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OCT 29 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

~~Angela R. Taylor, Family Court Judge~~
John C. Hayes, III, Circuit Court

MARK ALLEN ELLIOT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000949

PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

Whether the record supports the PCR court's conclusion that the alleged victim's cell phone records would not have impeached her credibility and trial counsel was therefore reasonable in failing to offer them into evidence.

STATEMENT

Procedural History

On July 30, 2009, the Horry County Grand Jury indicted Petitioner Mark Allen Elliot for kidnapping, second-degree criminal sexual conduct with a minor, and criminal sexual conduct. App. 1112, lines 19—App. 1113, line 7; App. 1237—App. 1238. On November 15, 2010, Petitioner proceeded to trial before The Honorable Larry B. Hyman, Jr. and a jury. App. 1. Ronald William Hazzard and Melinda Allyson Knowles represented Petitioner, and Nancy R. Livesay and Candice A. Lively represented the State. App. 3. The jury found Petitioner guilty of kidnapping, and Judge Hyman sentenced him to thirty years' imprisonment. App. 1112, line 19—App. 1113, line 13; App. 1158, lines 11-16.

On March 27, 2013, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance on counsel. App. 1162—App. 1171. The State filed a return on October 24, 2013. App. 1172—App. 1177. On October 27, 2014, Petitioner appeared at an evidentiary hearing before The Honorable John C. Hayes. Daniel Selwa represented Petitioner and Joshua Thomas represented the State. App. 1178. On November 24, 2014, Judge Hayes issued an order dismissing Petitioner's claim. App. 1230—App. 1236.

Facts

A Disobedient Teenager's Story

The State called to testify a female teenager ("complainant") who stated she was visiting North Myrtle Beach on June 28, 2009 with a female friend ("girlfriend") and the friend's mother and stepfather. She and her girlfriend were fourteen at the time. App. 341, lines 18-21; App. 548, line 1—App. 550, line 3. Around six or seven that evening, her then-boyfriend and his buddy, both seventeen, arrived in the area with nowhere to stay after driving themselves down from North

Carolina. App. 341, lines 22-25; App. 555, lines 1-8. The complainant's parents disapproved of her relationship with the boyfriend, so while her girlfriend's parents were at a local bar, the group of four teenagers secretly met on a nearby beach until eleven that night. App. 556, line 23—App. 557, line 8. At that time the girls went back home with the parents. App. 558, line 17—App. 559, line 11.

Complainant claimed that she told the older boys over the phone directions to the beach house so they could meet back up later that night. App. 558, line 17—App. 559, line 11. After the parents passed out, the older boys came over around one in the morning, and the group hung out for a while in front of the house. App. 560, lines 16-21; App. 565, line 20—App. 567, line 21. The older boys left at 2:30 a.m. and came back ten to fifteen minutes later. App. 881, line 17—App. 882, line 12.

Complainant claimed at some point thereafter, a man drove up in a car. She specifically stated she was standing with her back to the road holding onto the boyfriend at that time. She said she did not know where her girlfriend was at that point. The man asked for directions, then got out of the car, and with "his right arm . . . to the back so [they] couldn't see" whether or not he had a weapon, told the three to get on the ground and empty their pockets. The man then allegedly told the older boys to walk away, and he told her to get in the car. App. 568, lines 19-25; App. 569, lines 4-24; App. 570, line 6—App. 571, line 2; App. 573, lines 13-21. The man never grabbed her or otherwise touched her. App. 636, lines 1-3.

She said the two rode around in the 1991 Camry and "made a lot of turns" while he asked her questions about herself and she gave short answers. App. 573, line 24—App. 577, line 8; App. 638, lines 15-21. They stayed on paved and populated roads the whole time and simply meandered

around North Myrtle Beach. She would not testify that the man locked her in or that she ever tried to leave the car. App. 638, line 18—App. 639, line 6; App. 639, line 21—App. 640, line 5.

