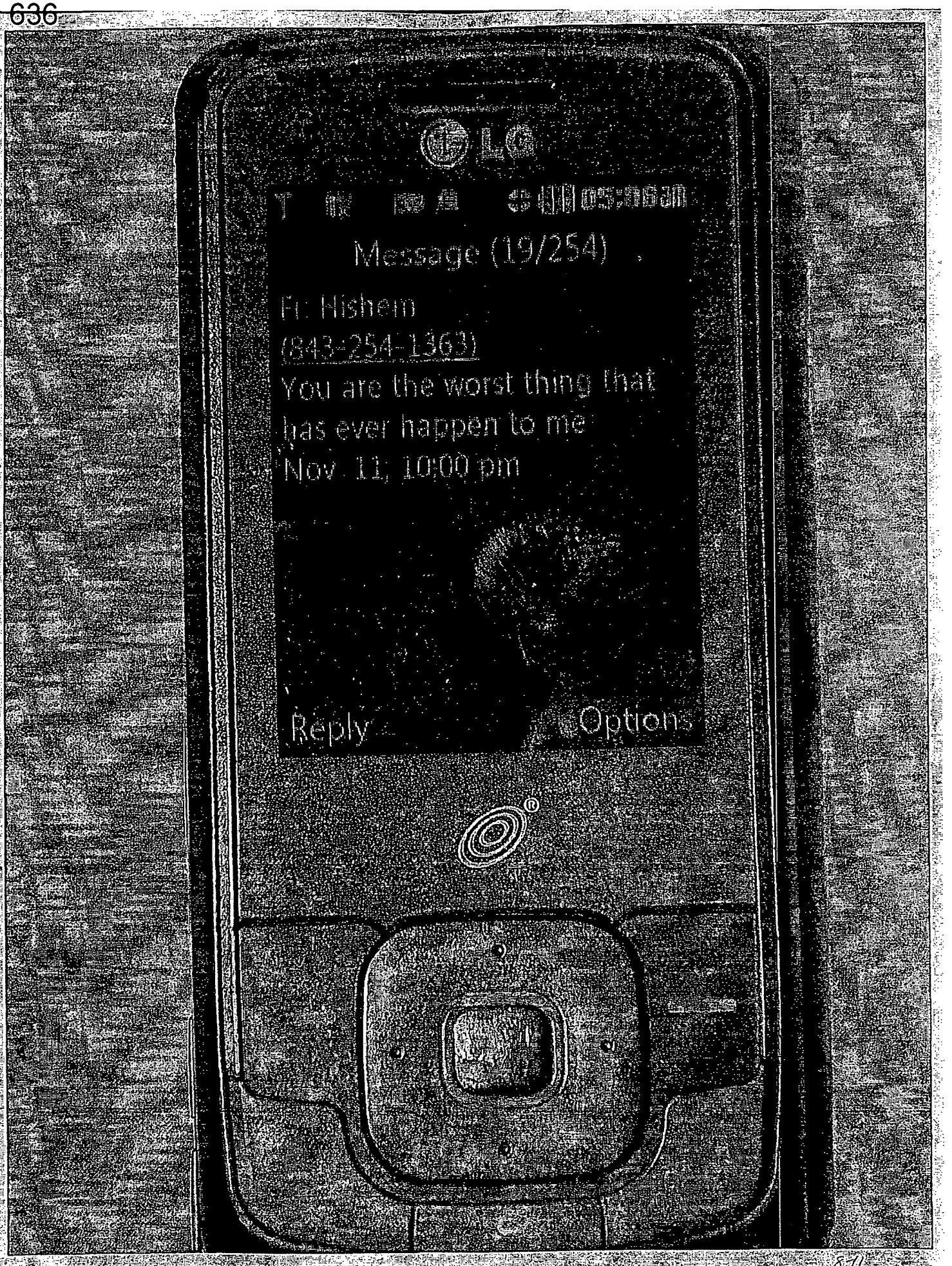
LG
05:18am
Message (19/254)
Fr: Hishem
(843-254-1363)
You are the worst thing that
has ever happen to me
Nov 11, 10:00 pm
Reply
Options

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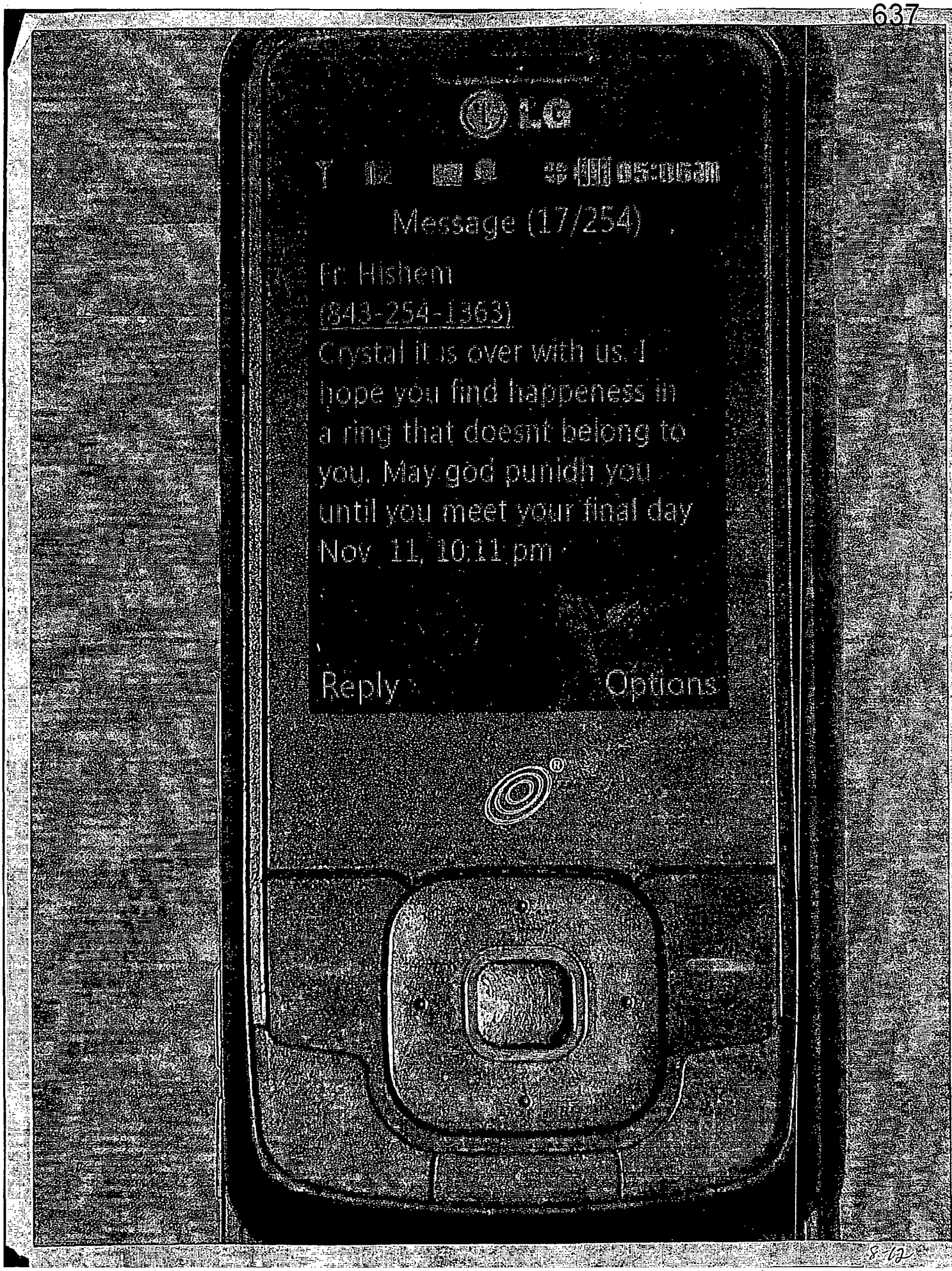
LG
05:08pm
Message (17/254)
Fr. Hishem
(843-254-1363)
Crystal it is over with us. I hope you find happeness in a ring that doesnt belong to you. May god punidh you until you meet your final day
Nov 11, 10:11 pm
Reply
Options

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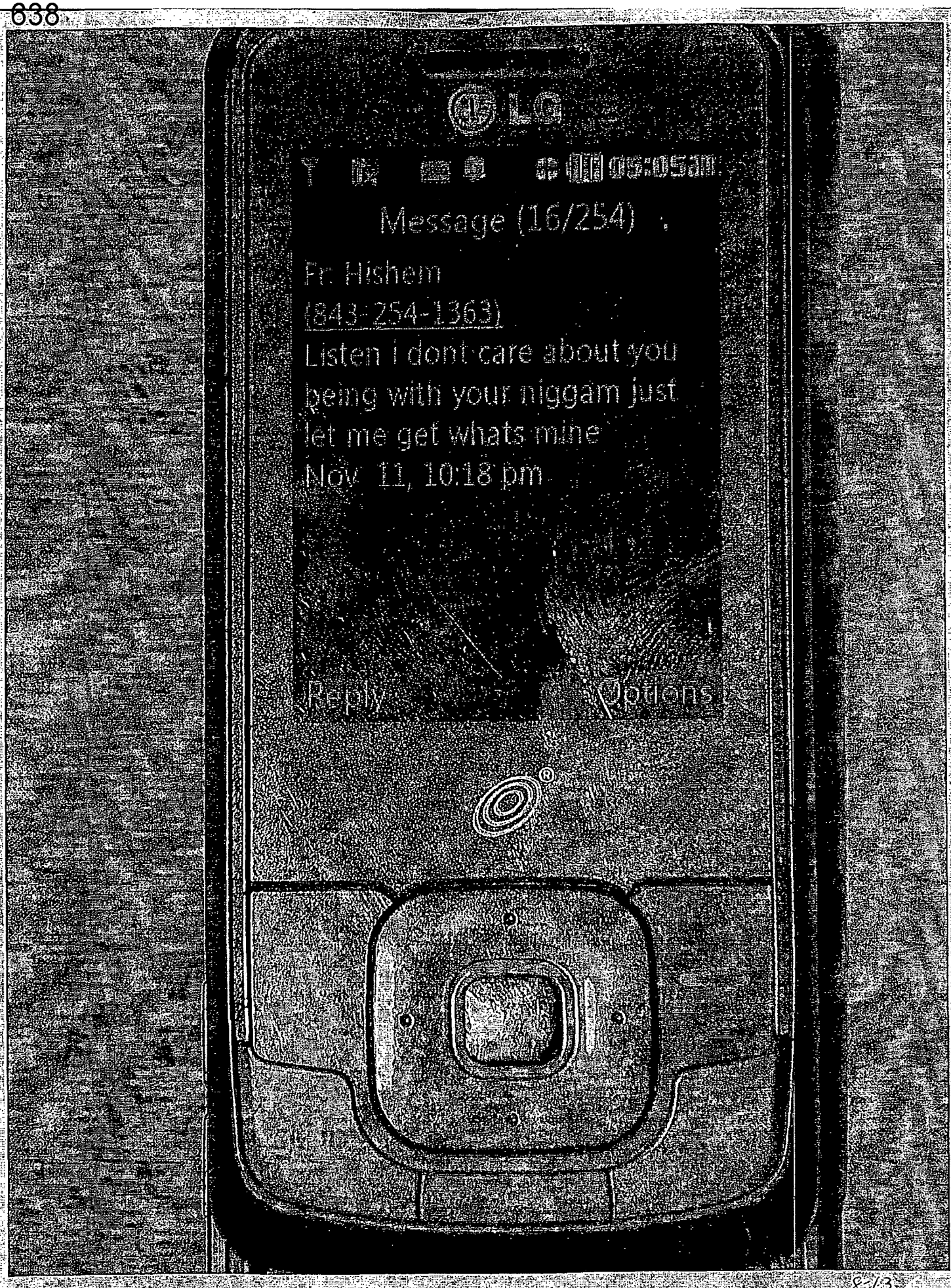
LG
05:05am
Message (16/254)
Fr: Hishem
(843-254-1363)
Listen I dont care about you
being with your niggam just
let me get whats mine
Nov 11, 10:18 pm
Reply
Options

