

VOLUME THREE OF THREE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

John C. Hayes III, Circuit Court Judge

RECEIVED

OCT 29 2015

S.C. Supreme Court

MARK ALLEN ELLIOT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000949

A P P E N D I X

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INDEX

INDEX	i
TRIAL TRANSCRIPT	1
APPLICATION FOR POST-CONVICTION RELIEF	1162
RETURN	1172
POST-CONVICTION RELIEF HEARING TRANSCRIPT	1178
PLAINTIFF'S EXHIBIT #1	1217
ORDER OF DISMISSAL	1226
INDICTMENT	1233

CLOSING ARGUMENTS BY COUNSEL

1000

1 pat -- Where does the weapon go?

2 Oh, well, I -- I wasn't looking
3 for that.

4 See, that's the problem when you
5 put together a story.

6 And I will give them credit.

7 All of them are singing off the
8 same sheet of sheet music very, very well.

9 In fact, their story is so in
10 lockstep, it almost strikes me as if it is rehearsed.

11 And let's think for just one
12 second -- jump forward.

13 When Ms. Livesay, the prosecutor,
14 has Detective Abercrombie on the stand, she asked him --
15 and I think she got an answer she wasn't expecting.

16 She says:

17 Detective, you've investigated
18 this case; right?

19 And he says:

20 Yes.

21 And she said:

22 And in your investigation, what
23 evidence have you found that corroborates this story?

24 And what did he tell you?

25 He said:

1 Well, all three of them said the
2 same thing.

3 No physical evidence.

4 No other evidence.

5 Just:

6 All three of them said the same
7 thing.

8 And it -- it's -- it's very
9 interesting in that regard.

10 So there is the question of -- of
11 where the weapon went.

12 But yet, this is considered to be
13 a -- a kidnapping.

14 Now, what does Mr. Bradley tell
15 us, if I'm going to assert that no one is telling the
16 complete truth.

17 Well, Mr. Bradley says, as part of
18 the story:

19 We came down.

20 Uh -- Mr. Elliott showed up.

21 We were told to get on the ground.

22 Then, we were told to walk away.

23 And then Mr. Howard and I ran
24 around and got in his car.

25 And I asked him, I said:

1 Well, did he have a gun in the
2 car? Did he have some kind of weapon in the car?

3 I mean, what were you going to do
4 differently when you got to the car than what you were
5 doing right there when he allegedly told you to walk
6 away?

7 And he says:

8 Oh, well one thing are the cell
9 phones were in the car; and Mr. Howard was going to try
10 to hit him with his car.

11 I guess he was going to run over
12 Ms. [REDACTED] as well, but -- you know -- collateral
13 damage being what it is, you've got to do what you got to
14 do.

15 Well, there again, there is one of
16 those niggling details.

17 Cell phone's in the car.

18 No. Cell phone records have the
19 two of them interacting back and forth pretty much the
20 whole time right up until about 3:17 AM; okay.

21 Now, he then says that he didn't
22 have his cell phone. He'd left -- somehow left his cell
23 phone in the car.

24 And once he gets to the car
25 though, he doesn't dial 911. He goes back to the -- the

1 house; okay.

2 And this is where one of those
3 interesting points really truly arises.

4 Because, when he gets his cell
5 phone, he doesn't call anybody.

6 Goes back to the house. Bangs on
7 the door.

8 Now, one of the -- one of the big
9 points that the State has made in this case is the issue
10 of the fact that Ms. [REDACTED] wasn't planning on going
11 anywhere. And she was taken against her will; and all
12 of this.

13 Remember what they told you?

14 It was the four of us out in the
15 yard.

16 Her friend Blythe, whose parents
17 were inside, the Carawans, Ms. [REDACTED] and Mr.
18 Bradley, and Mr. Howard.

19 We were all out there talking.
20 And then, Blythe went in the house for whatever reason.

21 And Ms. [REDACTED] says:

22 Yeah, we were just -- you know --
23 out there. We're not going anywhere whatsoever. We're
24 just out there spending time.

25 So when Mr. Bradley gets back to

CLOSING ARGUMENTS BY COUNSEL

1004

1 the house, what did he tell you?

2 He had to beat on the door.

3 And why do you got to beat on the
4 door?

5 Because the door is locked.

6 Now, if that's your best
7 girlfriend, and you're just going to be standing outside.
8 You ain't got no key. You ain't got no shoes on. You
9 have no intention of going anywhere.

10 Why is she locking you out of the
11 house? Why is she locking you out of the house?

12 No. They were going somewhere.

13 And this whole thing again about
14 the shoes and all like that, they're -- I don't know
15 where they came from.

16 Because, did you hear Detective
17 Abercrombie ask anybody about shoes?

18 He certainly didn't ask Mark
19 Elliott about whether or not she had on any shoes.

20 You didn't hear any testimony
21 about him asking her if she had on any shoes.

22 And you want to know what would
23 prove to you if she had on shoes?

24 I believe -- I was trying to
25 remember who it was that went up there and -- and picked

1 her up from 57th Avenue North in Cherry Grove.

2 What did that -- I think it was
3 Sergeant Downey, I think.

4 What did he tell you?

5 He says:

6 I got the call to go and retrieve
7 her from wherever she was.

8 I activated my -- uh --
9 microphone. Or he said you can activate the cameras from
10 the microphone in some fashion, and when you do that, it
11 will record from a minute prior to when it was activated.

12 That it was on the entire time
13 that he went to get her; on when he got her; on when he
14 took her to the hospital.

15 If she wasn't wearing any shoes,
16 don't you think they would have showed you that film of
17 him pulling up, and then there she is?

18 So I -- I don't really know where
19 all of that comes from.

20 But anyway, this kidnapping:

21 Now she's -- she's in the car
22 through no form of force, or coercion, or any visible
23 weapon of any sort whatsoever.

24 And then what is her testimony to
25 you?

1 That:

2 We then take this leisurely and
3 meandering drive through North Myrtle Beach and Cherry
4 Grove.

5 Because again, when you commit a
6 major felony, the one thing you want to do is just
7 leisurely drive around the city in which the felony has
8 been committed.

9 And he then takes her to -- by
10 everyone's account -- the most wide open and well lit
11 place in North Myrtle Beach and Cherry Grove.