Complainant also testified she never saw a weapon, had her cell phone with her in the car, and did not try to call the police or anyone else for help. App. 577, lines 11-25; App. 579, lines 12-16. She said her boyfriend called her a few times, and she answered and told him that she was walking back because the man told her to say so. She then cut the phone off and the man took it. App. 578, lines 3-25. She claimed she asked him multiple times to take her home, that he asked to kiss her, and that he told her to remove her shorts, but he was not threatening her. App. 581, line 3—App. 582, line 15. After some more driving, he stopped at a boat ramp, told her to get out of the car and put her hands on the seat. She then stated, “I believe he asked me to pull down my pants and my underwear” Without any attempt to escape or shout for help, she removed her clothes herself, and she claimed Petitioner penetrated her vaginally and anally, but he was not erect and did not ejaculate. App. 582, line 23—App. 586, line 21. She said the man stopped suddenly and told her to walk away. After he drove off, she walked around knocking on the doors of condos until she encountered a jogger. The jogger did not have a phone with him, so she followed him to his condo and waited for him to go inside and get one. She then called her boyfriend, who gave the phone to a police officer who was also at the beach house at that point. App. 590, line 13—App. 593, line 20.

The Buddy’s Story

The solicitor did not call complainant’s boyfriend, girlfriend, her girlfriend’s parents, or the early-morning jogger to corroborate her story. Instead the solicitor called the boyfriend’s buddy, who could only partially corroborate her story up until the time she left with Petitioner in the car. App. 313, line 5—App. 322, line 15. He claimed the group met back up at the beach house around 1 or 1:30 a.m. App. 347, lines 19-22. He first testified that after he and the boyfriend left for ten

minutes around 2:30 a.m. and returned, both of them had their cell phones. App. 350, lines 1-8. He said at that point the girlfriend did go inside. App. 353, lines 3-14. He also said the man started driving around the block between 3 and 3:30 a.m. App. 353, line 15—App. 354, line 20. As complainant got in the car, he and the boyfriend walked to their car and then doubled back to the beach house, but the door was locked. App. 324, lines 13-16. Later, when confronted with why neither he nor the boyfriend ever called the police, he testified that was because both of them left their phones in the car. App. 360, line 1—App. 361, line 23. Neither the buddy nor complainant ever made an in-court identification of Petitioner.

Law Enforcement's Accounts

The solicitor called multiple law enforcement officers to testify about their involvement with complainant and Petitioner on the morning in question. A Horry County officer testified that between 4 and 4:30 a.m., he responded to a BOLO for the vehicle in which complainant was riding in North Myrtle Beach. App. 378, lines 4-6; App. 380, lines 2-23. He eventually apprehended Petitioner in the car a couple miles away from the entrance to the neighboring Cherry Grove area and a few miles from the 53rd Street boat landing in Cherry Grove. App. 504, line 13—App. 507, line 12. He said during the arrest, a phone rang in the pocket of Petitioner's driver side door. He answered it, and on the other end was another police officer who was with the boyfriend and buddy at the beach house. App. 513, line 9—App. 514, line 17.

A Road Sergeant for the North Myrtle Beach Department of Public Safety said around 5 a.m., he found the complainant a few blocks from the 53rd Street boat ramp in front of a condo with a man in jogging clothes. App. 665, line 4—App. 671, line 14. A Detective from the Department of Public Safety assigned to the case then testified that the complainant told him that at boat ramp, Petitioner made her get out of the car and put her hands on the outside of the passenger car door. He

later testified that when the outside of the car was dusted for fingerprints, he found none, and he had noticed that she had changed her story of how she was positioned during the alleged sexual assault in her trial testimony. App. 689, line 7—App. 690, line 13; App. 789, line 2—App. 790, line 5. The detective also said on the afternoon of the alleged incident, he showed complainant a six-pack photo lineup with Petitioner’s face, and she picked a different photo. App. 804, lines 2-25. Finally, forensic witnesses testified that an investigation of DNA from swabs revealed that neither complainant’s anus nor vagina contained DNA from Petitioner. App. 962, lines 3-7.