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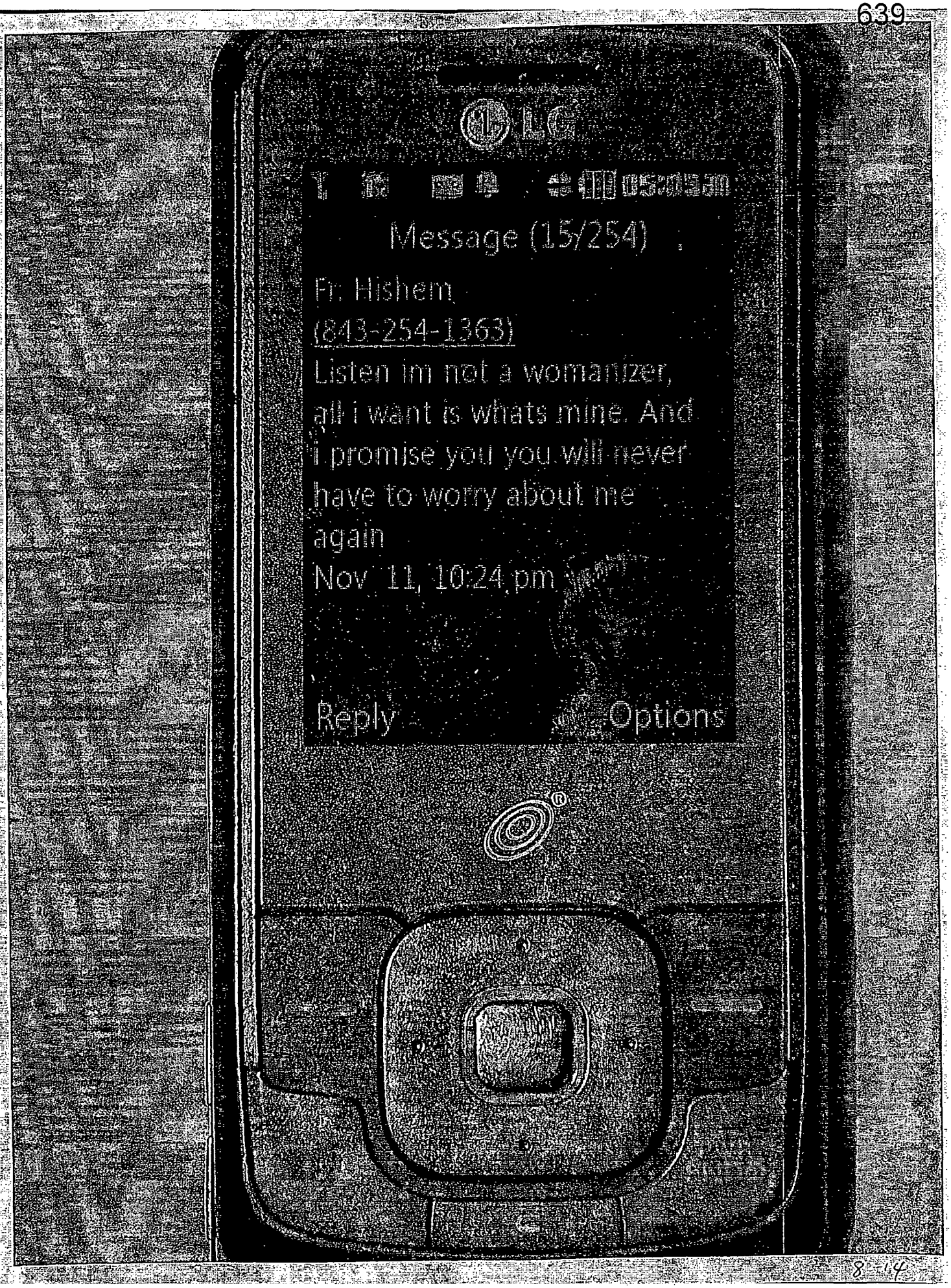
LG
Message (15/254)
Fr: Hishem
(843-254-1363)
Listen im not a womanizer, all i want is whats mine. And i promise you you will never have to worry about me again
Nov 11, 10:24 pm
Reply
Options

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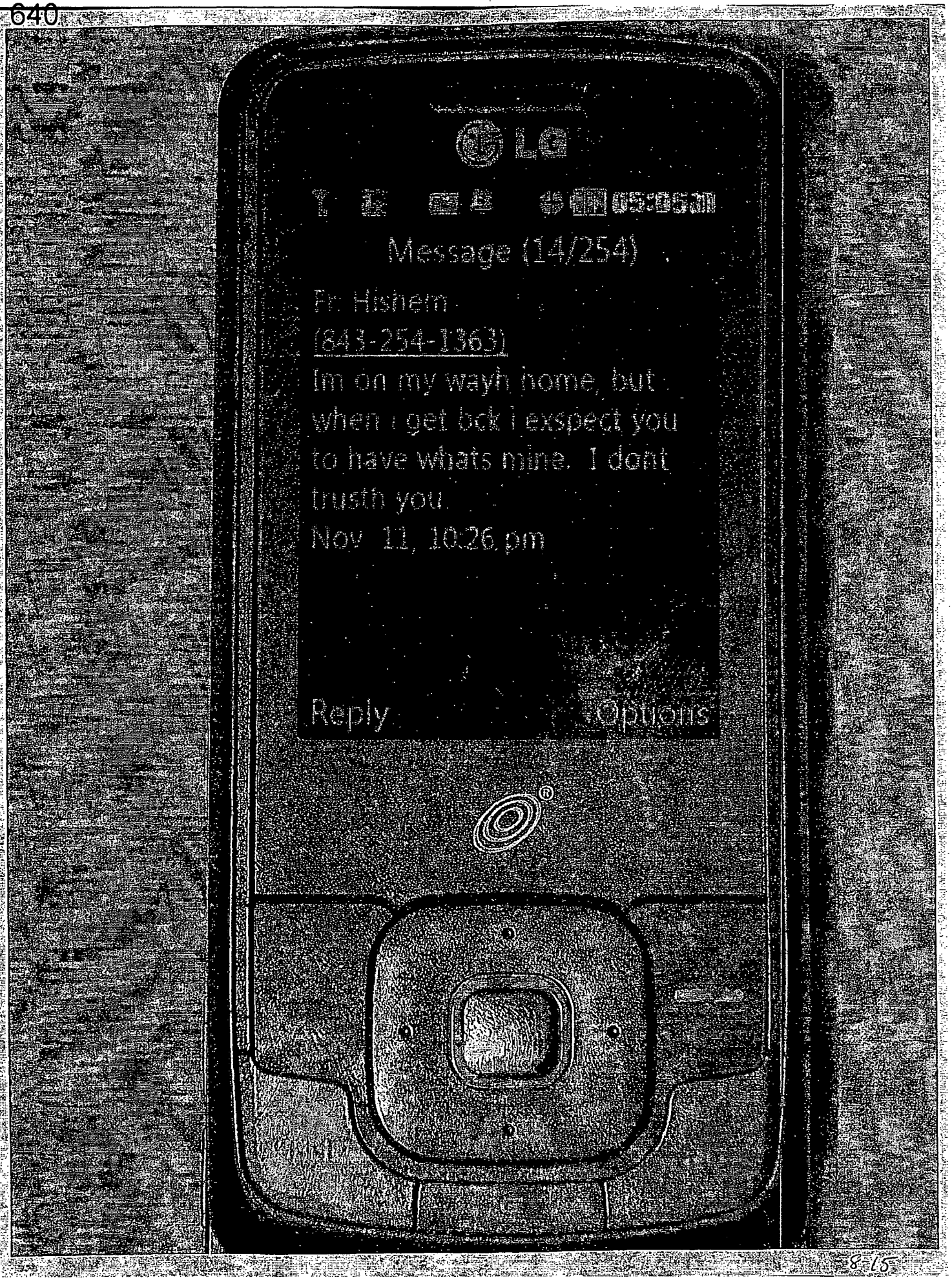
LG
Message (14/254)
Fr: Hishem
(843-254-1363)
Im on my wayh home, but
when i get bck i exspect you
to have whats mine. I dont
trusth you.
Nov 11, 10:26 pm
Reply
Options

8-15

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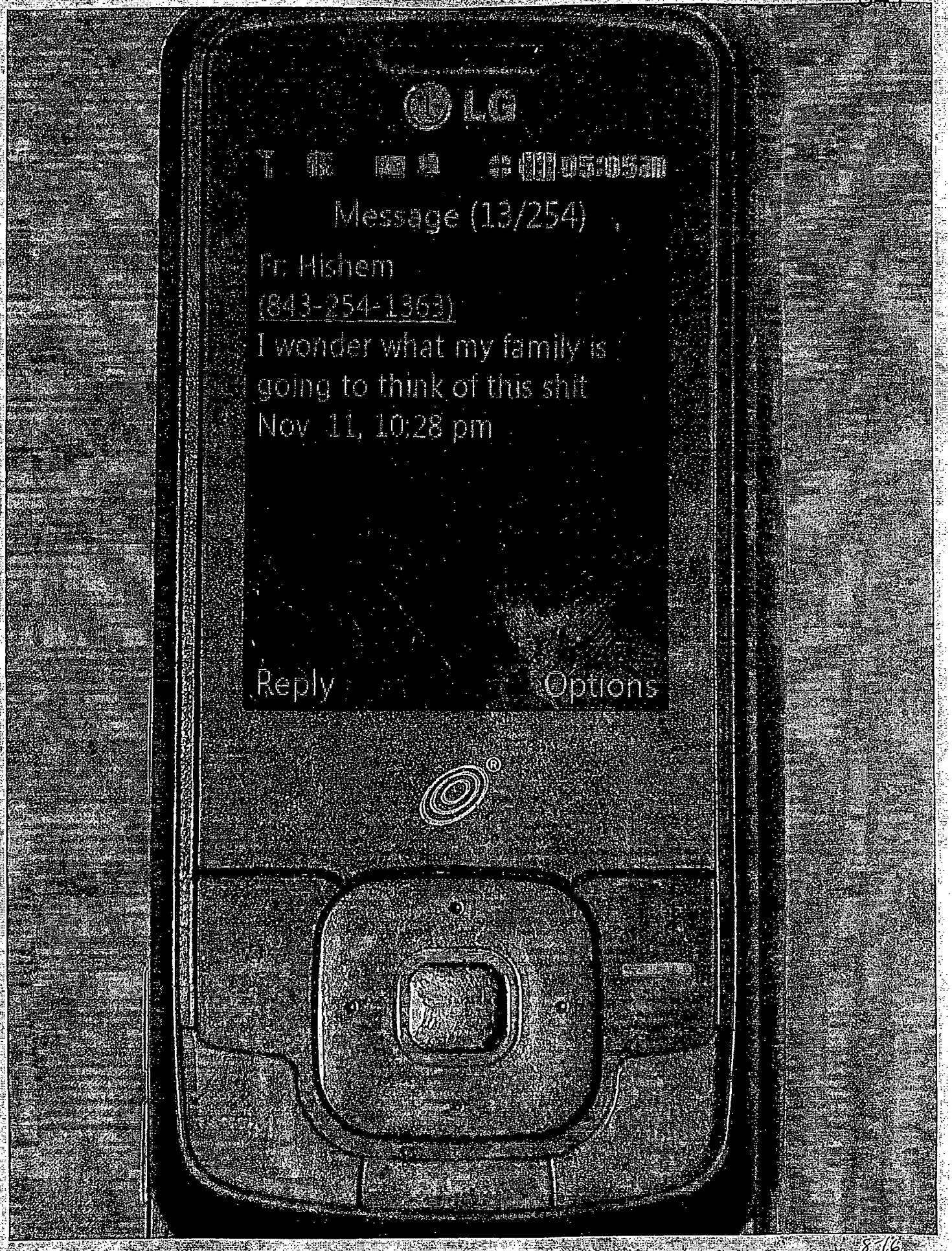
LG
05:05am
Message (13/254)
Fr: Hishem
(843-254-1363)
I wonder what my family is
going to think of this shit
Nov 11, 10:28 pm
Reply
Options

8/16

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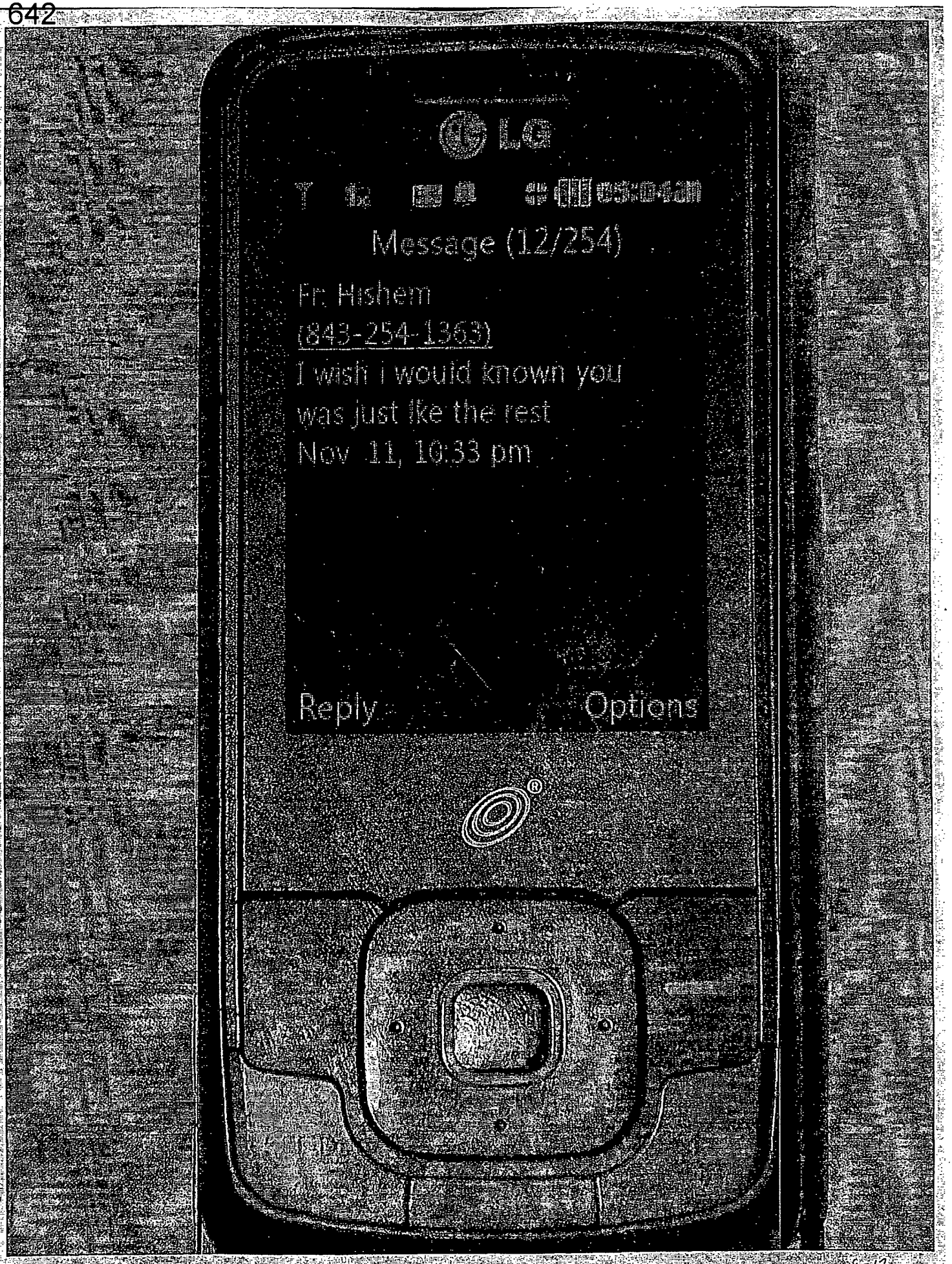
LG
Message (12/254)
Fr: Hishem
(843-254-1363)
I wish i would known you
was just like the rest
Nov 11, 10:33 pm
Reply
Options