12 What was her testimony?

13 Parking lot.

14 Wide open.

15 Well lit.

16 Hotels around.

17 Condos around.

18 Light from the light poles.

19 Lights from the buildings around
20 there.

21 And of course that's were you take
22 someone to commit a criminal sexual conduct.

23 Now, one of the issues I've got
24 is:

25 There's -- There's this whole

1 thing -- this whole thing about where was Mark?

2 Where was Mark.

3 And where does he go?

4 And where did they go?

5 Well, remember one of the things
6 about this case is that:

7 There's no question her cell phone
8 was in the car; absolutely no question about that.

9 Because remember, she's receiving
10 calls while she's in the car, and talking to folks while
11 she's in the car; okay.

12 If they really wanted you to know
13 where Mark Elliott was between 3:30 and 4:15 when the
14 police got behind him at Second Avenue North, heading
15 north, there's this thing called triangulation -- cell
16 phone triangulation.

17 If it's got a GPS chip, they can
18 GPS it.

19 Triangulation, they can use the
20 towers to triangulate the signals.

21 And they can go back and they can
22 not only give you -- it's not even a matter of a general
23 area -- nowadays, they literally give you latitude and
24 longitude for where the phone is at any moment; okay.

25 Now, what they're probability

1 going to tell you, is:

2 Well, we couldn't do that, because
3 remember the -- the phone was turned off.

4 Ah, but here's one of those
5 details again. Here's one of those details again.

6 What did Detective Abercrombie
7 tell you?

8 He said:

9 We were looking for BE

10 Uh -- We were at the BP.

11 We'd run Mark Elliott down.

12 He was out of the car.

13 And we won't even get to the whole
14 "car door open, car door closed," because I don't care.

15 And we called her cell phone; and
16 what?

17 It rang in his car. It rang in
18 his car.

19 Now, I don't know a ton about cell
20 phones. But I know once you turn one off, it ain't going
21 to ring when you call it; okay.

22 So now your cell phone is on.

23 So then the issue becomes:

24 If it's on, why didn't you just do
25 the triangulation?

1 I -- I get basically what they
2 give me -- you know.

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

6 And cell phone records aren't a
7 matter of -- they're not public -- they're not public.

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

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

14 We know that. We know that.

15 And how do we know that?

16 The DNA test. Their test.

17 The morning of June 29th, 2009,
18 they take Ms. [REDACTED] to Sea Coast Medical Center.

19 They have a rape kit analysis performed on her.

20 Not at the defense request;

21 Detective Abercrombie, because he wants evidence.

22 And I commend them for that.

23 That's what you want.

24 If this whole process is supposed
25 to be a search for the truth, let's get some evidence.

1 My problem is:

2 When you get the evidence and it
3 shows your case is wrong, don't just -- just discard it
4 and exclude it, you know.

5 Who had to put that evidence in?

6 Me. The Defense had to call all
7 the folks from SLED; get them there from Colombia; had
8 them get on the stand; testify to the testing that was
9 done and the results.

10 And what is the result?

11 No DNA. No physical evidence from
12 Mark Elliott whatsoever.

13 Now, what did Detective
14 Abercrombie say when he was talking to Mark?

15 He said -- uh -- and it was
16 interesting, because it's almost Shakespearean as far as
17 foreshadowing as to what was to come.

18 Because, what did Mark ask him?

19 Mark said -- or Mark told him, he
20 said:

21 Well, you just -- You just believe
22 in them because they say this. Do you not believe in
23 anything I say?

24 And what does Abercrombie tell
25 him?

CLOSING ARGUMENTS BY COUNSEL

1012

1 No; it's not even like that.
2 Because see, I've got -- there's the physical evidence.
3 I've got the DNA -- you know -- and that's what's going
4 to tell me what I need to know; okay.

5 But yet then, what does Detective
6 Abercrombie do with it? Throws it in the -- uh --
7 refrigerator at the office, and lets it sit there for
8 about 15 months; okay.

9 And Detective Abercrombie tried to
10 say:

11 Well, I -- Because I asked him:

12 Well, what determines, or what
13 triggers when you send the evidence to SLED?

14 And what does he say?

15 Well -- you know -- there's these
16 different things, and there's the economy, and there's
17 all this, that, and the third.

18 But, here's one of these issues
19 again.

20 What does Renee Best, the evidence
21 custodian tell you from this witness stand?

22 I asked her:

23 Well, what determines when you
24 take something to SLED?

25 She says:

1 When the investigative officer
2 asks me to take it.

3 When the investigative officer
4 asks me to take it, that's when I take it up there.

5 So, even though he tells Mark:

6 This DNA is so crucial and will be
7 dispositive and determinative of guilt or innocence, it
8 actually sits almost for 15 months, because he's already
9 made up his mind.

10 And how do we know he's made up
11 his mind?

12 Because, as I asked him:

13 With regard to Mr. Howard, Mr.
14 Bradley, and Mr. [REDACTED] -- Ms. [REDACTED] -- did you
15 ever ask them any questions that were searching and
16 probing and indicative that you may be doubting their
17 tale?

18 And what did he say?

19 No. No. I never asked them that.

20 They all came in.

21 They all read off the same sheet
22 of sheet music. And that was good enough for me, because
23 again, that's the evidence I have, the fact that all
24 three of them said the same thing.

25 Well folks, if the Mormon

1 Tabernacle Choir, everybody's singing the wrong note, the
2 fact that 350 of them are singing it doesn't make it
3 right, you know.

4 Numbers don't make it right.

5 Telling the same tale doesn't make
6 it right.

7 Look at the evidence.

8 What does the evidence tell us
9 actually occurred?

10 So, you get the DNA results back.

11 Mark is excluded as a contributor
12 to anything.

13 And I tried to keep it very simple
14 and talk specifically about -- you know -- the vaginal
15 and the rectal, because there was the issue of
16 penetration.

17 But trust and believe if he was
18 positive on anything they had tested, this fine
19 prosecutor would've told you about it.

20 And she didn't, because he isn't.

21 And why isn't he?

22 Because he didn't do it.

23 Now, the question maybe raised as
24 to:

25 Well, why in the world would

1 anyone -- anyone -- any young woman want go through this?

2 And I agree. I absolutely agree.

3 But there is absolutely no way to
4 crawl inside the brain of a person and figure out what
5 their determinations are as to why they do what they do?

6 You can't go down that road.

7 I'm not going down that road.

8 I stick with the road of evidence.

9 You know, just like those two
10 little schoolgirls in Florida who accused their teacher
11 of being inappropriate with them?