Petitioner’s Story and Complainant’s Cell Phone Records

Petitioner maintained from the time just after his arrest through trial that complainant and the two boys were looking for drugs. Petitioner did not have any, but he agreed to drive complainant around to help her find some. App. 309, line 12. Indeed, an officer from the North Myrtle Department of Public Safety testified that upon his arrest, Petitioner “stated very clearly that he did want to cooperate and would talk,” and he never asked for an attorney. App. 431, lines 1-2; App. 444, lines 6-15. Another public safety confirmed the testimony, saying Petitioner was “very cooperative” and gave responsive answers to his questions. App. 490, lines 6-13; App. 497, lines 19-24. He told the officers right then that “[t]he reason for that contact was they approached him and asked him . . . for drugs.” App. 499, lines 8-19. When he told the teenagers that he did not have any, the “young lady . . . got into the vehicle with him; and he drove her a few blocks away and left her there.” App. 500, lines 21-25. Similarly, Petitioner explained to another officer that complainant was “with the two male subjects and the three initially approached him to ask for drugs,” and complainant “had him take her to . . . the Cherry Grove area and drop her off at a motel where there were college kids . . . to buy drugs there.” App. 521, lines 7-9; App. 520, lines 10-14.

During the defense case, trial counsel called complainant and told her that the State had provided him her cell phone records from around the time of the incident. App. 882, lines 17-19. He had her agree that the records showed calls to her boyfriend's cell phone at 2:12 a.m., 2:20 a.m., and 2:24 a.m; a 50-second-long call at 2:41 a.m.; and a thirteen-minute-long call at 3:04 a.m. He then asked her did she claim to talk to people on the phone when they were already in her presence. App. 883, lines 13-25. She replied, "It wasn't unusual . . . in the relationship that we were in, to be around each other and be in different areas and still not speak direction to one another but to call each other if we didn't feel the need to be right next to each other." App. 884, lines 1-5. Pressed further, she said she could not explain because it was too long ago. App. 884, lines 14-16.

In closing argument, counsel gave the timeline as testified to by complainant and her boyfriend's buddy and noted, "Between around 12:15 all the way up to about 3:17, there is . . . conversation of some form back forth between" complainant and the boyfriend. "I'll give you" the texting, he said, but saw no explanation for the calls consistent with her story. He argued the lack of an explanation was significant because if she were truly a victim, she would not have to hide anything. App. 992, line 4—App. 993, line 22. Trial counsel then noted the discrepancy between the buddy's claim that both his and the boyfriend's cell phones were in car with the fact that "[c]ell phone records have [complainant and the boyfriend] interacting back and forth pretty much the whole time right up until about 3:17 AM." App. 1003, lines 17-20. He also pointed out that complainant's phone was on when it rang in Petitioner's car. App. 1009, lines 15-25. Finally, he asked the jury to consider what evidence was missing from the State's case:

Other than what's available through public records, I get what they give me, you know.

And cellphone records aren't a matter off—they're not public—they're not public.

So they don't do that. They don't provide you with that.

Whether that exist [sic], I do not know as far as having been requested; because they don't have a problem with not showing you stuff that doesn't support their case.

App. 1011, lines 3-13.

In the State's closing argument, the solicitor stressed that according complainant's testimony, "she weren't out at some party," and the group of teens was not "out cruising the boulevard trying to meet people. They were in the front yard in a residential neighborhood." Therefore, the theory that they were looking for drugs made no sense. App. 1035, line 8—App. 1036, line 20. The solicitor also minimized trial counsel's focus on the cell phone records, saying, "He wants to make a big deal out of these phone records because he thinks: That's the way I can divert the fact that she was kidnapped." App. 1063, lines 2-9.