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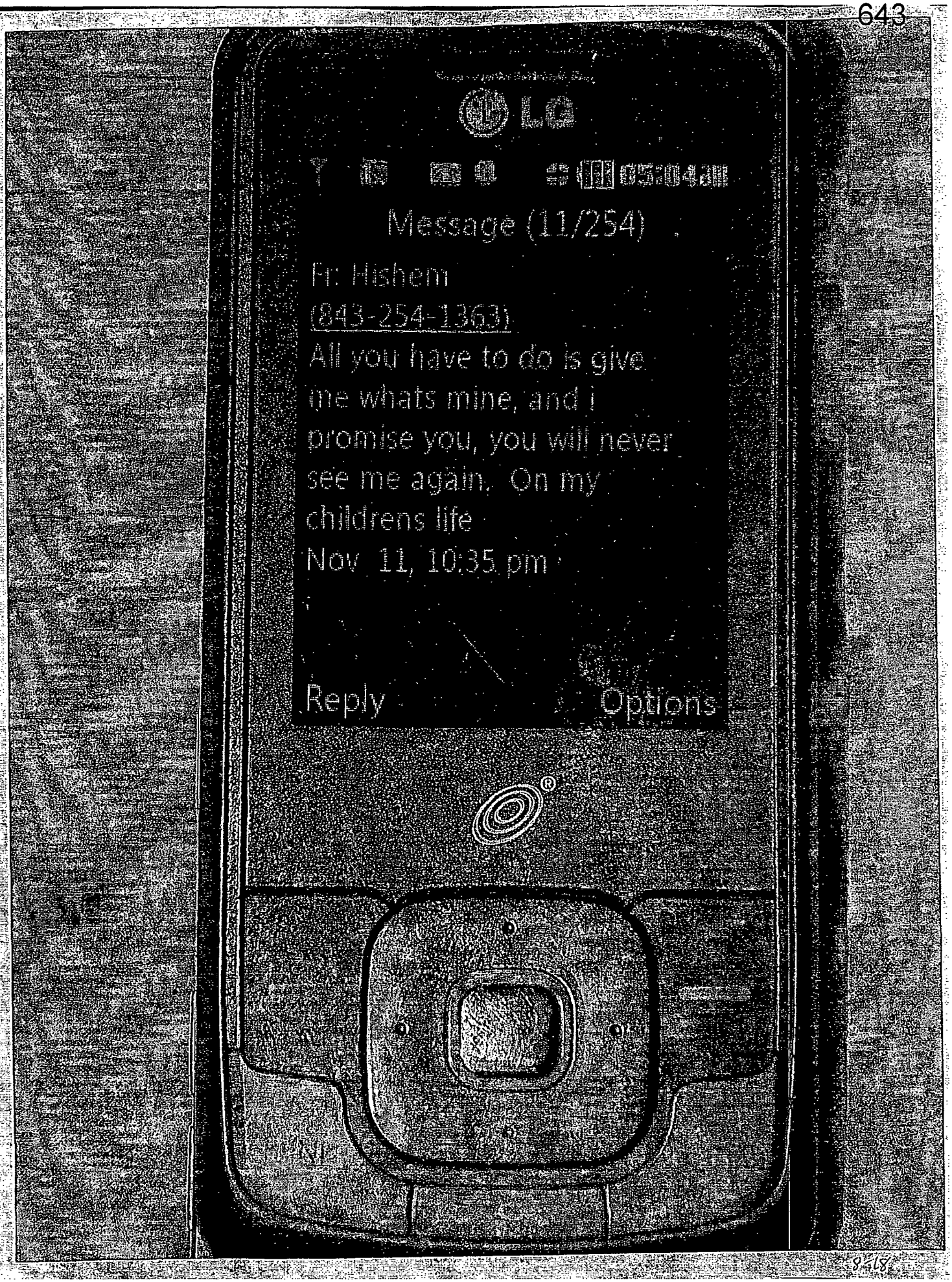
LG
05:04
Message (11/254)
Fr: Hishem
(843-254-1363)
All you have to do is give me whats mine, and i promise you, you will never see me again. On my childrens life
Nov 11, 10:35 pm
Reply
Options

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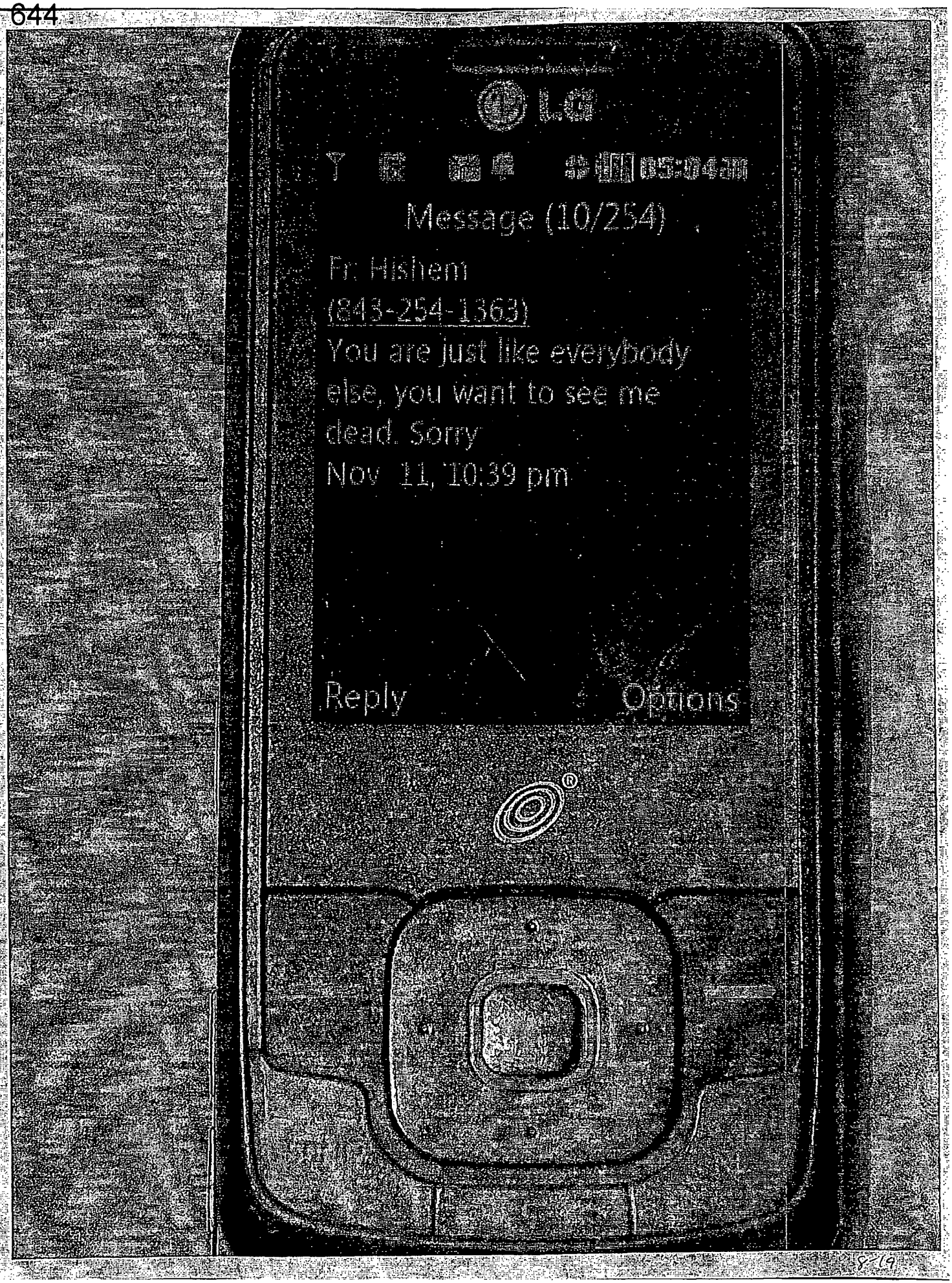
LG
05:04 am
Message (10/254)
Fr: Hishem
(843-254-1363)
You are just like everybody
else, you want to see me
dead. Sorry
Nov 11, 10:39 pm
Reply
Options

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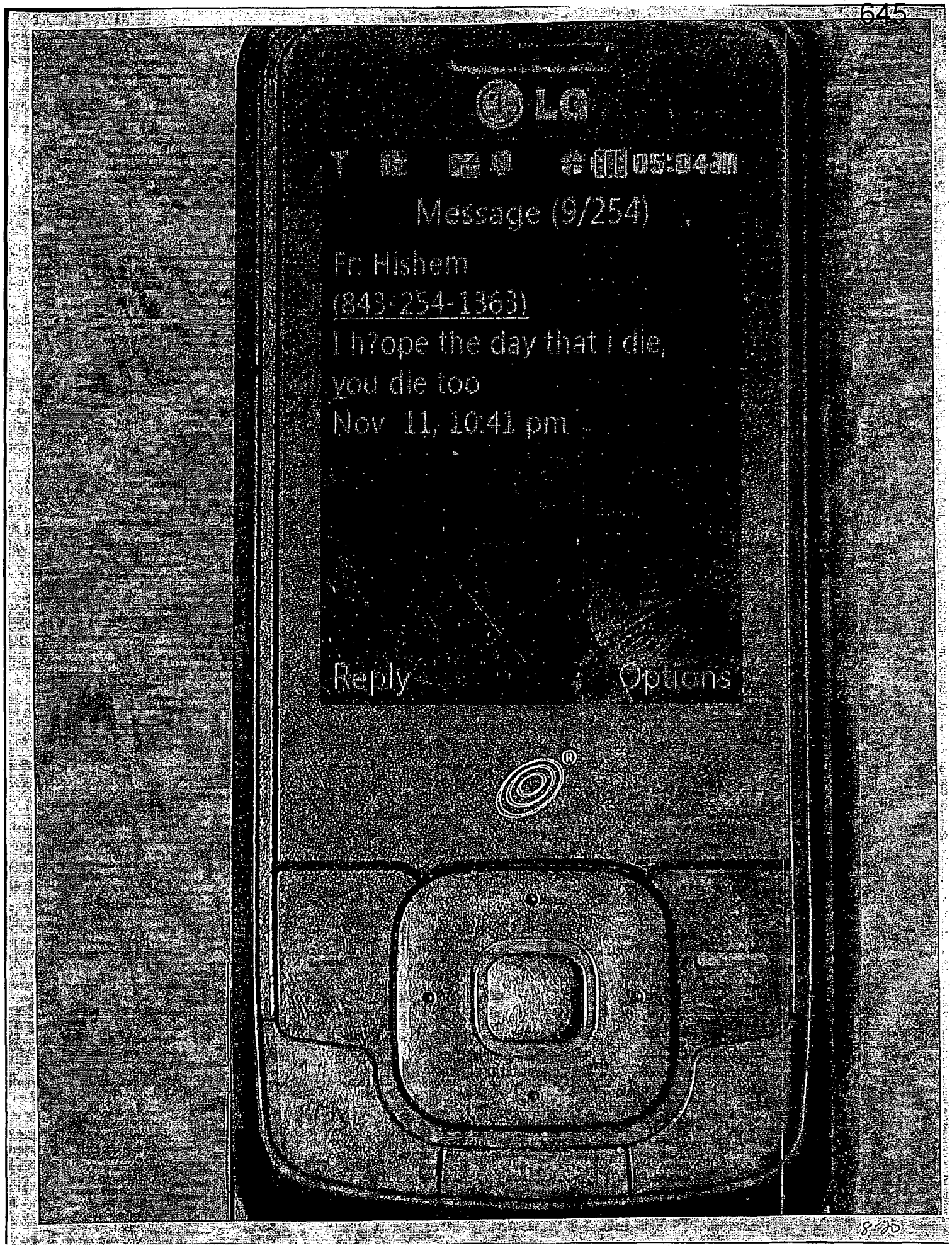
LG
05:04am
Message (9/254)
Fr: Hishem
(843-254-1363)
I h?ope the day that i die,
you die too
Nov 11, 10:41 pm
Reply
Options