12 Why?

13 The judge says:

14 They didn't like the report cards
15 that was getting read to come home.

16 But did they stick to their story?

17 They stuck to it.

18 Because that's the thing:

19 Once you tell a big tale -- once
20 you tell a big tale, you're stuck with it.

21 It's like grabbing a tiger by the
22 tail. It's almost impossible to let go at that point.

23 And why would you tell the tale to
24 begin with?

25 Well, sometimes you need -- When

1 you're doing something wrong -- When you're doing
2 something you ought not to be doing, one of the things
3 that comes with age, hopefully for all of us, is that:

4 Really, it's just easier and
5 better to just fess up when you're caught.

6 Just fess up.

7 You got me.

8 I -- I did it.

9 I was wrong.

10 I shouldn't have been out there.

11 I shouldn't have been out there
12 with them boys.

13 Shouldn't have been out running
14 around trying to find some drugs. Shouldn't have been.

15 But instead, once the jig is up
16 and the Carawans are notified and -- you know:

17 Oh, my gosh, what's going on?

18 Well now, you got to explain why
19 you're out here with this man?

20 So now, it's got to be a
21 kidnapping; okay.

22 Well then, the issue becomes:

23 Well if he kidnapped her, well why
24 did he do that?

25 Well, according to her, she ain't

1 got no money; okay.

2 So -- you know -- it couldn't
3 happen over that.

4 So then, what's the only other
5 thing?

6 It's got to be sex.

7 So then, we got to say it's sex.

8 And see, that's the twisted and
9 insidious road that it goes. And that's where it comes
10 from. And once you grab that tiger by the tail -- and I
11 think -- and again, as the judge will tell you:

12 What I think is not the law and is
13 not the facts of the case.

14 It's all about what you find the
15 -- the facts of the case to be.

16 What I think is:

17 I really think Ms. [REDACTED] did
18 try to let that tiger go, because what was the testimony
19 from Detective Abercrombie?

20 Yeah. Came in. Showed her six
21 photographs.

22 Mr. Elliott was in there. And she
23 didn't pick him.

24 And yeah, I realize that there is
25 not always -- uh -- you know -- an identification -- an

CLOSING ARGUMENTS BY COUNSEL

1018

1 eyewitness identification. I realize that.

2 But if you want to let this tiger
3 go, isn't that one of the quickest ways you might be able
4 to do it?

5 Uh -- No -- No, I don't see him
6 there.

7 And in fact, not even:

8 I don't seem there.

9 It was:

10 I think it's this other guy, here.

11 And what did Detective Abercrombie
12 say when I asked him about that?

13 He goes:

14 Well, no, no, no, no. I mean, if
15 you're not sure -- If you're not sure, let's just put
16 you're not sure.

17 Let's not say you picked guy
18 number two.

19 So maybe she was trying to let
20 that tiger go.

21 Now, the issue of whether there's
22 any DNA there?

23 You know, I don't care. You can
24 shop about presumptive tests. And you can talk fluid.
25 And you can talk about anything you want, you know.

1 I tried to keep her from getting
2 too incredibly technical with Mr. Humbert from SLED --
3 the expert from SLED.

4 Uh -- But what did Detective
5 Abercrombie say?

6 He's had training in DNA
7 investigation. And he has that basic knowledge just like
8 I do, just -- Well, The Court's' knowledge is far beyond
9 mine, but we all have some knowledge and training in that
10 regard.

11 And what did he tell Mark?

12 He said:

13 It don't take much. It does not
14 take much to leave your DNA behind when you have sexual
15 contact with someone.

16 Penetration. What happens?

17 Skin cells come off.

18 Epithelials come off.

19 Other fluids come off and mingle;
20 and that's where the match is made.

21 So it ain't about -- Don't let
22 them give you that red herring about:

23 Well, he didn't cum. And he
24 didn't ejaculate inside of her, so there was nothing to
25 test in that regard.

1 No, no, no, no, no, folks.

2 Don't let them give you that.

3 Don't let them give you that.

4 Don't let them make you believe
5 that one person can put a part of their body inside
6 somebody else and leave absolutely no physical evidence,
7 no DNA evidence behind.

8 We know the deal with that.

9 Now, why would the DNA not be
10 there?

11 You know, it's strange; because
12 again, that DNA evidence, that's the State's evidence.
13 That's the State's test. That's their results.

14 You see, they didn't like the
15 results.

16 So this is what happens is:

17 They put the people up here from
18 SLED, these wonderful folks that took the time out to
19 come down here because they want to see justice done.

20 And she starts asking about:

21 Well, on -- on some cases, doesn't
22 this happen? And then, on some cases, doesn't that
23 happen?

24 No.

25 How about we talk about this case.

1 What happened in this case?

2 It ain't about other cases.

3 What about this case, you know?

4 Don't let her lead you down the
5 path. Don't ever let them lead you down the path, you
6 know.

7 Now, with regard to Mark, again:

8 He -- His -- His story is, you
9 know:

10 I took her. I dropped her off. I
11 don't know what the drug was all about.

12 Again, that's not my concern.

13 Was something going on, and
14 somebody going somewhere?

15 Yes.

16 Because again, Blythe's done
17 locked the door because she ain't expecting to see her
18 girl for a while.

19 Uh -- And I'm assuming really
20 until the next morning, if you're going to lock somebody
21 out.

22 And remember, they don't have a
23 key; okay.

24 But she's going somewhere and
25 she's going to do something.

1 But Mark won't tell them -- and --
2 When -- When you look at -- Even in the very beginning
3 when he first starts talking about Detective Abercrombie,
4 he tries to stay out of the issue of the drugs at all.

5 Because what does he say?

6 I mean, this is a man who what?

7 He's been arrested. He's been in
8 jail that at this point for like 10 hours.

9 And what does he say?

10 He says:

11 Well -- you know -- to make a long
12 story short, I gave her a ride and then let her go -- let
13 her out.

14 And -- uh -- But Detective
15 Abercrombie won't let it go.

16 So that's when you get into the
17 whole issue of:

18 Okay, there was drugs involved and
19 they wanted -- But even when he says that, Detective
20 Abercrombie says:

21 So, are you trying to say that
22 this girl was out there trying to buy drugs?

23 And what does Mark say?

24 Well, I mean -- you know -- I
25 ain't trying to get in nobody's business.

1 You know, he's -- he's not trying
2 to get her in trouble. He's not trying to get her
3 trouble.

4 And when you -- when you talk
5 about what is, and -- and where you can find the truth:

6 You know, my grandmamma told me
7 when I was a little boy -- she told me a long time ago,
8 she said:

9 Son, if you want to know which way
10 the wind is blowing, don't look at the big oak tree.

11 Look at the leaves on the tree.

12 Look at the little things, you
13 know.

14 Look at the little things that
15 tell you exactly what is going on here.

16 Because, with Mark -- you know --
17 he says:

18 Uh -- Uh -- No.

19 You know, I'm not trying to -- you
20 know -- say anything or -- or put anybody under the bus
21 in that regard.

22 But then, first on the -- on the
23 roadside, or at the -- uh -- BP Station after -- you know
24 -- he's been crispy Kentucky fried -- uh -- they ask him
25 about the scenario.