An hour and ten minutes after the jury began deliberating, it sent a note to the judge asking to see the phone records. App. 1095, lines 20-23; App. 1098, lines 22-24; App. 1102, App. 20-22. However, because trial counsel had never offered them into evidence, the judge could not provide them. App. 1102, line 23—App. 1103, line 20. Less than an hour later, the jury delivered its verdict of guilty for the kidnapping charge. App. 1108, lines 3-12.

The PCR Proceedings

At the PCR hearing, Petitioner moved complainant's cell phone records into evidence. App. 1235. They showed instructions for reading the records and a list of communications through the phone on the day of the incident as follows. App. 1217—App. 1229.¹

¹ Petitioner's boyfriend's cell phone number ends in 8623. App. 806, line 10—App. 807, line 20. Her girlfriend's cell phone number ends in 9952. App. 886, lines 17-19.

Key to Understanding CDMA Call Detail Reports

Calling number:	This column reflects the number placing the call (the individual who initiated the call). If the call is an outgoing call, this will be the Sprint PCS target number.
Called number:	This column reflects the number actually called. In most cases this number will be the same as the number in the "Dialed Digits" column. If the number has been forwarded, or if there is a routing number, then this will be reflected. If the number has a 11 in front of the area code, that means the call rolled to voicemail and was NOT answered by the customer.
Dialed digits:	This column reflects the digits that the caller enters into the keypad of the phone. If the call is an incoming call, this will be the Sprint PCS target number.
M_R #:	Mobile Role (Type of Call). Listed as outgoing, incoming, routed call* or undetermined.
Start Date:	Date and time the call was initiated.
End Date:	Date and time the call was ended.
Duration:	Duration of call, in seconds.
Repol number:	This reflects which phone switch handled the call.

*Routed calls come in two main varieties. The first, also known as Temporary Local Dialing Number (TLDN). They may be considered to be bridge/router numbers to complete a call. The second is when a call is not answered, but is routed to voicemail. Calls routed straight to voicemail will also have an "11" before the number indicated in the "Called_Nbr" column.

*The CDMA call detail report may indicate the sending and receipt of text messages and e-mail. While not flagged as text messages, the line will indicate no duration, the dialed digits column will either be blank or will show an e-mail address, and the repol column will contain one of the following numbers: 13; 291; 292; 293; 294; 295; 296; 297; 298; 347; 681; 682; 683; 684; 686; 687; 688.

* On the CDMA network, Sprint maintains Gateway and SWAT (Soft Wireless Access Tandem) networks in areas where there are large Sprint customer populations. These provide the required extra space that helps Sprint maintain all of the calls. When a call moves through a gateway or SWAT cell site information is not retained and is not recoverable.

*800) 877-2400, (866) 677-8204, (866) 222-2604, and (877) 836-4746 are numbers that connect customers using Instinct phones to their voicemail.