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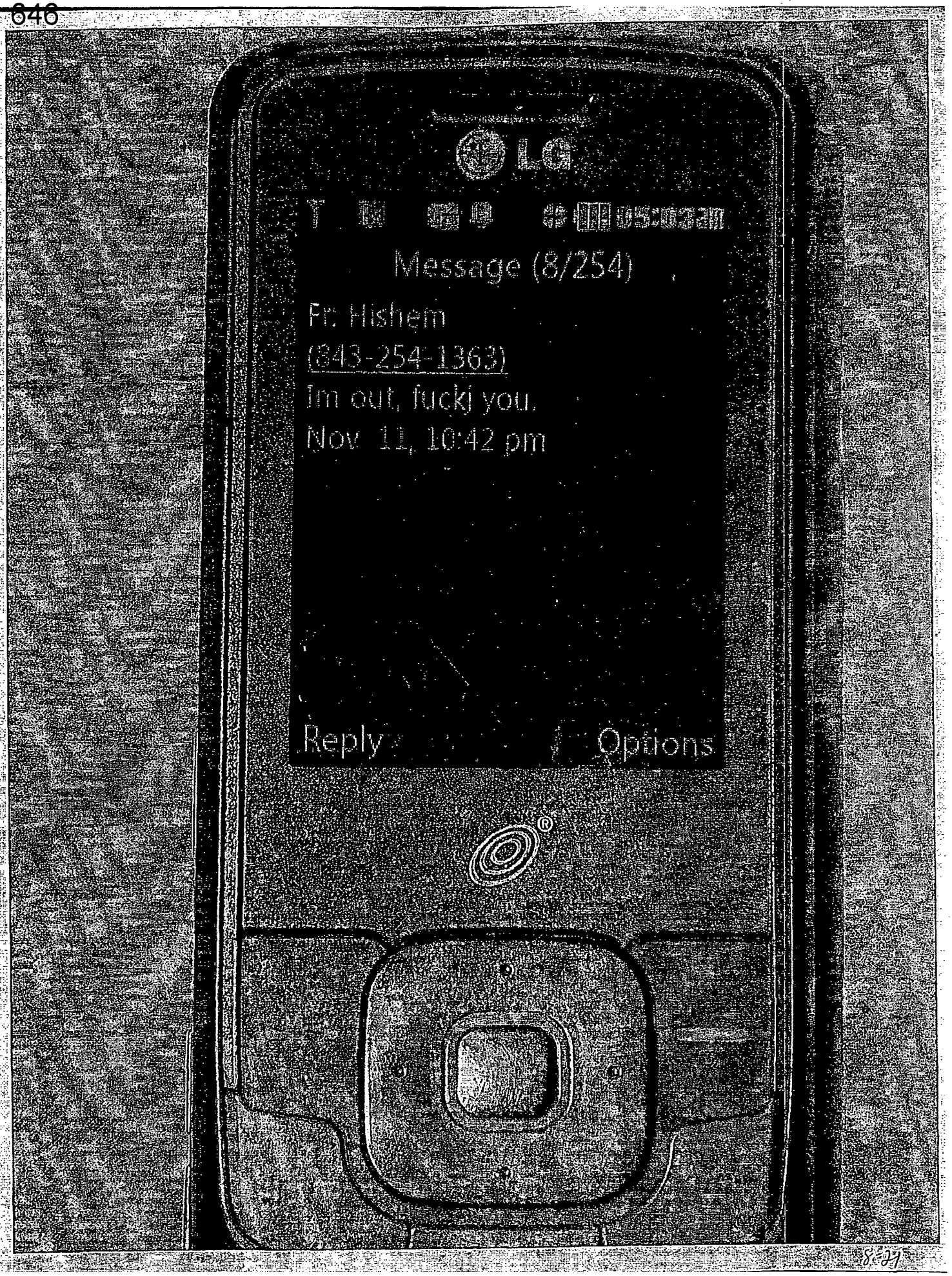
LG
05:03 AM
Message (8/254)
Fr: Hishem
(843-254-1363)
Im out, fuckj you.
Nov 11, 10:42 pm
Reply
Options

8-24

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LG
Message (6/254)
Fr: Hishem
(843-254-1363)
I dont trusth you
Nov 11, 10:58 pm
Reply
Options

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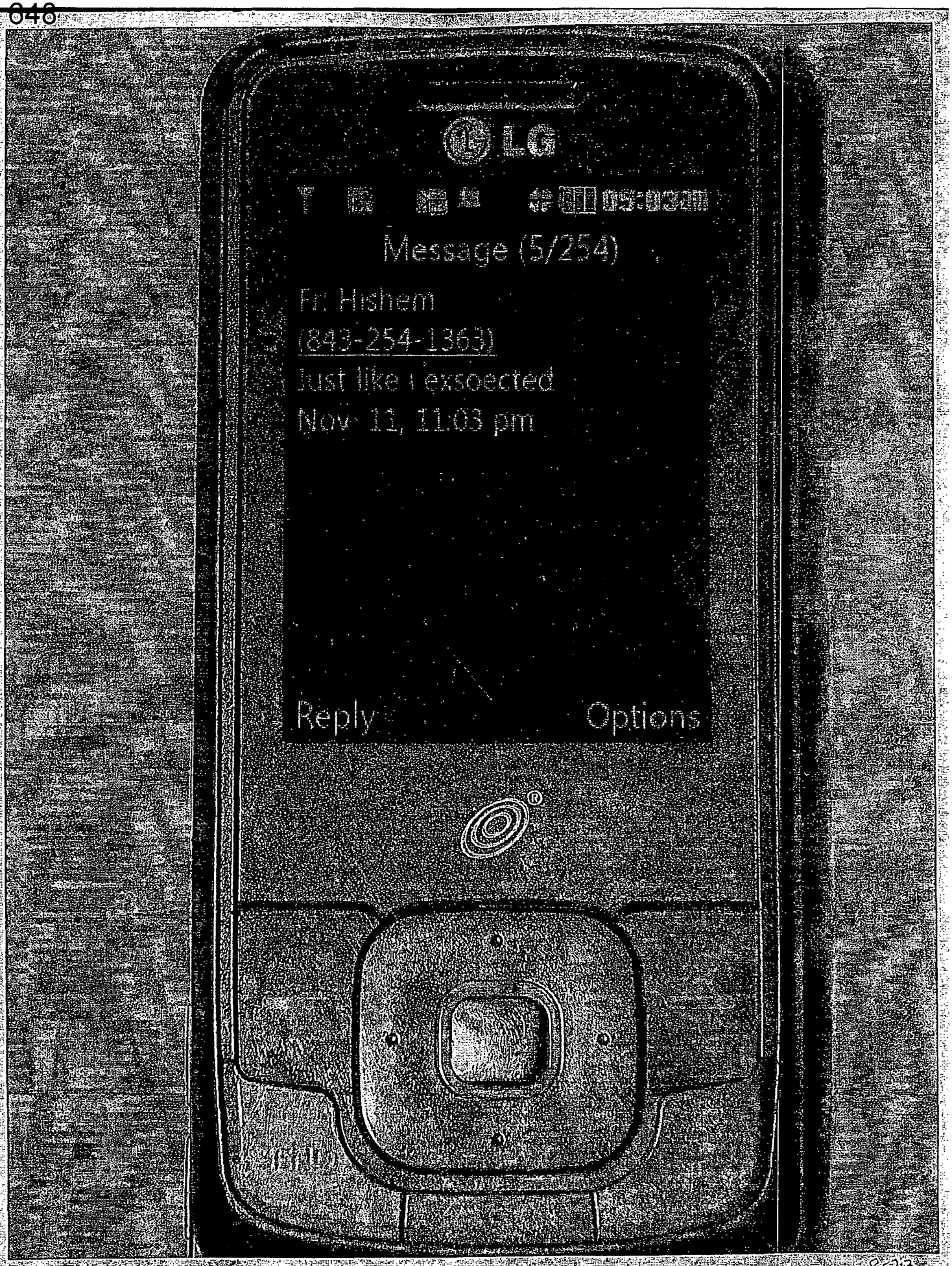
LG
05:03am
Message (5/254)
Fr: Hishem
(843-254-1363)
Just like i exsoected
Nov 11, 11:03 pm
Reply
Options

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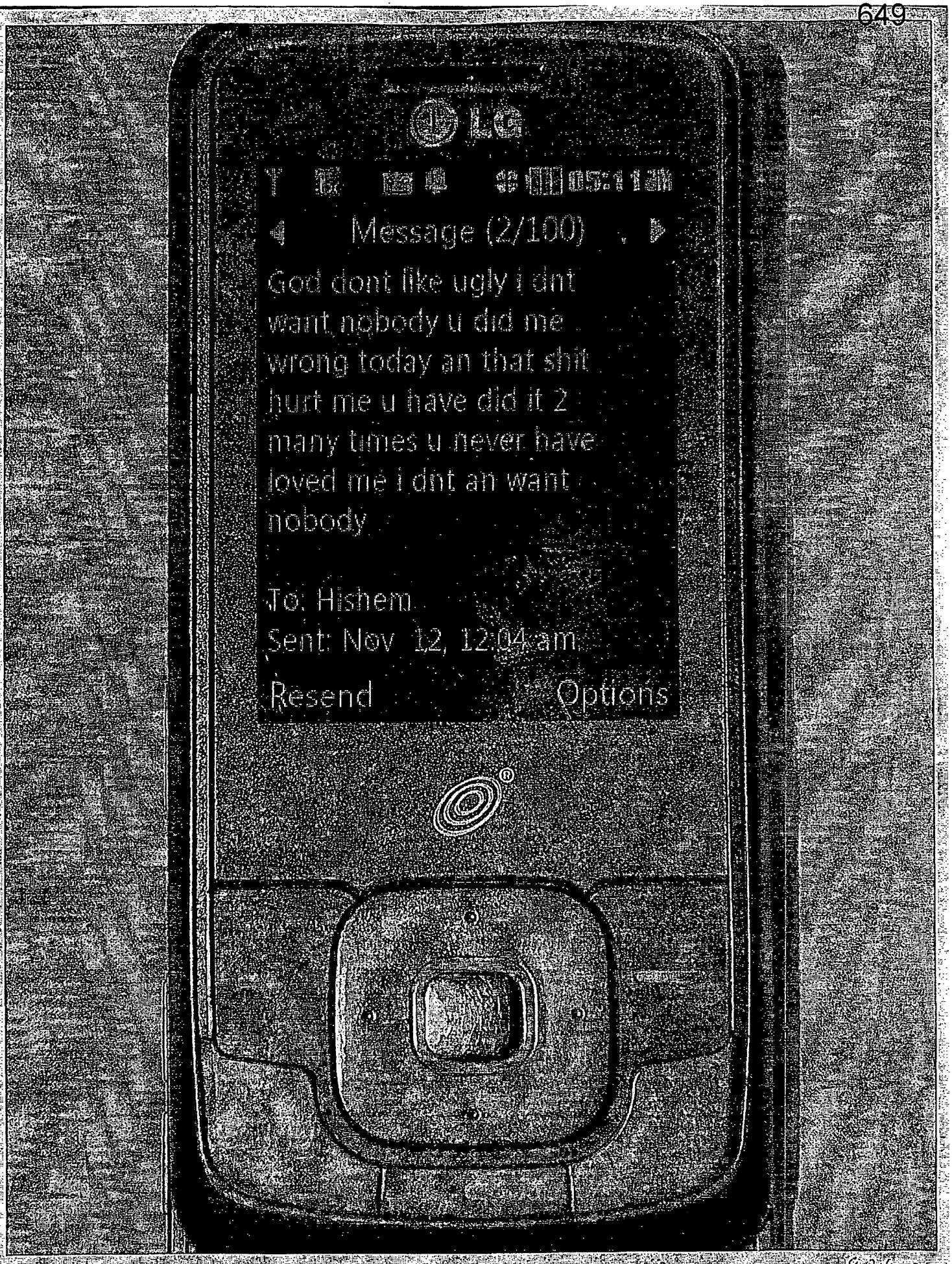
LG
Message (2/100)
God dont like ugly i dnt want nobody u did me wrong today an that shit hurt me u have did it 2 many times u never have loved me i dnt an want nobody
To: Hishem
Sent: Nov 12, 12:04am
Resend
Options

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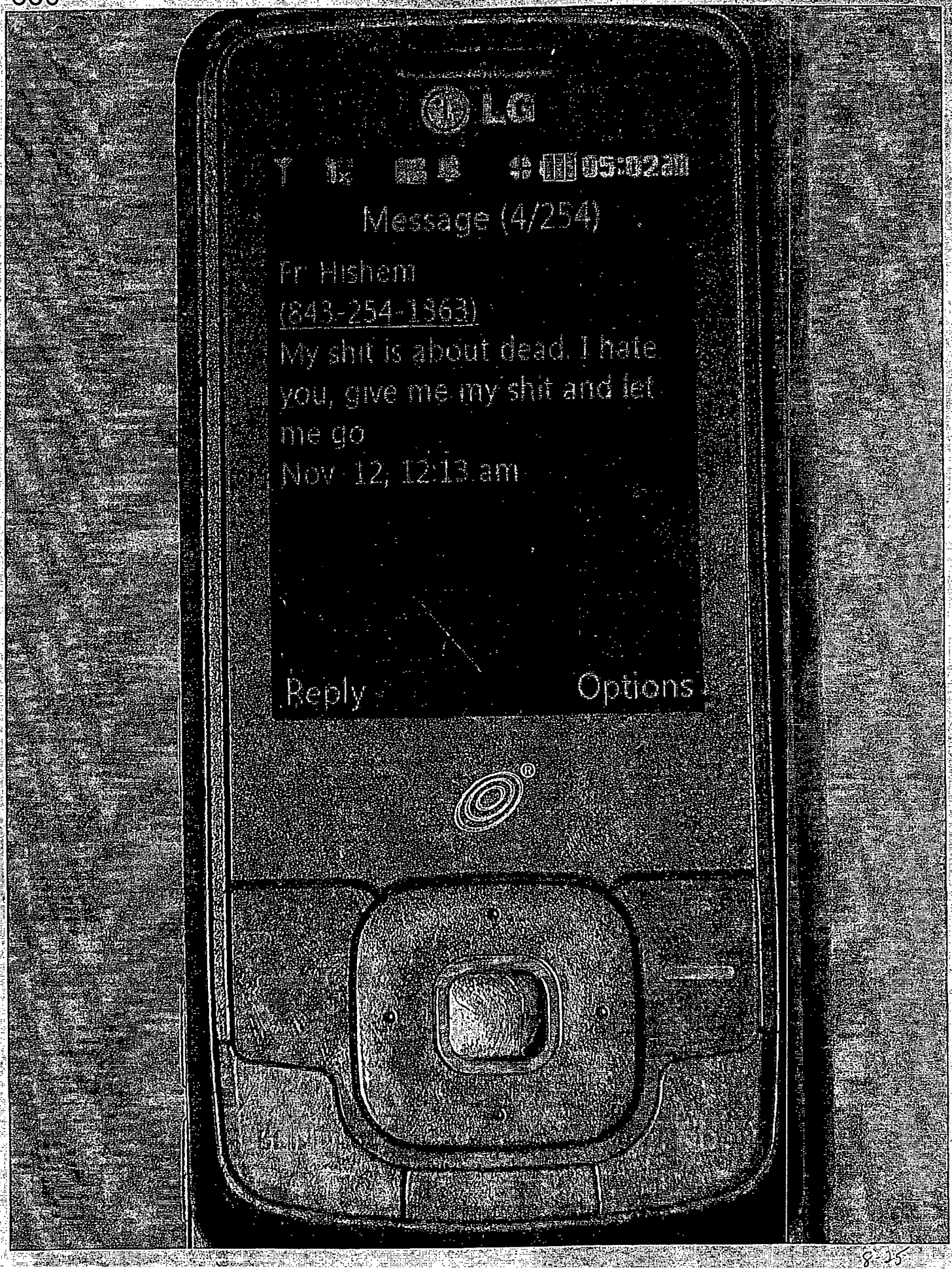
LG
05:02am
Message (4/254)
Fr Hishem
(843-254-1363)
My shit is about dead. I hate you, give me my shit and let me go
Nov 12, 12:13 am
Reply
Options