CLOSING ARGUMENTS BY COUNSEL

1024

1 What happened?

2 What's going on?

3 And he says:

4 Uh -- Well, they -- they -- they
5 wanted to buy -- you know -- some drugs; okay.

6 And -- uh -- what does -- uh -- I
7 think it was -- uh -- Lieutenant Baldasarre say?

8 He says:

9 Well, that's not what they're
10 saying. That's not what they're saying.

11 They're -- They're talking to the
12 police right now, telling them something else.

13 And what's Mark's immediate
14 reaction?

15 Sitting in the back of that car
16 after having 50,000 volts shot through him 3 times, what
17 does he say?

18 He goes:

19 Well, bring them over here.

20 Does that sound like a robber; a
21 kidnapper; and a rapist?

22 What's does he say immediately?

23 Bring them over here. We'll get
24 this cleared up right now.

25 That's one of those little things

1 to keep your eye on, you know.

2 Also, Mark -- One of the -- uh --
3 reasons, I guess, that -- that really wasn't -- by the
4 time he got to talking to Detective Abercrombie -- uh --
5 the drugs were not that big of an issue is:

6 Because what did Lieutenant
7 Baldasarre already say to him?

8 When he does start talking about
9 drugs, Baldasarre goes:

10 I don't want to hear nothing about
11 no drugs.

12 I'm not worried about no drugs.

13 Don't tell me about no drugs.

14 And then, you got the other guy in
15 the background going:

16 Yeah, you don't want no more of
17 this juice; do you?

18 You know, talking about the Taser.

19 You know, so -- But the one thing
20 again that Mark is always consistent on, and always clear
21 and forthright on is:

22 Did not rob anyone.

23 Did not kidnap anyone.

24 Did not rape anyone.

25 And in fact, when you watched his

1 video, I'm sure you could see the actual disbelief when
2 he was told that that's what they were saying about him;
3 okay.

4 So now, this is a matter where you
5 have to make a determination of guilt or innocence.

6 And you have to look at all of the
7 evidence that's been presented to you.

8 And quite frankly, if you believe
9 what you've been told by the State, then Mark Elliot is
10 guilty and you've convicted him.

11 But if you look at all of the
12 evidence; if you look at these tax facts, and you see
13 where they do not come together as the truth should, and
14 invariably always does -- there's a reason why they say
15 the easiest thing in the world is to tell the truth --
16 there's a reason why they say that; okay -- then, your
17 verdict will be one that's not guilty.

18 Because, as Detective Abercrombie
19 said when Mark asked:

20 Well, you just going to take their
21 word and not believe me.

22 And Abercrombie says:

23 No. I got the rape kit. And if
24 your DNA is there, then I know she's telling the truth.

25 Well folks, what does it mean when

1 the DNA in a perfectly well done test performed to South
2 Carolina Law Enforcement Division and national standards
3 is done, and there is absolutely no DNA, no evidence
4 whatsoever?

5 We know what that means.

6 That means:

7 Not guilty.

8 Thank you.

9 THE COURT:

10 Thank you, Mr. Hazzard.

11 Ms. -- uh -- Livesay?

12 MS. LIVESAY:

13 Thank Your Honor.

14 Ladies and gentlemen of the jury,
15 I'm going to try to keep this short.

16 I know y'all have been here all
17 week, and now it's Friday morning, and y'all are ready to
18 probably start deliberating.

19 So I'm going to try to keep it as
20 short as I can.

21 But I think what's telling the
22 most about this story is something that my mom always
23 tells me.

24 Just the facts.

25 Look at the facts.

CLOSING ARGUMENTS BY COUNSEL

1028

1 That's what you got to look at in
2 every case, and whenever you're deciding anything.

3 And that's what I want you to look
4 at in this case, the facts.

5 What are the facts in this case?

6 The entire incident got started
7 from a 911 tape that described a red burgundy car with a
8 black male with a white tank top and shorts.

9 You know who that was?

10 That guy (pointing to Defendant
11 Elliott).

12 That's who it was.

13 Police didn't run up on him on
14 happenstance.

15 Somebody called 911.

16 And guess when they called 911?

17 Around the same time BE told
18 you that they were out there and this man rolled by and
19 told them to get on the ground.

20 They told immediately right after
21 that.

22 That young boy ran up to that
23 adult's house, banging on the door:

24 Call 911. Call 911. That girl's
25 been kidnapped.

1 Listen to the 911 tape when the
2 whole thing got started.

3 What did that boy tell you?

4 Somebody rolled up in a 4-door
5 Camry, got out, had what we thought was a gun, or a gun.

6 Told us to get down on the ground.

7 He told the two of us to walk.

8 And then he put BE in that
9 car and took off.

10 He called 911 and told that right
11 away.

12 Now, Mr. Hazzard's made this big
13 deal:

14 Well, she was -- They were out at
15 three o'clock in the morning. Those boys weren't
16 supposed to be down here. Uh -- She was down here
17 meeting her boyfriend.

18 And you know why that's telling?

19 Because they weren't supposed to
20 be down here. They weren't.

21 That's why they were sneaking out
22 at three o'clock in the morning, because they didn't want
23 to get in trouble.

24 But you know what?

25 When some crap went bad, they were

CLOSING ARGUMENTS BY COUNSEL

1030

1 banging on that adult's then.

2 They didn't care about getting in
3 trouble.

4 They didn't care that they weren't
5 supposed to be down here.

6 All they cared about was finding
7 that young girl.

8 They didn't care then about those
9 guardians knowing, or BE daddy's knowing, or
10 anybody knowing.

11 They were scared.

12 And that's why they went up there
13 and banged on that adult's store. That's why they called
14 911.

15 Let me tell you something:

16 If all this was on the up and up,
17 and this:

18 Oh, she just gets in the car and
19 rolls off with this man.

20 Ain't nobody calling 911, folks.

21 You ain't going to wake up two
22 adults at three o'clock in morning who don't even know
23 you're down here -- you're not even supposed to be down
24 here -- to tell them:

25 This girl's been kidnapped. Call

1 the police.