CALLING_NBR	CALLED_NBR	DIALED_DIGITS	M_R_#	START_DATE	END_DATE	DURATION(SEC)	REPOLL_#
(704) 224-5099	(704) 663-9952		Outbound	6/29/09 1:58:59	6/29/09 1:58:59	0	294
(704) 663-9952	(704) 224-5099		Inbound	6/29/09 1:59:53	6/29/09 1:59:53	0	297
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 2:12:47	6/29/09 2:15:33	166	690
(704) 224-8623	(910) 352-9883	(704) 224-5099	Routed Call	6/29/09 2:12:48	6/29/09 2:15:41	173	588
(704) 224-8623	(910) 352-9903	(704) 224-5099	Routed Call	6/29/09 2:20:44	6/29/09 2:22:08	84	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 2:20:44	6/29/09 2:21:59	75	690
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 2:24:33	6/29/09 2:24:58	25	690
(704) 224-8623	(910) 352-9974	(704) 224-5099	Routed Call	6/29/09 2:24:34	6/29/09 2:25:08	34	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 2:36:00	6/29/09 2:38:30	150	690
(704) 224-8623	(910) 352-9988	(704) 224-5099	Routed Call	6/29/09 2:36:03	6/29/09 2:38:39	156	588
(704) 224-5099	(704) 224-8623	(704) 224-8623	Outbound	6/29/09 2:41:59	6/29/09 2:42:49	50	690
(704) 224-5099		(704) 663-9952	Outbound	6/29/09 2:52:45	6/29/09 2:52:51	6	690
(704) 224-5099	(704) 663-9952	(704) 663-9952	Outbound	6/29/09 2:53:20	6/29/09 2:53:28	8	690
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 2:53:30	6/29/09 2:53:34	4	588
(704) 663-9952	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 2:53:47	6/29/09 2:54:01	14	690
(704) 663-9952	(910) 352-9846	(704) 224-5099	Routed Call	6/29/09 2:53:49	6/29/09 2:54:08	19	588
(704) 663-9952	(704) 224-5099		Inbound	6/29/09 3:03:01	6/29/09 3:03:01	0	294
(704) 224-8623	(910) 352-9954	(704) 224-5099	Routed Call	6/29/09 3:03:08	6/29/09 3:03:11	3	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 3:04:00	6/29/09 3:17:15	795	690
(704) 224-8623	(910) 352-9963	(704) 224-5099	Routed Call	6/29/09 3:04:02	6/29/09 3:17:23	801	588
(704) 224-5099	(704) 663-9952	(704) 663-9952	Outbound	6/29/09 3:17:21	6/29/09 3:18:00	39	690
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:33:41	6/29/09 3:34:20	39	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:33:41	6/29/09 3:34:20	39	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 3:33:42	6/29/09 3:34:07	25	690
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 3:34:43	6/29/09 3:36:22	99	690
(704) 224-8623	(910) 352-9928	(704) 224-5099	Routed Call	6/29/09 3:34:44	6/29/09 3:36:31	107	588
(704) 663-9952	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 3:36:31	6/29/09 3:36:39	8	690
(704) 663-9952	(704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:36:32	6/29/09 3:36:51	19	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:36:32	6/29/09 3:36:51	19	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:36:54	6/29/09 3:37:22	28	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:36:54	6/29/09 3:37:22	28	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:37:24	6/29/09 3:37:35	11	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:38:03	6/29/09 3:38:08	5	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:38:11	6/29/09 3:38:16	5	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:39:27	6/29/09 3:39:32	5	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:40:25	6/29/09 3:40:30	5	588