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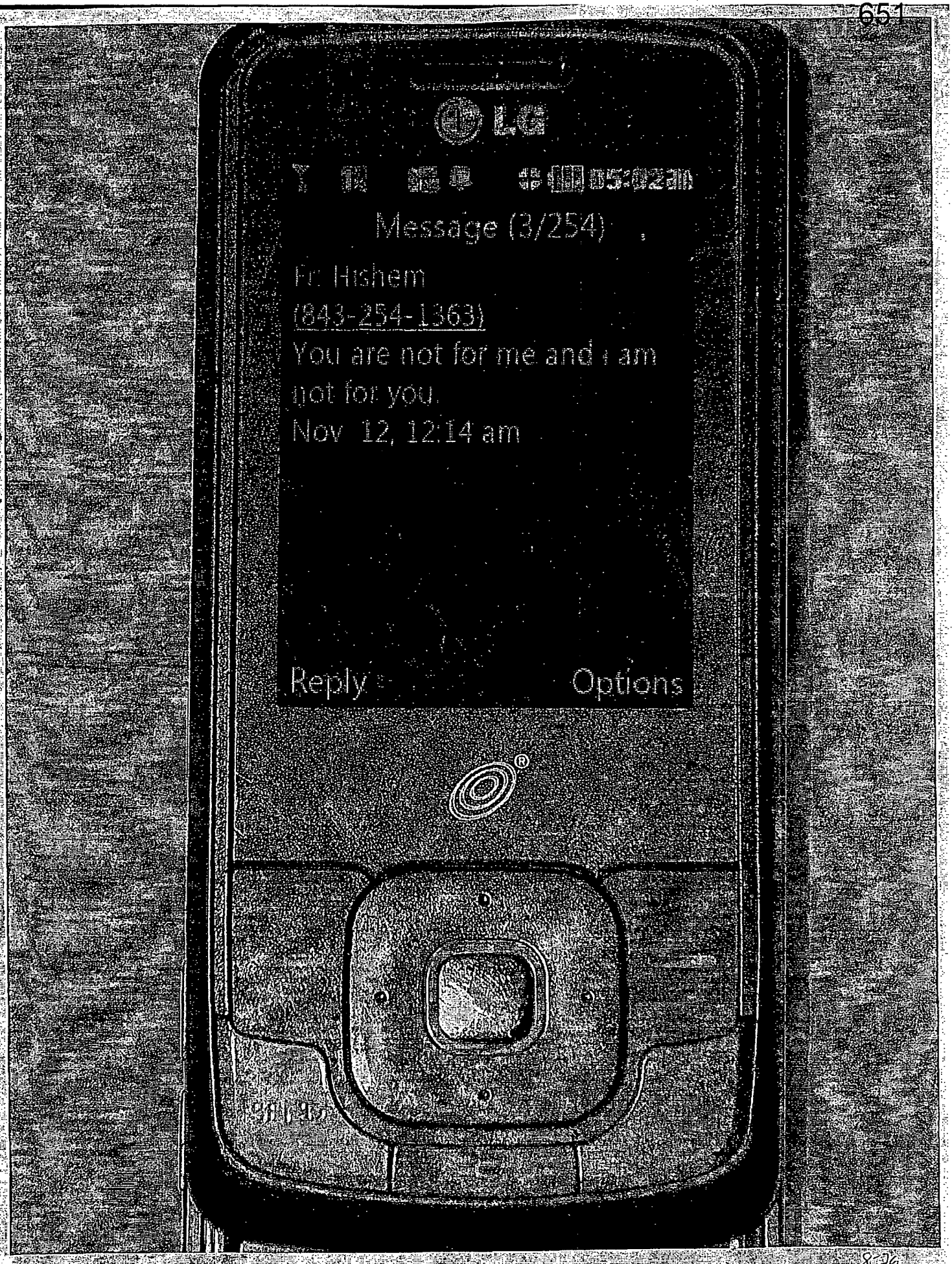
LG
05:02am
Message (3/254)
Fr: Hishem
(843-254-1363)
You are not for me and i am
not for you.
Nov 12, 12:14 am
Reply
Options

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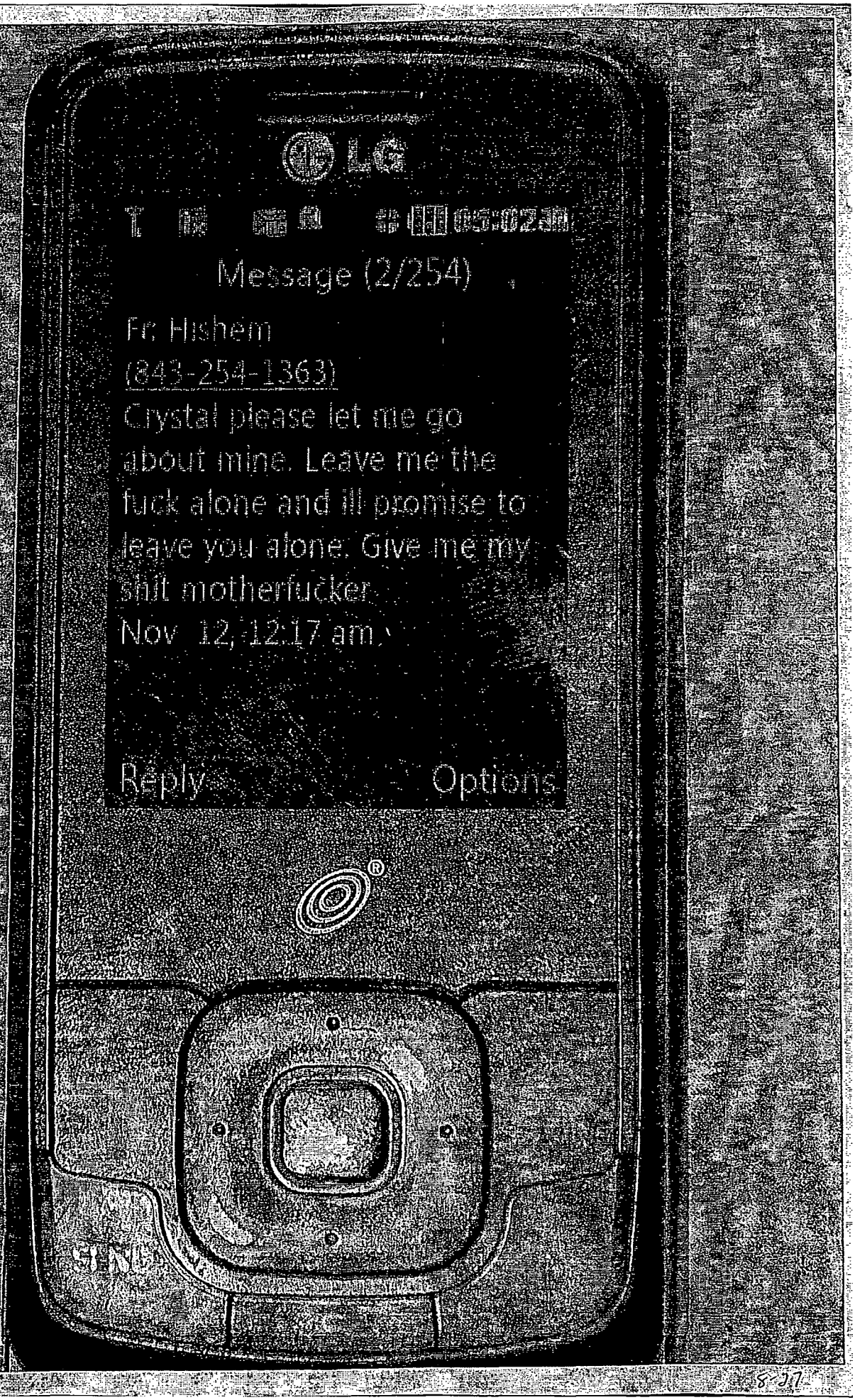
652


LG
Message (2/254)
Fr: Hishem
(843-254-1363)
Crystal please let me go about mine. Leave me the fuck alone and ill promise to leave you alone. Give me my shit motherfucker
Nov 12, 12:17 am
Reply
Options

8-17

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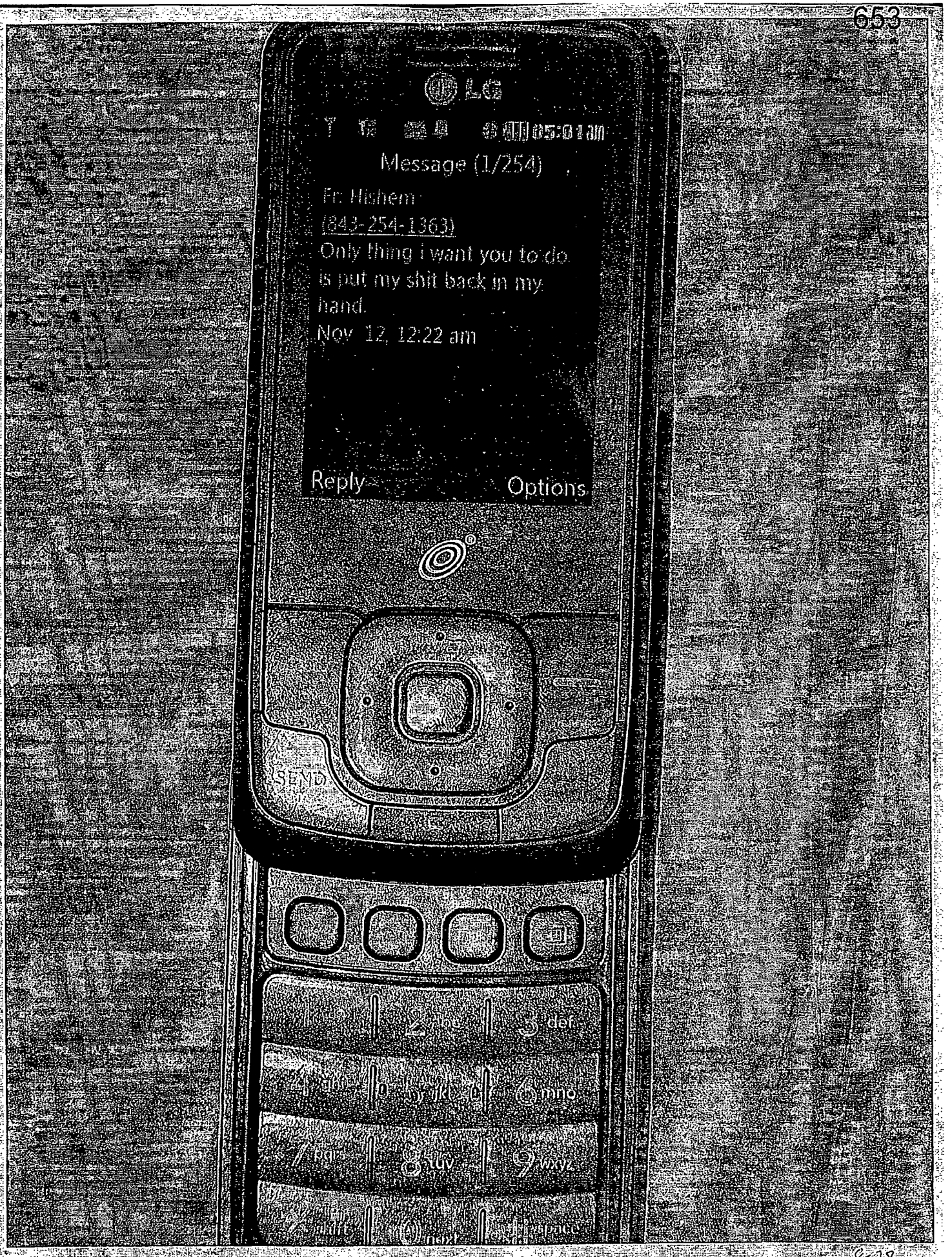
LG
05:01 am
Message (1/254)
Fr: Nishem
(843-254-1363)
Only thing i want you to do
is put my shit back in my
hand.
Nov 12, 12:22 am
Reply
Options
SEND
2 abc
3 def
6 mno
7 pqrs
8 tuv
9 wxyz
0 next