2 That's not how it goes when
3 everything's on the up and up, and we just riding around.
4 And we're going to meet up later on; and all of this kind
5 of stuff.

6 You don't call 911.

7 And you ain't waking up adults at
8 three o'clock in the morning.

9 Now, he made a big deal:

10 Why didn't you call the police?

11 Didn't you have your phone?

12 Didn't Matthew have his phone?

13 Why didn't y'all call the police?

14 We're talking about two 17-year-
15 old boys that roll down here to meet up with one of their
16 friends that didn't even have anywhere to stay.

17 They're 17. They're not adults.

18 The first thing they did was do
19 what they thought was best: notify an adult.

20 And then that adult knew what to
21 do. And then she called 911, and put him on the phone,
22 and allowed him to give the description.

23 They're 17 folks.

24 They don't think like adults
25 think.

1 The first thing they know to do is
2 run for an adult.

3 That's what they did.

4 And then, the adult knows what to
5 do.

6 That's why they didn't call 911
7 right away.

8 But it ain't like they were down
9 there twiddling their thumbs, walking around, and just:

10 Well, I -- I don't know. I mean
11 -- mumbling around.

12 They ran up there, banged on that
13 door, got an adult, and called the police.

14 Now, something else:

15 It's all -- Everything's all up on
16 the up and up. She's just decided to get in this car
17 with a stranger she's never met before in her life.

18 And he's never met her before in
19 his life.

20 He admitted that to you.

21 I rolled up on her and two dudes.
22 And that was first time I had met them.

23 She was down here with her
24 boyfriend sneaking out of the house to meet him.

25 He's driving five hours down from

1 Kannapolis, North Carolina. just to see her; okay.

2 This is obviously some sort of
3 teenage love thing going on.

4 She's sneaking out of the house.

5 They're kind of fighting out there
6 like teenagers do.

7 And then they make up and they're
8 out there hugging.

9 Even he says that.

10 When I rolled up, this dude and
11 this girl were out there hugged up on each other and the
12 other guy was sitting in the driveway.

13 It's on the tape. Listen to it --
14 on the roadside.

15 And then, all of a sudden, she
16 says:

17 Well, even though I got my
18 boyfriend down here, he's got a car, he's got another
19 friend down here.

20 They've come down here to meet me.

21 I'm sneaking out of the house just
22 so I can meet with him.

23 But instead of doing that, I'm
24 going to roll off with this guy, who she's never seen,
25 and he's never met her.

CLOSING ARGUMENTS BY COUNSEL

1034

1 Does that make any sense at all?

2 At three o'clock in the morning,
3 she don't know where she's at. And just all of a sudden
4 is going to jump in the car with this guy; okay?

5 And what else is important about
6 that is:

7 Where was she?

8 She weren't out at some party.

9 They weren't out cruising the
10 Boulevard trying to meet people.

11 They were in the front yard in a
12 residential neighborhood.

13 They were in front of this house
14 (pointing to photo). That's where they were; okay.

15 These people that are our looking
16 for drugs?

17 They're out looking for drugs?

18 That's what this is all about;
19 drugs?

20 They're out standing in the front
21 yard of the house, folks.

22 They ain't cruising the Boulevard
23 together.

24 That ain't where he found her, in
25 Matt's car.

1 They ain't walking on the
2 Boulevard. That ain't where he found her; okay.

3 I'm here to tell you in North
4 Myrtle Beach, this ain't where you're at when you're
5 looking for drugs.

6 Let's -- Let's be honest about it.
7 You're cruising the Boulevard. There are places to go to
8 look for drugs.

9 I'm telling you, it ain't this
10 housing development on Hillside Drive; okay.

11 It's all about drugs. It's all
12 about drugs.

13 But yet, they're out there
14 standing in their front yard.

15 And she told you there was no
16 traffic out; nobody was out walking around all these
17 little houses.

18 It's a residential neighborhood.

19 They ain't out there looking for
20 drugs, folks.

21 That ain't the area to be looking.

22 They could be looking for drugs if
23 they wanted to, but they won't (sic).. They were out
24 there standing in the front yard, hanging out, trying to
25 spend time together at three o'clock in the morning.

CLOSING ARGUMENTS BY COUNSEL

1036

1 And this guy rolled up.

2 Now he told you:

3 Well -- uh -- all of this

4 kidnapping stuff doesn't make any sense.

5 Sure it does.

6 This man was not afraid of those

7 three teenagers.

8 He's an adult that was riding

9 around that night at three o'clock in the morning.

10 He weren't a bit more worried

11 about BE and those two little boys out there

12 causing him any problems -- little teenagers -- no more

13 than most adults would when they walk up to a child; okay

14 folks.

15 That's not equal standing.

16 Me walking up to a 14-year-old, or

17 to a 12-year-old, or to any child is not an equal

18 balance, folks.

19 That's an adult.

20 You talking life experiences.

21 You talking about somebody that's

22 knowing what's going on, is rolling up on three

23 teenagers, that have never even been down here, standing

24 out there in the yard, who have snuck out.

25 He won't worried about them when

1 he jumped out of that car.

2 Mr. Hazzard said:

3 Well, when they were at the
4 roadside, what did he you tell the cops?

5 Bring them over here.

6 Yeah, he told them:

7 Bring them up here.

8 He won't worried about Ryan

9 Bradley and MH two 17-year-old boys.

10 He won't a bit more worried about
11 those boys.

12 That's why he, when he jumped out
13 of that car, he won't worried about them doing nothing.

14 He knew he had the upper hand on
15 that crowd.

16 Now, Mr. Hazzard said:

17 Well, how about this weapon? How
18 about this -- this weapon?

19 Let me tell you something, folks:

20 They took this crowbar out of the
21 car because when BE [REDACTED] told them:

22 He was holding something behind
23 his back. It was dark. And it was three o'clock in the
24 morning.

25 Well, when you're holding this

1 like this (indicating with the crowbar) at three o'clock
2 in the morning, yes, it kind of looks like a gun.