CALLING_NBR	CALLED_NBR	DIAMED_DIGITS	M_R_#	START_DATE	END_DATE	DURATION(SEC)	REPOLL_#
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:40:45	6/29/09 3:40:49	4	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:43:30	6/29/09 3:43:34	4	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:43:46	6/29/09 3:43:51	5	588
(704) 909-1708	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:46:00	6/29/09 3:46:06	6	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:48:05	6/29/09 3:48:10	5	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:53:21	6/29/09 3:53:26	5	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:53:56	6/29/09 3:54:02	6	588
(704) 200-8558	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:56:53	6/29/09 3:56:59	6	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:58:30	6/29/09 3:58:35	5	588
(843) 458-3058	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 3:58:54	6/29/09 3:59:28	34	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:01:47	6/29/09 4:01:50	3	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:02:37	6/29/09 4:02:44	7	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:06:09	6/29/09 4:06:14	5	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:08:51	6/29/09 4:08:54	3	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:14:18	6/29/09 4:14:23	5	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:17:48	6/29/09 4:17:52	4	588
(704) 909-1708	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:25:15	6/29/09 4:25:20	5	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:25:46	6/29/09 4:25:52	6	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:31:42	6/29/09 4:31:47	5	588
(843) 458-3058	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:38:46	6/29/09 4:39:01	15	588
(843) 458-3058	(910) 352-9844	(704) 224-5099	Routed Call	6/29/09 4:39:13	6/29/09 4:39:53	40	588
(843) 458-3058	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 4:39:13	6/29/09 4:39:44	31	690
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 4:51:09	6/29/09 4:51:34	25	690
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:51:13	6/29/09 4:51:50	37	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:51:13	6/29/09 4:51:50	37	588
(704) 663-9952	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 4:56:06	6/29/09 4:56:31	25	690
(704) 663-9952	(704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:56:07	6/29/09 4:56:47	40	588
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:56:07	6/29/09 4:56:47	40	588
(704) 909-1708	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 4:57:23	6/29/09 4:57:48	25	690
(704) 909-1708	(704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:57:28	6/29/09 4:58:03	35	588
(704) 909-1708	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 4:57:28	6/29/09 4:58:03	35	588
(704) 909-1708	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 4:58:19	6/29/09 4:58:21	2	690
(704) 909-1708	(910) 352-9870	(704) 224-5099	Routed Call	6/29/09 4:58:24	6/29/09 4:58:30	6	588
(704) 224-6473	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 6:50:42	6/29/09 6:51:07	25	690
(704) 224-6473	(704) 224-5099	(704) 224-5099	Routed Call	6/29/09 6:50:46	6/29/09 6:51:22	36	588
(704) 224-6473	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 6:50:46	6/29/09 6:51:22	36	588

Trial counsel testified at the hearing and answered the question of why did he not move the phone records into evidence:

I should have. I should have introduced them. Because it wasn't an issue of trial strategy as far as wanting to have the final closing argument, because we ended up—"we" being the defense—putting everybody from SLED to prove that there was no DNA of [Petitioner] on [complainant] or on her clothing. So we already lost the last close.

I think I was thinking the phone records were a little hard to read. . . . I remember thinking I didn't want to confuse the jury in that regard, but that is obviously the thing that they honed in on, those phone records. So, yes, I should have put them in evidence.

App. 1207, line 16—App. 1208, line 9. Trial counsel also explained his belief that having the records in evidence would have made a difference in the jury's decision:

On the front-end of the trial, you are looking at these incredibly huge charges . . . and to have been able, through to evidence, to have the jury come back not guilty on [the other charges], . . . I believe had they had the phone records to look back on in the jury room—obviously they didn't believe [complainant] when she said she was sexually assaulted, so the question then becomes were they looking for the information they would need to not believe her when she said she was kidnapped. I mean, yes, them asking for the phone records, to me, is huge.

App. 1211, lines 3-18.

In the order of dismissal, the PCR judge wrote that Petitioner failed to show a defect by trial counsel in failing to move the records into evidence because the records only substantiated the complainant's testimony and would not reflect on her credibility, and her examination at trial established all the records would show. App. 1235.

ARGUMENT

THE RECORD DOES NOT SUPPORT THE PCR COURT'S CONCLUSION THAT COMPLAINANT'S CELL PHONE RECORDS WOULD NOT IMPEACH HER CREDIBILITY, AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OFFER THEM INTO EVIDENCE.

The record does not support the PCR court's conclusion that complainant's cell phone records would not impeach her credibility, and trial counsel was ineffective for failing to offer them into evidence. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