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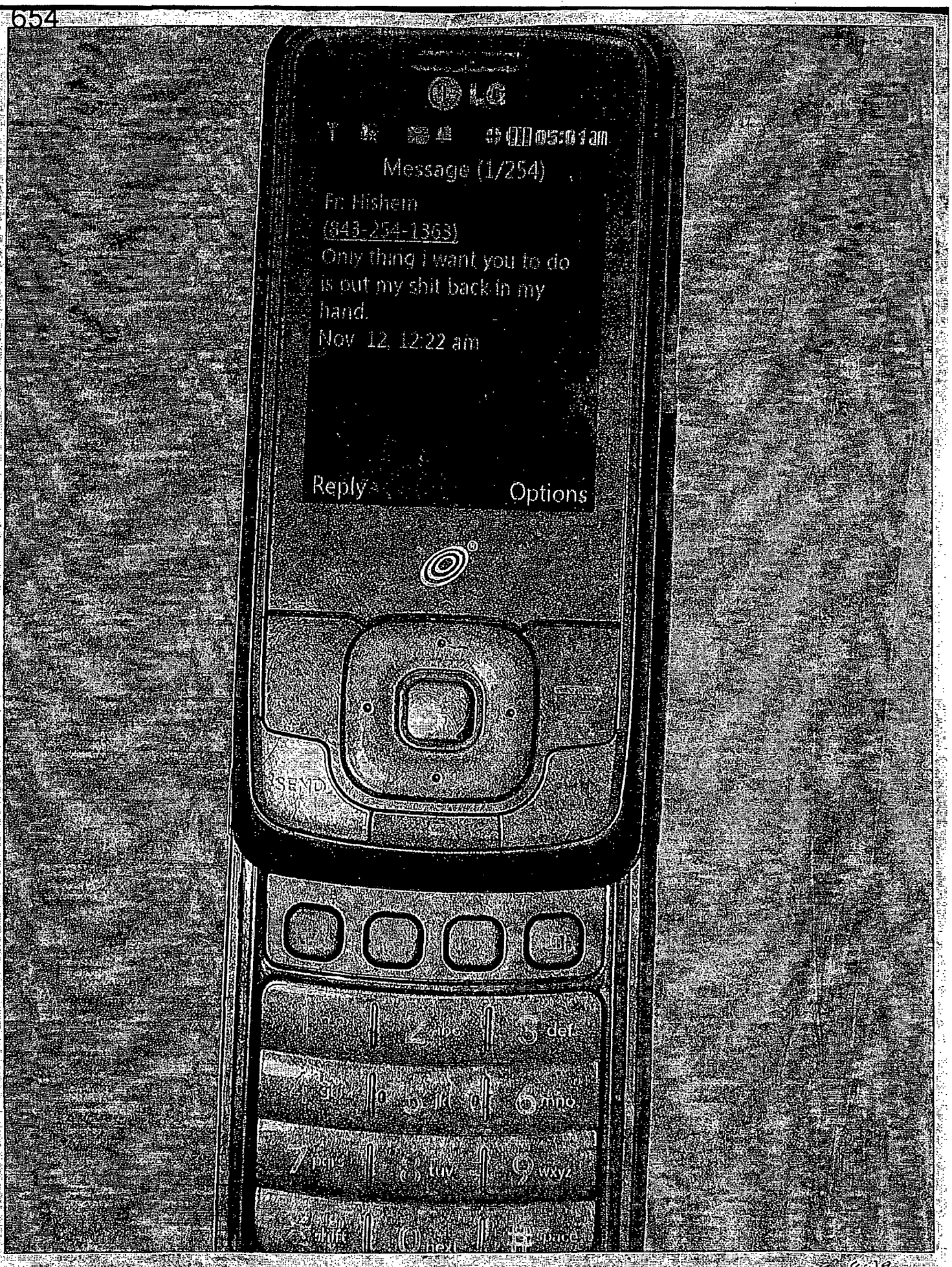
654


LG
05:01am
Message (1/254)
Fr: Hishem
(843-254-1363)
Only thing i want you to do is out my shit back in my hand.
Nov 12, 12:22 am
Reply
Options
SEND
2 abc
3 def
6 mno
8 tuv
9 wxyz
0 next
Tap space

8-29

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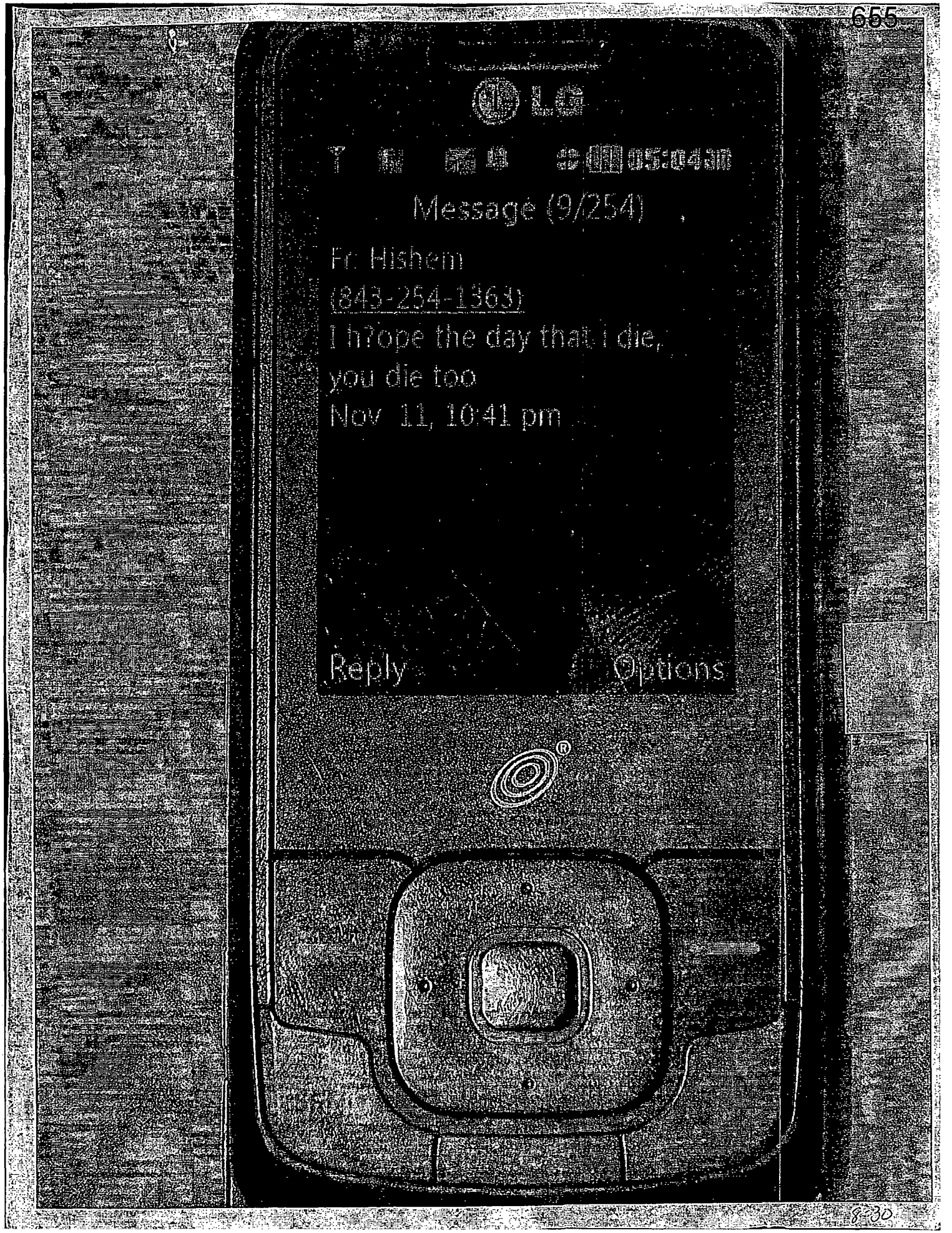
LG
05:04 am
Message (9/254)
Fr: Hishem
(843-254-1363)
I hope the day that I die,
you die too
Nov 11, 10:41 pm
Reply
Options

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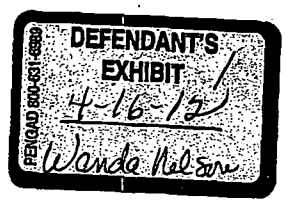
INCIDENT INTERVIEW REPORT



YCSO CASE NUMBER: 201000048533 LEAD NUMBER:

PERSON INTERVIEWED: Hashim Ali ONeal

DATE OF BIRTH: [redacted] SOCIAL SECURITY NUMBER:

ADDRESS: (HOME) [redacted]

Conway S.C. 29526 TELEPHONE:

(WORK) TELEPHONE:

DATE OF INTERVIEW: 11/12/10 TIME: 6:29 pm

LOCATION OF INTERVIEW: MJC / CID

PURPOSE/TOPIC OF INTERVIEW: Attempted Murder

DETAILS OF INTERVIEW:

I met with Hashim in the conference room of the Detective Division. I offered Hashim something to drink and he declined. I read him his Miranda rights from a YCSO waiver of rights form. Hashim acknowledged he understood his rights and agreed to talk by signing the form.

Hashim stated he and Crystal began to argue when she came home from getting her hair done. Hashim was watching a movie and talking loudly with his son. This was around 6:00 pm. She asked him to be quite and went upstairs for awhile. She came back down and left the residence, Hashim stated he did not know where she went or what time this was. He did state they talked on the phone and text each other a few times while she was gone. When Crystal came back home they began to argue about the ring he had given her. Hashim states he had decided that the relationship was off and asked for the ring back and was going to leave the residence. Hashim then packed his belongings in his car and was preparing to leave when he got the ring back. She told him it was in the console of her car and this is where he found it. Hashim said he then left in his car and drove around awhile then came back to the residence.

I then asked what happened when he came back and he stated "whatever she said happened." I asked for his side of the story and he repeated whatever she said. Hashim then asked for a lawyer and the interview was terminated at that time.

OFFICER / AGENT: Eddie Strait

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INCIDENT INTERVIEW REPORT

YCSO CASE NUMBER: 201000048533 LEAD NUMBER: _____

PERSON INTERVIEWED: Crystal Caldwell

DATE OF BIRTH: [redacted] SOCIAL SECURITY NUMBER: _____

ADDRESS: (HOME) [redacted]

Rock Hill S.C. TELEPHONE: [redacted]

(WORK) _____

_____ TELEPHONE: _____

DATE OF INTERVIEW: 11/12/10 TIME: 6:29 pm

LOCATION OF INTERVIEW: PMC

PURPOSE/TOPIC OF INTERVIEW: Attempted Murder

DETAILS OF INTERVIEW:

I spoke with Crystal Caldwell in the emergency room at Piedmont Medical Center where she was being treated for a gunshot wound. She stated she did not who shot her, but gave details of an argument between her and her boyfriend, Hashim Oneal.

Crystal stated that she left the residence around 7:30 or 8:00 pm because Hashim had said nasty things to her. She had told him to leave the residence and he did pack his things up into his car. She stated they did talk on the phone and send text messages to each other while she was gone. Crystal came home around midnight and he was still there. Crystal asked him for the house keys and the keys to her car. He asked for his ring back and she gave it to him then.

Crystal stated she then went to walk out of the apartment and heard a noise and felt like she could not walk. Hashim then said it looks like you have been shot. Hashim then brought her to PMC to be treated.

When I asked her if Hashim had shot her, she replied she did not see him shoot her, but there were the only two in the apartment.

DEFENDANT'S EXHIBIT 2
4-16-12
Wanda Nelson
PENGAD 800-631-6989

OFFICER / AGENT: Eddie Strait

PAGE 1 OF 1

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INCIDENT INTERVIEW REPORT

YCSO CASE NUMBER: 201000048533 LEAD NUMBER: _____

PERSON INTERVIEWED: _____

DATE OF BIRTH: _____ SOCIAL SECURITY NUMBER: _____

ADDRESS: (HOME) _____

_____ TELEPHONE: _____

(WORK) _____

_____ TELEPHONE: _____

DATE OF INTERVIEW: 11/12/10 TIME: _____

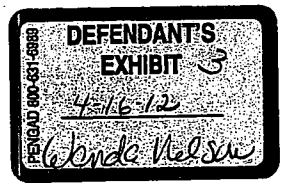
LOCATION OF INTERVIEW: PMC

PURPOSE/TOPIC OF INTERVIEW: Attempted Murder

DETAILS OF INTERVIEW:

Crystal Caldwell called Hashim Oneal on her phone in front of me and asked him to come back to PMC because she needed to go to CMC in Charlotte and she was scared. She told him she needed somebody with her before she went. Hashim told her he would come back to see her.

I found Hashim sitting in his car in the parking lot of PMC and asked him to step out. I placed Hashim in hand cuffs for officer safety and asked if he had any weapons on him. He stated he did not and I could check and see. I did a pat down search of Hashim and did not find any weapons. I then informed him he was under arrest for attempted murder and advised him of his rights. I asked Hashim if he wanted to talk with me at the office and he sated he would.



OFFICER / AGENT: Eddie Strait

FORM 5

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
County of York)

2012 CP4603568

Hashim Alli Oneil-350619)
Full name and prison number (if any) of Applicant)

v.

State of South Carolina)

APPLICATION FOR POST-CONVICTION RELIEF

FILED-RECEIVED
2012 OCT -8 AM 11:44
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, S.C.

INSTRUCTIONS ▪ 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 MacDougall Corr. Inst.

2. Name and location of Court which imposed sentence York County General Sessions - 1675 York Hwy. York, S.C 29745

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) I was not indicted of the offenses which sentence was imposed

(b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 4.18.12 - 10yrs. Non-violent

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) My attorney Refused to File, after I inform him to do so.