3 It kind of looks like a weapon to
4 three teenagers -- to a 14-year-old girl and two 17-year-
5 old boys.

6 When you hold it like this and
7 it's dark, it looks like a gun.

8 What did she tell you?

9 He was holding it by his arm like
10 that (indicating with the crowbar).

11 Yes, it does look like a gun. It
12 did look like a weapon.

13 I'm here to tell you, folks:

14 It ain't a gun. But it sure as
15 heck could be a weapon. And it was in that car.

16 It don't shoot a bullet, but I
17 promise you (knocks the crowbar on the table), when you
18 lay it against somebody, it can do some damage.

19 When he got the car, he had this
20 in his hand. And he was holding it like this with that
21 sticking out, so they would think it was the end of a
22 gun.

23 He knew what he was rolling up on.

24 That's what that conversation is
25 about, asking for directions, all that.

1 He was gauging right then who he
2 was talking to you.

3 He was getting a look and gauging
4 right then who he was talking to.

5 And it didn't take him long.

6 He was fooling around with some
7 teenagers that didn't know what was going on. And he
8 knew right then he had the upper hand.

9 He thought about it.

10 He pulled that car out.

11 He grabbed his tire iron and got
12 out.

13 She didn't get in that car
14 voluntarily.

15 That's what doesn't make any
16 sense.

17 And isn't it ironic that all three
18 of them says:

19 He was holding something that they
20 thought was a gun behind his arm like this (indicating).

21 Then, low and behold, you search
22 the car. And what's in the car?

23 Something that corroborates their
24 story.

25 Now something else:

CLOSING ARGUMENTS BY COUNSEL

1040

1 It's -- It's all about these
2 drugs. She's looking for drugs. She's getting ready to
3 go out. It's -- It's all this going on.

4 Folks, look what she's wearing:
5 No shoes were ever turned in
6 because she wasn't wearing shoes.

7 Lance O'Bryant, the first guy she
8 came across that night, listen to his testimony.

9 What did he tell you?
10 She ran up to me.
11 I was kind of hesitant in the
12 beginning.

13 And in fact, my guard didn't come
14 down until I noticed she didn't have any shoes on.

15 Then I was like:
16 Whoa, this -- this is something
17 going on here. I mean, maybe it's -- I need to -- she is
18 having some problems. I to need help her. I need to get
19 her to a phone.

20 There's no shoes 'cause she won't
21 wearing any shoes that night.

22 That's why there's no shoes.

23 The first person she ran up on,
24 this is what she was wearing.

25 And she's 14.

1 Do 14-year-old girls wear this
2 when they're going to a party, or they're going to buy
3 some drugs?

4 Does this look like something that
5 she would be wearing to go do that?

6 No, folks.

7 She had changed into this and
8 these socks, thinking she was going to bed.

9 She even told you before then:

10 When I was out, I was walking
11 around. I was wearing a dress.

12 That's what 14-year-old girls wear
13 when they're going somewhere.

14 They are the atypical.

15 That makeup's going to be on.

16 The hair is going to be fixed at
17 14.

18 They going to be wearing a dress,
19 or they gone die.

20 It's going to kill them that they
21 got to go to school in something don't look quite right.

22 That's how 14-year-old girls
23 think.

24 That's how 30-year-old women
25 think.

CLOSING ARGUMENTS BY COUNSEL

1042

1 If they're going to go somewhere,
2 they gone be looking good. They ain't gone be wearing
3 this.

4 But he wants you to believe she
5 decided to put this on to go out and look for drugs to go
6 to party.

7 That doesn't make any sense.

8 And when you look closer at the
9 evidence and the facts, because this is the facts; these
10 are the clothes that came off of her that night when she
11 was found.

12 I want you to take a look at the
13 bottom of these socks.

14 Dirty, with holes in the bottom.

15 They're dirty. And they got holes
16 in the bottom because she was out there wandering around
17 on Ocean Boulevard looking for help; looking for somebody
18 to help her.

19 That's why.

20 She was running around in these
21 socks looking for help.

22 She didn't have any shoes on.

23 These socks show you. These
24 facts, this evidence shows you:

25 She was walking around that night

1 in these socks looking for somebody to help her.

2 Now, what's important about that
3 -- and I know I showed you that map 50 -- probably 50
4 times.

5 The reason I showed you that map
6 is because what's so important about that map is where
7 they found her.

8 They found her here, folks; all
9 the way at the end of the beach;, miles and miles from
10 Hillside Drive where she -- where she started off at.

11 That's a long way from home for
12 somebody that don't know the area.

13 How do you think she got there,
14 folks?

15 This defendant wants to tell you:

16 I gave her ride a couple of
17 blocks. I gave her a couple of blocks.

18 Well, she won't found a couple of
19 blocks.

20 She was found by a jogger from
21 Asheville, 5 or 6 miles from Hillside Drive.

22 She got there because that's where
23 he dropped her off.

24 Folks, she didn't ride no couple
25 of blocks.

CLOSING ARGUMENTS BY COUNSEL

1044

1 Her boyfriend has his car down
2 there. If she wanted to ride a couple of blocks, they
3 would have taken her a couple of blocks.

4 That's not what happened.

5 He dropped her off all the way at
6 the end of the beach, because that's where he took her.

7 Now, there's been a lot of talk
8 about this boat ramp, because that's where she said she
9 was sexually assaulted.

10 What's important about that:

11 She's only been down here two
12 times.

13 She's from Kannapolis, North
14 Carolina, five hours from here; okay.

15 And ironically, she knows that
16 there's boat ramps right along in here.

17 Actually she didn't know that
18 until she came walking back this way away from the boat
19 ramp.

20 And what did Detective Abercrombie
21 tell you?

22 I've been down here 15 years. And
23 I'm not familiar with these boat ramps.

24 All the way at the end of the
25 beach.

1 But yet, somebody who's only been
2 down here twice in their entire lives, who was staying 5
3 miles from the incident, said:

4 I was raped at a boat ramp.
5 Isn't that an ironic place to
6 pick?

7 And she told you a well-lit boat
8 ramp.

9 If she wanted to make up a lie,
10 she would have told you:

11 He took me behind somewhere in the
12 woods where it was dark. I couldn't see nothing. And he
13 raped me and left me out there.

14 But that ain't what she told you.
15 She told you:

16 I was raped at a boat ramp.
17 And ironically, 5 miles from her
18 house and blocks from where she was found walking,
19 there's a boat ramp.