In determining whether trial counsel was deficient in a particular aspect of trial, a court must assess the reasonableness of his actions under the facts and circumstances within counsel's knowledge: "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). *Cf. Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In determining whether trial counsel's deficient management of evidence harmed the defendant's case, the court should consider the following factors: the importance of the evidence in the prosecution's case; whether the evidence was cumulative; the presence or absence of other evidence corroborating or contradicting the evidence on material points; the overall strength of the prosecution's case. *C.f. State v. Curry*, 370 S.C. 674, 680, 636 S.E.2d 649, 652 (Ct. App. 2006) (in determining harmless error, court should consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case" (quoting *State v. Clark*, 315 S.C. 478, 482, 445 S.E.2d 633, 635 (1994))). The court should also consider that the importance of a piece of evidence to the jury's deliberations and the overall strength of the prosecution's case are reflected in a jury's written request to review the evidence during deliberations. *C.f., e.g., State v. Stanley*, 700 N.E.2d 881, 899 (Ct. App. Ohio 1997) ("The question from the jurors indicates that they believed that they were missing an exhibit, but does not demonstrate that the jurors placed any kind of special evidentiary value or weight on the document."). Importantly, the standard for prejudice "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

In this case, an objective view of the record shows indisputably that trial counsel's failure to move complainant's cell records into evidence was not reasonable. Petitioner's defense focused on impeaching complainant and the buddy's credibilities because their testimony was the only evidence sufficient to prove the State's case for kidnapping beyond a reasonable doubt. To impeach complainant, trial counsel relied heavily on her phone records by calling and

examining her even though she was as a hostile witness. He also used the records in closing argument both to impeach her and the buddy's timeline and to argue that the State's inability to acknowledge and reconcile the records created reasonable doubt. Thus, providing the jury with a copy of the records to look at firsthand was natural. Accordingly, trial counsel plainly and repeatedly admitted in his PCR testimony that he should have moved them into evidence.

Trial counsel recalled thinking that the records could have been confusing to look at. Nevertheless, he never testified that he made an actual, affirmative decision to withhold the records based on this thought. Moreover, such a decision would have certainly been unreasonable. Less than two full pages of the actual records were important to the defense. The records came with a page of instructions on how to interpret the values in each of column of the spreadsheet along with four notes explaining otherwise unexplained features of the records. Ultimately, only understanding the columns for calling number, called number, dialed digits, and start and end times was necessary for a complete analysis of the times of complainant's communications. Most importantly, the impeaching complainant's timeline necessitated a detailed comparison of the exact times of complainant's phone communications. The jury was simply not equipped to do that with nothing more than trial counsel's having read aloud a few lines from the records and having complainant acknowledge that the records were probably accurate. Such a strategy would do nothing to address jury concerns about whether trial counsel was reading the records imprecisely or whether the exact times of the communications were close enough that they could be reconciled with complainant's foggy memory.

Not only does the record show the failure to move the record was defective but also that the shortcoming undermined any confidence in the outcome of Petitioner's trial. This case turned on the credibilities of complainant and the buddy, both of which hung in the balance apart

from the phone records. Complainant seemed a mischievous and forward teenager lacking in good judgment. The jury wound up less than convinced of her allegation of sexual assault. She never screamed for help or tried to escape even though she was in populated areas in Petitioner's car. Petitioner never used force or showed a weapon. She never identified Petitioner or out of court and picked a different photo in the lineup provided by police. She claimed Petitioner was not erect but was somehow able to penetrate her vagina and anus. Finally, the lack of physical evidence of fingerprints and DNA tended to contradict her story. The buddy shared complainant's knack for misbehavior and poor judgment. He changed his sworn testimony about the location of his and the boyfriend's cell phones, and he testified the girlfriend locked the group out of the house, which suggests she was not expecting complainant to stick around that night. He never called for help, and he also never made an in or out of court identification of Petitioner. The State curiously never called or ostensibly questioned the boyfriend, girlfriend, girlfriend's parents, or the jogger, all of whom should have been in strong positions to corroborate complainant's timeline and mental state after the incident assuming her story was true.