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INEffective Assistance of Counsel

(b) Perjured Testimony

(c) Instructions

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Failure to Raise defenses and Failure to file appeal.

(b) The State's star witness Statement and testimony are inconsistant.

(c) Instructions given to jury were not justified by the Evidence.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(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 Ayes@ to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

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?

NO

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

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? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Robert A. MuckenFuss - 201 North Tryon St. PO Box 31247 Charlotte, N.C. 28202

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Arraignment and Plea, trial and Sentencing.

ii. _____

iii. _____

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

Dismissal OR Retrial

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of York)

I, Hashim Alli O'Neil, 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.

H. O'Neil

SUBSCRIBED C. HUNTER NOTARY PUBLIC SOUTH CAROLINA

SWORN to and subscribed before me this 3rd day of October, 2012.

Sheri C. Hunter (L.S.)
Notary Public

My Commission Expires: June 18, 2018

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

I, Hashim Ali O'Neil, 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.

Applicant

SWORN to or affirmed to and subscribed before me this 3rd day of October, 2012.

SHERYL C. HUNTER NOTARY PUBLIC SOUTH CAROLINA

Notary Public

My Commission Expires: June 18, 2018

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Hashin Alli Oneil, #350619, Applicant, v. State of South Carolina, Respondent.	)	2012-CP-46-3568 **RETURN**

In response to the post-conviction relief application filed on October 8, 2012, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The Applicant was indicted by the April 2012 term of the York County Grand Jury for Attempted Murder (2012-GS-46-0977) and Possession of a Firearm during the Commission of a Violent Crime (2012-GS-46-0977A). Robert Muckenfuss, Esquire, represented him. On April 18, 2012, the Applicant proceeded to a jury trial pursuant to which he was found guilty of Assault and Battery, 1st degree as a lesser included offense of Attempted Murder. The Honorable John C. Hayes, III sentenced the Applicant to confinement for ten (10) years for Assault and Battery, 1st degree. The Applicant did not appeal his conviction or sentence.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel"
    a. "Failed to raise defenses and Failure to file appeal."
2. "Perjured testimony"
    a. "The State's star witness(sic) statement and testimony are inconsistent."
3. "Instructions"
    a. "Instructions given to jury were not justified by the evidence."

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, and the South Carolina Department of Corrections' records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used 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 v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

IV.

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

V.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

April 25, 2013.

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS
	2012-CP-46-3568
HASHIN A. O'NEIL, 350619 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	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(s) by depositing same in the United States mail, postage prepaid:

Rebecca K. Lindahl
550 S. Tryon St., Ste 2900
Charlotte, NC 28202

DATED this 25th day of April, 2013.

Chandra Young, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
County of York	)	2012-CP-46-03568
	)	
	)	
Hashin Ali O'Neil,	)	
	)	
Applicant,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

August 16th, 2013
York, South Carolina

BEFORE:

THE HONORABLE G. EDWARD WELMAKER, JUDGE.

APPEARANCES:

CHARLES T. BROOKS, III, ESQ.
Attorney for the Applicant

J. RUTLEDGE JOHNSON, ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

AMINAH R. HARDY, RPR, CVR-CM
Official Court Reporter

INDEX

WITNESS	Direct	Cross
Hashin Ali O'Neil	3	9
Robert Muckenfuss	11	16
Officer Beasley	19	

EXHIBITS

No.	Description	Page

(No exhibits were marked.)

PROCEEDINGS

MR. JOHNSON: May it please the Court, Your Honor. This is the case of Hashin O'Neil versus State of South Carolina, case number 2012-CP-46-3568. Mr. O'Neil was indicted at the April 2012 term of the York County grand jury for attempted murder and possession of a firearm during the commission of a violent crime. On April 18, 2012, he proceeded to a trial pursuant to which he was found guilty of the lesser included of assault and battery first degree -- the lesser included of attempted murder. He was acquitted on the attempted murder and on assault and battery of a high and aggravated nature. The Honorable John C. Hayes, III, sentenced him to confinement for ten years for the assault and battery first degree. He did not appeal his conviction or sentence; however, he filed a timely PCR application on October 8, 2012, and the State filed its return on April 25, 2013. And he is represented here today by Mr. Charles Brooks.

THE COURT: All right. Mr. Brooks, ready to proceed?

MR. BROOKS: Yes, sir.

THE COURT: Call your first witness.

MR. BROOKS: We call Mr. O'Neil to the stand.

DIRECT EXAMINATION

BY MR. BROOKS

Q. Mr. O'Neil?

A. Yes.
Q. How are you today?
A. I'm doing fine.
Q. Now, you brought this post-conviction relief application; is that correct?
A. Yes, sir, I did.
Q. Now, I'm going to ask you a couple background questions. You are currently scheduled to max out when?
A. In 2015 December.
Q. And you are actually parole eligible now?
A. Yes, I am.
Q. So -- and do you understand that the only remedy that we can get in this hearing is to get you a new trial and, in effect, start over?
A. Right.
Q. And you understand that based on procedural issues, appeal rights of us or the State that that would mean you would probably -- if you're successful, you would probably not get your new trial until maybe three years from now when you are no longer incarcerated here?
A. I understand.
Q. And you understand that and I've explained that to you?
A. Yes, you have.
Q. And you indicate you still want to go forward; is

that correct?
A. Yes, I have.
Q. Now, you had Mr. Muckenfuss as your lawyer?
A. Yes.
Q. And he was court appointed to you?
A. Yes he was.
Q. Okay. And you brought your application alleging ineffective assistance of counsel; is that correct?
A. Yes.
Q. Now, bear in mind as we go through the question-and-answer process with you on the stand, the lady seated next to your left is the court reporter. So it's important that you give a verbal response and not just rely on nodding of your head, okay? Do you understand that?
A. Yes, I do.
Q. Okay. Now, one of the issues you raised was that he didn't file your appeal; is that correct?
A. Yes, I did.
Q. And obviously you wanted to appeal --
A. Yes, I did.
Q. -- what happened; is that correct?
A. Yes, I did.
Q. And as far as you know, no appeal was ever filed?
A. It was not.

Q. Okay. Another issue you talked about was the jury instructions?
A. Right.
Q. What was submitted to them to determine the outcome of the case; is that correct?
A. Right.
Q. The jury was given lesser-included instructions of attempted murder; is that correct?
A. Four included offenses.
Q. Okay. And it's your position they should not have been given that; is that correct?
A. Exactly.
Q. That your lawyer should have objected to that.
A. Exactly.
Q. If that happened, you would have only been faced with guilty or not guilty of attempted murder?
A. Exactly.
Q. Now, you understand that if that was the scenario, that the only thing the jury had to decide, that could have made your fate worse than it is?
A. Right.
Q. Okay. But you felt like based on the evidence that's the only thing that the jury should have been able to determine?
A. Right.

Q. Whether you were guilty or not guilty of attempted murder?
A. Exactly.
Q. And that no lesser-included offenses should have been submitted?
A. I don't believe they should have been submitted.
Q. Okay. And you feel that changed the dynamic of the case?
A. Yes, I did.
Q. Explain to the Court why you feel that changed the dynamic of the case.
A. Because I was charged with attempted murder and possession of a firearm during the commission of a violent crime. And I feel like these lesser-included offenses should not have been included into my trial because I wasn't informed of the existence of these included offenses, and my constitutional rights -- I feel like my constitutional rights were violated because I have an entitlement to be tried only on the charges approved by the grand jury. And I also have a 6th amendment right to be informed of the nature and cause of the accusations against me. And I also have a constitutional right to due process. So if I'm not aware of these four additional charges, how it is possible for me to prepare a defense for these additional charges when I was never informed of

the existence of these four additional charges?
Q. Okay. And obviously that's something you feel like your lawyer should --
A. He should have objected.
Q. -- have objected?
A. Exactly.
Q. And obviously that did not occur.
A. It did not occur.
Q. Okay. Now, you also want to talk about -- there's an issue of subject matter jurisdiction or lack thereof?
A. Right. I did not waive my right to presentment to a grand jury, and I did not plead guilty, so I believe the court lacks subject matter jurisdiction to convict and sentence me for an offense that I was never charged with.
Q. Which is?
A. The assault and battery first degree.
Q. Okay. And that's what you feel like that changed the dynamic of what you were facing?
A. I believe a material variance was created between these four additional charges and the allegations and the indictment.
Q. Okay.
A. Yes. And I feel like my attorney should have objected, and by him not objecting to the supplemental jury instructions, it highlights deficient performance

because this material variance was created, and I was prejudiced because -- by him not objecting to these supplemental jury instructions it highlights -- excuse me. It basically undermined the confidence of the outcome of my trial.

Q. All right. Now having said this Mr. O'Neil, have we covered the issues you wanted to raise on PCR, or is there anything else?

A. That's basically the issues that I wanted to basically highlight. Yes.

Q. Okay. And in conclusion, you want a new trial to be granted to you; is that correct?

A. Yes. Yes.

Q. Answer any questions Mr. Johnson has.

CROSS-EXAMINATION

BY MR. JOHNSON

Q. Just briefly, Mr. O'Neil, are you aware that the statute for attempted murder actually says that includes the lesser-included offenses of assault and battery high and aggravated nature and assault and battery first degree?

A. Yes, I do understand that there are lesser-included offenses to attempted murder. But I also understand that these lesser-included offenses also have elements that are not included in the greater-included offense. So if you

accuse me of shooting someone and possessing a firearm during the commission of a violent crime and the jury determines that I did not commit these offenses, how are you going to say, "Okay, he did commit this crime here. Let's include these additional charges and convict him of something that's totally irrelevant to what he was charged with."

Q. What -- but my question is that per the statute in South Carolina, per the law in South Carolina --

A. Yes.

Q. -- those lesser-included offense come in whether you're indicted with them or not. Do you understand that?

A. No, I do not.

Q. Okay. You also understand there's testimony at the trial that it was just you and your girlfriend in the apartment, correct?

A. Right.

Q. And there was a gunshot?

A. Yes.

Q. And she ended up with a gunshot wound?

A. Yes.

Q. And she did not fire that gun?

A. Who said she did not --

Q. That's from testimony at trial.

A. That's the testimony, yes.

Q. Okay. So by process of elimination, the only person that could have fired that gun is you. That's the testimony at trial.

A. That's the testimony, testimony.

Q. That's what was presented to the jury?

A. Right.

MR. JOHNSON: That's all I have for this witness, Your Honor.

THE COURT: Any redirect?

MR. BROOKS: No, sir.

We'd call Mr. Muckenfuss to the stand.

DIRECT EXAMINATION:

BY MR. BROOKS

Q. Mr. Muckenfuss, how are you?

A. Good. How are you doing?

Q. Doing good. You represented Mr. O'Neil in this matter?

A. I did.

Q. You were court appointed in this matter?

A. I was.

Q. Did you object to this lesser-included offense instructions being submitted to the jury?

A. To give a little background of how that came about, at the end of the trial, Judge Hayes asked us to come back into chambers to discuss the jury instructions. It was at

that point that Judge Hayes discussed the lesser-included offenses with counsel. And he indicated that he would instruct the jury on the lesser-included offense. At that point, after the discussion with the judge in chambers, we met with Mr. O'Neil. There were two other cocounsel with me trying the case with me. And we met with Mr. O'Neil and discussed the lesser-included offense with him. And at that point, it was my belief it was appropriate for the case and it was good for Mr. O'Neil, so I did not object to the lesser-included offenses.

Q. All right. So what I'm hearing you say is you discussed this with him?

A. That's correct.

Q. And was there anybody else present during these discussions?

A. There were my cocounsel, two lawyers from my firm Elizabeth Timmermans and Jenny Boswell, who tried the case with me.

Q. And you explained to him that a jury could come back with something lesser by virtue of the fact of this being submitted?

A. That's correct.

Q. Did you -- you do acknowledge you did not file an appeal the notice of intent to appeal.

A. That is correct.

Q. So you don't dispute his version of no appeal being filed?

A. I don't dispute that the fact that no appeal was filed. I do dispute the -- how it came about, I guess, the description of any conversation we had with them that I do dispute that aspect of it. And I can elaborate if you'd like me to.

Q. Please.

A. So immediately after the verdict, we met with Mr. O'Neil again. Ms. Timmermans, Ms. Boswell, and myself met with Mr. O'Neil in the holding cell. We actually tried the case in this courtroom, and met with Mr. O'Neil in the holding cell. Mr. O'Neil, as best I recall, asked about an appeal. He asked our opinion about an appeal. We discussed with him the fact that -- and keep in mind when we got the verdict, which was guilty on assault and battery first degree, nonviolent, in my view and my cocounsel's view, that was a victory to some extent for us. And I understand he was convicted, but that was a success based on the evidence we were facing in the trial.

We had some significant evidentiary successes. We kept out some significant evidence in the case that was damaging to Mr. O'Neil's case. We kept that out of trial. So we felt like that conviction on assault and battery first degree, nonviolent, was a good result based on what

we were facing. So we advised Mr. O'Neil that we would not -- that it would be better not to appeal the case. We didn't feel like any result would have been better than what we got. Obviously, yeah, I told him it's his decision whether he wanted to appeal or not.

Mr. O'Neil didn't say anything after that. He didn't tell me to appeal the case. And he didn't say "don't appeal my case." It was my belief and I believe the belief of my cocounsel after that meeting that, you know, it was our understanding he did not want to appeal. We didn't expressly state it one way or the other, but it was our advice to him not to appeal it and that's how we left it from that conversation. And after that we did not file an appeal.

Q. Now you -- he was acquitted of the attempted murder?

A. He was acquitted of attempted murder and possession of a firearm.

Q. Okay. So if he did appeal -- and he wouldn't have had anything to lose had he appealed, right?

A. I don't know that.

Q. Well, let's think about it. He's already been acquitted of the attempted murder and the possession of a weapon. So in double jeopardy, he can't be tried for that again. He's already been acquitted. You understand that?