20 How else would she know that,
21 unless that's where he took her?

22 That's not a place you make up
23 that you've been raped, a well-lit boat ramp.

24 We're not talking about a
25 situation where she said:

CLOSING ARGUMENTS BY COUNSEL

1046

1 I was raped at a boat ramp.

2 And there ain't a boat ramp

3 nowhere nearby.

4 So what's that all about?

5 There's a boat ramp blocks from

6 where she was found walking that somebody who's lived

7 here 17 isn't even that familiar with.

8 She knew about that boat ramp

9 because he took her there.

10 That's a hard story to make up,

11 that I was raped at a boat ramp.

12 And low and behold, you go out

13 there and a block from where she's found, there's a boat

14 ramp.

15 She knew that because that's where

16 he took her.

17 What else is important about her

18 story?

19 When she told you up here, and

20 what she told Abercrombie about the details of that rape.

21 She told this jury; she told that

22 detective:

23 On June the 29th, on that

24 afternoon, that:

25 He raped me anally and vaginally.

1 And what she also -- she also told
2 him, and what she told you today is:

3 He was not erect. I do not
4 believe he was erect. I do not believe he ejaculated.
5 Now, the Defense wants to minimize
6 that.

7 And I'll tell you why.

8 Two reasons:

9 One reason:

10 Isn't that a weird fact to make up
11 about somebody that's been raped?

12 Isn't that a weird detail to come
13 up with, that he wasn't erect?

14 Why would you make that up?

15 Why would you make that up?

16 If you wanted to make up a story,
17 what would you say?

18 I've been raped.

19 It was painful.

20 All these horrible details.

21 He was holding me.

22 I think he had a gun on me.

23 I think he had a knife on me' all
24 these terrible things.

25 That's not what she said.

CLOSING ARGUMENTS BY COUNSEL

1048

1 She said:
2 It lasted maybe two minutes.
3 I do not believe he was erect.
4 And afterwards, he said:
5 I cannot do this to you; and let
6 her go.

7 Now, if you wanted to make up a
8 story, is that the one that would be made up?

9 She told that on the afternoon of
10 June the 29th of 2009.

11 That:

12 He was not erect.

13 And:

14 It only lasted two minutes.

15 He appeared sorry and regretful.

16 Left her out there, and then took
17 off.

18 She told that before that guy from
19 SLED tested that evidence; okay.

20 She's not making up a story to
21 conform to the evidence. She already told us that.

22 She already told us:

23 He wasn't erect.

24 We already knew that.

25 She's not making up a story to

1 conform to the evidence.

2 And she's not making up a story
3 that seems unbelievable.

4 That's a detail that she wouldn't
5 know unless you was there.

6 Now, Mr. Hazzard wants to tell you
7 that:

8 Well, they gone lead you down that
9 road. They gone lead you down that road.

10 Folks, that ain't no road.

11 That's what we got.

12 That's the truth.

13 That's what she told you.

14 Now, you can go back and listen to
15 any testimony you want to.

16 And I suggest:

17 If there's any confusion, Jasper
18 Humbert was the SLED guy that came up here.

19 Go back and listen to his
20 testimony.

21 He'll tell you:

22 What was I looking for?

23 Semen.

24 That's what I was testing for;
25 okay. That's what I was testing for.

1 That's why I was asking him those
2 questions.

3 Well, if that's the case, wouldn't
4 it be more likely if you were erect and ejaculated to
5 find semen?

6 Wouldn't that make sense?

7 Obviously, if you aren't erect,
8 isn't it going to be hard to find semen.

9 If you don't ejaculate, isn't it
10 going to be hard to find semen?

11 Run the tape back.

12 He tells you:

13 What I'm looking for, semen.

14 That's the DNA.

15 The way you get semen is you
16 ejaculate.

17 Just because we're in this
18 courtroom doesn't change the way our bodies work -- the
19 way the physical body works.

20 Just 'cause this is a criminal
21 case doesn't mean I can make the body work any different
22 and produce those blood test.

23 Now, the thing about physical
24 evidence is:

25 She was in that car.

1 There's no doubt she was in that
2 car.

3 You know why there's no doubt that
4 she was in that car?

5 He told you that.

6 Guess what, folks?

7 Her fingerprints ain't in that
8 car.

9 Her DNA ain't in that car.

10 But does it mean she won't in
11 there?

12 No. That's not what it means.

13 He told you she was in there.

14 And -- you know -- he maybe
15 could've slipped past if he had gotten that story:

16 Instead of:

17 She ran from the car.

18 Maybe if he was thinking (begins
19 to snap fingers several times while speaking) just maybe a
20 tad bit quicker, he could have come up with:

21 I don't know nothing about no
22 girl.

23 Because honestly, she couldn't
24 pick him out of the lineup, and she was right there in
25 the car with him.

CLOSING ARGUMENTS BY COUNSEL

1052

1 There was no DNA.

2 Her DNA weren't in the car.

3 Her fingerprints weren't in the
4 car.

5 We dusted. We did all that.

6 We processed the car.

7 There's no physical evidence
8 there.

9 Does it mean she wasn't in the
10 car?

11 I mean, if that's what we're
12 looking at, no, it doesn't.

13 The real world doesn't look like
14 that.

15 It doesn't work like that.

16 There's not DNA everywhere you go
17 like Mr. Hazzard wants you to believe.

18 She was in that car.

19 She told you that. And he told
20 you that.

21 There's not one ounce -- not one
22 fingerprint to prove she was in that car.

23 So maybe if he could have thought
24 (snaps fingers) just a tidbit quicker, he could've had
25 that one.

1 Because she couldn't pick him out.
2 We did have her DNA in that car.
3 So then it would've been like:
4 Oh, I don't know no girl.
5 I found that phone on the ground
6 and picked it up.

7 That would've been the story then.
8 Because, that's about how this
9 case is working on the Defense side.

10 But if he could've thought just
11 that quickly:

12 There ain't no DNA. There's no
13 proof -- no fingerprints. Her fingerprints ain't in the
14 car. Her DNA ain't in the car. She won't in that car.