As stated previously, a detailed comparison of the exact times of the phone communications with complainant's timeline would have further damaged her credibility. According to her, the older boys came over around 1 a.m. and the three were in front of the house together save fifteen minutes around 2:30 a.m. to 2:45 a.m. until the alleged kidnapping. However, the phone records show that between 12:30 a.m. and 2 a.m., complainant and her boyfriend sent 15 text messages back and forth; between 2:12 a.m. and 2:25 a.m., the boyfriend made two calls to complainant of sufficient duration that the two had to have been speaking; and at 3:03 a.m. he made a call to her that she seems to have declined. Additionally, the two spoke on the phone for around

13 minutes from 3:04 a.m. to 3:17 a.m., the time when complainant testified the car drove up as she was embracing the boyfriend at the side of the road. Accordingly, comparing the specific times of her communications, her story cannot be true.

The communications from 3:33 a.m. to 4:31 a.m. show that complainant received a voicemail from the boyfriend; had an approximately 90-second conversation with him; did not answer one call from the boyfriend and one call from the girlfriend; and then received numerous, consistent calls from both that ended after only a few seconds. While these communications are consistent with complainant's overall story, they are also consistent with Petitioner's account, namely that complainant voluntarily and deliberately got in his car and left the others for an objectionable purpose and under circumstances that the others would likely protest or have cause for concern. Moreover, according to the instructions with the records, none of the latter, three-to-seven second calls went to complainant's voicemail, which suggests her phone was not off as she testified, but that she was actively declining the calls by an "end" button on her phone.

Very interestingly, one of the police officers called by the State specifically claimed that during Petitioner's arrest, the phone rang in the car door, the officer answered it, and another police officer was on the other end. However, the records show that every single call received from 3:36 a.m. to 6:50 a.m. went to voicemail.

Trial counsel's examination of complainant and his arguments during closing were not sufficient to make up for his failure to move the actual records into evidence. As trial counsel stated in his PCR testimony, for a jury who did not believe complainant about the sexual assault allegation, the natural question is whether any evidence counseled against believing her allegation of the kidnapping. As explained previously, her failure to explain the apparent discrepancy in the timelines when trial counsel read times from the phone records allowed could

be chalked up to her foggy memory of the exact times during the incident or trial counsel's imprecise reading of the records. Similarly, without the records the jury had to take trial counsel's word for it in closing that "between around 12:15 all the way up to about 3:17, there is . . . conversation of some form back forth between" complainant and the boyfriend.

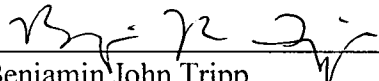
Indeed, through closing argument, trial counsel actually confused the issue and minimized the significance of the records by arguing that the State did not provide them after all and suggesting that the question even existed of "whether the records exist." Similarly, the solicitor minimized the records by stating as a foregone conclusion that the teens were all together at the house and that the records were just a red herring. Having the physical records for the jurors to see for themselves would have allowed the jury to decide what weight to give them. Beyond these arguments, the jury could have also independently gleaned from the records that numerous voicemail recordings should have either supported or contradicted complainant's account, but the State either failed to investigate them or intentionally withheld them.

Finally, relatively quickly into deliberations, the jurors themselves decided they needed to look at the phone records. Once the request was denied, they needed less than an hour to decide that the evidence in front of them weighed in favor of believing complainant regarding the kidnapping allegation. From all of these considerations in the record, the only conclusions to be drawn were that the documented phone records were a critical piece of evidence for Petitioner's defense, the records were not substitutable by an oral reading of one or two entries during trial, and the evidence carried enough weight to tip the even scales in Petitioner's favor. Accordingly, the PCR court's dismissal of Petitioner's claim of ineffectiveness for failure to move the records into evidence was unsupported, and this Court should reverse.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of October, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Angela R. Taylor, Family Court Judge

MARK ALLEN ELLIOT,

PETITIONER,

V.

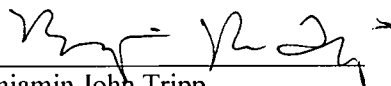
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000949

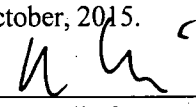
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire this 29th day of October, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of October, 2015.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.