A. I would acknowledge that.

Q. So the only thing that he could lose is if he ended up having to go trial again on what he was convicted of, which the judge gave him ten years. Right?

A. Correct.

Q. Okay. And is it your understanding that is the maximum that he could get for that particular charge, what he was convicted of?

A. I can't recall.

Q. Okay. If it is the maximum, then you would acknowledge that going forward and appealing, he'd have nothing to lose. He was still going to go -- be sent to SCDC, right?

A. Correct.

Q. He'd already been given what we presume to be the maximum for what he was convicted of. He'd already been acquitted of attempted murder, the more serious charge for which he could not be tried again, and the weapons charge for which he would could not be tried again. So there was nothing for him to lose?

A. Perhaps. It's my view it's his decision whether he wants to appeal or not, and he did not instruct me to appeal. Whether he had anything to lose or not, I can't say that for sure, but he did not instruct me to appeal his case.

MR. BROOKS: Beg Court's indulgence.

THE COURT: Yes, sir.

MR. BROOKS: No other questions, Judge.

THE COURT: All right. You may cross-examine.

MR. JOHNSON: Just two, Your Honor.

CROSS-EXAMINATION:

BY MR. JOHNSON

Q Are you aware that section -- South Carolina law section 16-3-600, subsection b(3) states that assault and battery in the first degree is a lesser-included offense of attempted murder?

A. Yes, I'm aware of that.

Q. So the judge was proper in his instruction to the jury on the lesser-included offense?

A. That's my belief, yes.

Q. That's probably the reason you didn't object?

A. I did -- that is the reason I didn't object. I also -- again, during this trial, we were faced -- to put in context, there was a witness, the victim, who testified against Mr. O'Neil. And, you know, it was my belief she was at least fairly credible. We did the best we could to cross-examine her. And we kept out some significant evidence, so it's my belief it would have been ineffective not to have lesser-included offenses because of the risk of him being convicted of attempted murder. And again, the State was seeking life without parole, so he had a

significant risk of life without parole if he was convicted of attempted murder. Our goal was to avoid that. That was our objective. So I believe it was a good thing to have the lesser-included offenses instructed.

Q. So it gives the jury other options than just the attempted murder?

A. Correct.

Q. Okay. And in that being a lesser-included offense, the Court had subject matter jurisdiction to convict of him of a lesser-included offense. Would you agree with me?

A. I would agree. It's my understanding the Court can instruct -- even over a defense objection can instruct the jury on lesser-included offenses if they're properly lesser-included offenses.

Q. But while he was indicted for attempted murder, it would not destroy subject matter jurisdiction that he's convicted on a lesser-included offense?

A. That's my understanding.

Q. Okay. And just to sum it one more time, he never instructed you to file an appeal on your behalf?

A. He did not -- my recollection, he did not instruct me to file an appeal.

Q. And you advised him about filing an appeal?

A. I did. He asked me the question and that

conversation. I gave him my opinion about that and -- but I told him it's obviously his decision whether to appeal or not. I think I even ultimately -- I may have told him that, you know, if he decided to appeal ultimately the Office of Appellate Defense would handle his appeal. I think we had that discussion, but he never instructed me to file the appeal.

MR. JOHNSON: No further questions, Your Honor.

THE COURT: Any redirect?

MR. BROOKS: No other questions, Judge.

THE COURT: Thank you. You may step down.

MR. BROOKS: Judge, we have one other witness, who is Officer Beasley, who is in the holding cell. My client wants me to call him to the stand.

THE COURT: All right.

MR. JOHNSON: Your Honor, just before that, do you have any objection to letting Mr. Muckenfuss go?

THE COURT: Any objection?

MR. BROOKS: No objection.

THE COURT: Without objection, this witness may be excused.

OFFICER BEASLEY, after having first being duly sworn, testified under oath as follows:

DIRECT EXAMINATION

BY MR. BROOKS

Q. Officer Beasley.
A. Yes, sir.
Q. I'm sure you are a bit perplexed as to why we called you to the stand?
A. Yes, sir.
Q. Do you remember the trial of Mr. O'Neil?
A. Yes, sir.
Q. Do you remember telling his lawyer he should appeal?
A. No, sir.
Q. Do you remember there being discussions about whether or not an appeal should be filed?
A. No, sir.
MR. BROOKS: Beg Court's indulgence.
No other questions.
THE COURT: Cross-examination.
MR. JOHNSON: No, Your Honor. Officer, you may step down.
MR. BROOKS: He can be excused, Judge.
THE COURT: Without objection, may be excused.
MR. BROOKS: Judge, that's the applicant's case.
THE COURT: Anything from the State?
MR. JOHNSON: No, Your Honor.
THE COURT: What were the -- what was the verdict form like? Do we have a copy of that? Was it just for attempted murder with the -- is that in the file, the

verdict form?

MR. JOHNSON: Sometimes it is; sometimes it isn't. I don't think I have it.

MR. BROOKS: Might be in the transcript.

THE COURT: Well, I was looking at the charge.

MR. BROOKS: No, it's not in the transcript.

MR. JOHNSON: Your Honor, it may be in the part of the record. It may be in the general sessions file.

THE COURT: Well, let me look for a minute. I'm looking at page 597. I think I can figure out what it is by reading Judge Hayes' instructions.

MR. BROOKS: It was not listed as an exhibit.

THE COURT: Well, Mr. Brooks, seems like the major thrust of your client's complaint is really a legal issue as to whether or not the judge would have a right to list the lesser-included offenses. Statute says that he does, but whether he -- that they are there, but whether or not he abused his discretion in doing so. I believe the remedy that Mr. O'Neil seeks through the PCR -- I fail to see how the attorney violated his duty under the Strickland standard for not objecting to the lesser-included offenses when the statute clearly shows that the judge certainly has -- judges are required to charge those laws that are applicable to the evidence that the judge sees fit.

I am concerned about the matter of the appeal, however. I'm going to ask an order be prepared denying the PCR relief. I think that -- well, I think the judge acted properly, but I'm not an appellate judge. We have appellate judges to know whether or not that was done. But I believe he is entitled to the belated appeal. So I'm going to give him that relief for the appeal, since even all the evidence says they talked about it, and whether there was miscommunication there, I think that's -- certainly jeopardizes your client not having the benefit of the appeal. So I will -- I do believe he's entitled to a belated appeal, but I don't believe from what I've seen -- and I obviously I've not read all the testimony of each witness, but I have had a chance to read the charge from the judge and the arguments of the counsel along that time.

If you would prepare me an order, I'll be glad to review it and sign it giving him his appeal. All right. Mr. Johnson, if you would prepare that.

MR. JOHNSON: You want me to prepare it?

THE COURT: Yes, sir.

MR. BROOKS: Thank you very much.

(Whereupon, the proceedings were concluded.)

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

I, Aminah R. Hardy, RPR, Official Court Reporter for the 16th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 16th day of August, 2013.

December 27, 2013

Aminah R. Hardy

Aminah R. Hardy, RPR, CVR-CM

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTENTH JUDICIAL CIRCUIT
Hashin Alli Oneil, #350619, Applicant, v. State of South Carolina, Respondent.	)	2012-CP-46-3568 **ORDER OF DISMISSAL AND GRANT OF APPEAL PURSUANT TO WHITE V. STATE**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PC filed October 8, 2012. The Respondent made its Return on or about April 25, 2013.

An evidentiary hearing was held on August 16, 2013, at the Moss Justice Center in York, SC. Charles T. Brooks, III, Esquire represented the Applicant. J. Rutledge Johnson, Esquire of the South Carolina Attorney General's Office represented the Respondent.

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. The Applicant was indicted by the April 2012 term of the York County Grand Jury for Attempted Murder (2012-GS-46-0977) and Possession of a Firearm during the Commission of a Violent Crime (2012-GS-46-0977A). Robert Muckenfuss, Esquire, represented him. On April 18, 2012, the Applicant proceeded to a jury trial pursuant to which he was found guilty of Assault and Battery, 1st degree as a lesser included offense of Attempted Murder. The Honorable John C. Hayes, III sentenced the Applicant to confinement for ten (10) years for Assault and Battery, 1st degree. The Applicant did not appeal his conviction or sentence.

In his application for post-conviction relief the Applicant alleges that he is being held in

custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel"
   a. "Failed to raise defenses and Failure to file appeal."
2. "Perjured testimony"
   a. "The State's star witness(sic) statement and testimony are inconsistent."
3. "Instructions"
   a. "Instructions given to jury were not justified by the evidence."

SUMMARY OF TESTIMONY

At the PCR hearing, Applicant testified Counsel was appointed to him. He also stated Counsel failed to file an appeal on his behalf. He testified he thought the jury should not have been instructed concerning Assault and Battery, 1st degree as he was indicted for Attempted Murder. He also stated he wanted a verdict of simply guilty or not guilty on the Attempted Murder charge. He claims Counsel should have objected to this jury instruction. Applicant, lastly, stated he did not believe the trial court had subject matter jurisdiction as he was not indicted for Assault and Battery, 1st degree.

On cross-examination, Applicant stated he understood Assault and Battery, 1st degree was a lesser included offense of Attempted Murder under S.C. Code Ann. 16-3-600(B)(3). He also agreed that the facts, as presented at trial, showed he was the only one who could have fired the gun that shot Victim.

Counsel testified he fully discussed the jury instructions with the State and the trial judge in chambers and understood the trial judge would instruct the jury concerning Assault and Battery, 1st degree as a lesser included offense of Attempted Murder. Counsel also stated he discussed this with Applicant. Counsel admitted he did not file an appeal on Applicant's behalf, but discussed filing an appeal with Applicant in the holding cell immediately after the verdict was read. Counsel testified he believed Assault and Battery, 1st degree was a victory considering the evidence presented at trial. Counsel also stated he was successful in keeping the jury from learning of evidence which was damaging to Applicant's case. Counsel further testified he advised Applicant not to appeal the verdict

as he did not believe there would be a better outcome. He stated Applicant did not ask him to file an appeal, and it was his understanding that Applicant did not desire an appeal.

On cross-examination, Counsel testified again that Assault and Battery, 1st degree is a lesser included offense of Attempted Murder under S.C. Code Ann. 16-3-600(B)(3). He also stated he did not object to the jury instruction because he wanted the jury to have other options than Attempted Murder. Additionally, he testified the trial court had subject matter jurisdiction to sentence Applicant under Assault and Battery. 1st degree. He lastly testified the decision to appeal the case belonged to Applicant. but Applicant did not instruct Counsel to file an appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the hearing, Applicant alleged that he was denied effective assistance of counsel when trial counsel failed to file an appeal his behalf.

This Court agrees that the allegation that the Applicant was denied a direct appeal is meritorious. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).[1]

The Court affirmatively finds that the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that the Applicant is entitled to a belated review of his conviction(s). A petition for belated review pursuant to White v. State can remedy the Applicant's lack of a direct appeal.

[1] "Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review." [Emphasis added]. Davis, 288 S.C. at 291, n. 1, 342 S.E.2d at 60.

The Court also finds Applicant's other allegations are without merit. Applicant has failed to meet his burden of proof as to other PCR issues.

IT IS THEREFORE ORDERED:

1. That this current Application for Post-Conviction Relief be dismissed with prejudice.

2. That the Applicant is granted a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Within thirty days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicants' convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 227(g) for the appropriate procedure for securing belated appellate review.

3. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED!

G. Edward Welmaker
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

9-23-, 2013
Florence, South Carolina.

WITNESSES

YCSD / Strait

lgc

ARREST WARRANT NUMBER

Count I – Arrest Warrant J156057

Count II – Arrest Warrant J156058

ACTION OF GRAND JURY

True Bill s/George White, Foreperson on 3-24-11

TRUE BILL

Foreperson of Grand Jury

4/12/12

VERDICT

Guilty Assault & Battery 1st Degree

Foreperson of Petit Jury

Date: 4/18/12

AMENDED

DOCKET NO. 2011-GS46-00977 and 2011-GS46-00977A

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

April 12th Term 2012

THE STATE

vs.

HASHIN ALLI ONEIL

(also known as HASHIM ALI O'NEAL)

Indictment for

COUNT I -ATTEMPTED MURDER

SC Code Section 16- 03-0029

CDR Code 3410

COUNT II – POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME

SC Code Section 16-23-0490; CDR Code 0549

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

697

CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA) 2012 OCT -9 . AM 8: 46 INDICTMENT
)
COUNTY OF YORK) DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

At a Court of General Sessions, convened on April 12, 2012, the Grand Jurors of York County present upon their oath:

COUNT I - ATTEMPTED MURDER

That on or about November 12, 2010, the Defendant Hashin Alli Oneil (also known as Hashim Ali O'Neal) did, with intent to kill, attempt to kill another person or persons, to wit: Crystal Caldwell, and said Defendant did so with malice aforethought, either expressed or implied. Said incident occurred at , Rock Hill, South Carolina. Said incident did occur within York County, South Carolina. All in violation of 16-03-0029, Code of Laws of South Carolina (1976, as amended).

COUNT II - POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME

That on or about November 12, 2010, the Defendant Hashin Alli Oneil (also known as Hashim Ali O'Neal) did unlawfully have in his actual or constructive possession a firearm while committing the crime of Attempted Murder, a violent crime as defined in Section 16-1-60, Code of Laws of South Carolina (1976, as amended). Said incident occurred at , Rock Hill, South Carolina, which is located within York County, South Carolina. All in violation of Section 16-23-490, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the Common Law of the State of South Carolina and the statute(s) in such case made and provided.

ASSISTANT SOLICITOR