15 He picked -- I picked that phone
16 up.

17 I was out looking for some drugs,
18 and that phone was on the ground, and I picked it up.

19 All he's told you is what conforms
20 to the story right there.

21 Well, okay -- Well -- I tried
22 that. Well okay, well let me tell you this much.

23 As soon as he got down on that
24 ground -- He was Tased. He was down on the ground, hands
25 behind his back.

CLOSING ARGUMENTS BY COUNSEL

1054

1 Mr. Hazzard want you to believe:
2 This man was just Tased, Kentucky
3 fried, chicken fried.

4 Well, he won't that fried, folks.
5 Because he picked up on that
6 officer saying:

7 Oh, I think I saw her run from the
8 car too.

9 He's so incapacitated, he's been
10 Tased. He don't know what's going on.

11 But he -- He picked up on that.
12 As soon as they asked him, what
13 did he say?

14 She ran when I ran.

15 He picked up on what those other
16 officers were out there saying, because he knew right
17 from the get-go why they were running behind him.

18 So as soon ask he got out of that
19 car, his mind was working.

20 And as soon as that officer said:
21 I saw -- I think I saw her run
22 too.

23 There's been a big issue on it.

24 I thought I -- Listen to the tape.

25 The officer said:

1 I think -- there's 3 cars out
2 there that are running after him -- I think I saw her run
3 from the car.

4 He immediately picks up on that
5 after being Tased, handcuffed, on the ground, and tells
6 this officer:

7 She ran when I ran.

8 That's -- That's pretty good for
9 somebody who -- uh -- is so incoherent and been Tased
10 with 50,000 volts.

11 I mean, at this point, Mr. Hazzard
12 is ready to say that he was fried out there on the
13 ground.

14 But he was smart enough to pick up
15 on that.

16 Now, at that time, they were
17 asking him about the girl:

18 Yeah, I picked her up with two
19 dudes; this and that and the other.

20 We hadn't gotten into any drugs
21 yet. Because he hadn't really got it all together yet --
22 that story all together.

23 He says at this point in time:

24 I'll lead them on this chase
25 because they're still looking for the girl.

1 Then once he has some time to
2 collect himself and think about it, then he's really got
3 his story straight.

4 Then it's:

5 Yeah, I rolled up. And she ran
6 when I ran.

7 And in fact, what's telling about
8 that is:

9 He even asked -- He asked the
10 officer:

11 Well, what's she running for?

12 If she's so innocent, what's she
13 running for?

14 I mean, he's already -- for
15 somebody:

16 Oh, he don't want to throw her
17 under the bus.

18 Right from the get-go:

19 What's she running for?

20 And then, later on, when you here
21 him trying to come up with this drug story, the first
22 thing he asked -- Mr. Hazzard wants you to think:

23 Oh, well, he don't want to throw
24 her under the bus.

25 The first question he asked:

1 He -- I'm trying to -- He says:
2 I'm trying to figure out how to
3 say this right, or say this in the correct way.

4 What was she doing out at three
5 o'clock in the morning?

6 That's what he told the officers.

7 That's when he was trying to get
8 that drug story together. Because then it's like:

9 Yeah, what was she doing out?

10 She must have been up to no good.

11 She must have been out there
12 looking for some drugs.

13 Why else are young people out at
14 three o'clock in the morning? Looking for drugs.

15 That's where he got that story
16 from.

17 Never once in all these statements
18 could he ever get it right where he dropped her off.

19 First:

20 She jumped at the car.

21 Then it was:

22 Two blocks from the house at a
23 motel.

24 Detective Abercrombie says:

25 Well, right off the be able to,

CLOSING ARGUMENTS BY COUNSEL

1058

1 this is a residential area.

2 Oh, okay. If that's the case,
3 then I saw all them motels, then. How about that.

4 Okay, I saw all them motels.

5 Does that work?

6 And now, is it kind of consistent
7 with what you got -- what you figured out?

8 I mean, the story is constantly
9 changing as he's listening to the facts.

10 He never tells a date where he
11 dropped that girl off.

12 From the time they picked him up,
13 all this time he's talking on the roadside, all this time
14 he's talking to Detective Abercrombie, never once did he
15 say:

16 I dropped her off right here.

17 This is where I dropped her off
18 at.

19 And -- you know -- its funny -- uh
20 -- Mr. Hazzard says:

21 On the roadside, he said:

22 Tell them boys to come on over
23 here. Tell them. I got something to say to them. Tell
24 them.

25 But you didn't hear him say:

1 Uh -- We in the car. Let me show
2 you where I dropped that girl off at.

3 He didn't say that.

4 Yeah, I dropped her off two
5 blocks.

6 You didn't hear him go:

7 Oh, we in the car. Get in the
8 car. I'm going to show you where I dropped her off.

9 You didn't hear him say that.

10 It was:

11 Bring them boys over here.

12 Because he won't worried about
13 them.

14 But it was never:

15 Well, I picked her up and I
16 dropped her off two blocks. We in the car now. I'm in
17 the car. Let me show you where I dropped her off at.
18 Let's -- Let's get this straight.

19 He never said that.

20 Because he couldn't tell you where
21 he dropped her off. Because then he would have to admit
22 that he took her 5 -- 6 miles from where she was staying,
23 at that boat ramp.

24 Now, it's hard to have broke that
25 story out.

CLOSING ARGUMENTS BY COUNSEL

1060

1 Two blocks up the road; that's
2 easy to work out.

3 But then, that's when all that
4 time comes into play.

5 Well, what's she doing for 30
6 minutes?

7 What's she doing for 45 minutes?

8 That's not a time-sensitive play,
9 folks; because then he has to admit he took that girl,
10 drove her around, made sure she didn't know where she was
11 at; took her 5 or 6 miles from where she was staying,
12 raped her at that boat ramp, and left her out there.

13 Because it don't make no sense to
14 be leaving her 5 or 6 miles with no shoes out there
15 wandering around.

16 That don't make any sense.

17 He just dropped off two blocks.

18 He won't jump and tell nobody
19 where them two blocks where he dropped her off at.

20 That don't make no sense, folks.

21 Listen to Lance O'Bryant's
22 testimony again. That's where he found her.

23 Now that phone thing is important.

24 Mr. Hazzard even called BE
25 to the stand to talk about that phone.

1 Now, that's something else too.
2 He's gotten up here and told you:
3 Uh -- I'm kind of -- I'm hand-
4 tied. All I got is what the State gives me. I can't
5 talk to no witnesses. I can't do nothing. I'm just over
6 here on Defense.

7 Well folks, you know that ain't
8 true.

9 Mr. Hazzard called some witnesses.
10 He called the victim.
11 I can't talk to no witnesses. I
12 might tamper with the witnesses.

13 Well folks, you got to know that
14 is -- that's not true. That's simply not true.

15 He called the victim to the stand.

16 For somebody that can't do
17 nothing, can't call no witnesses, he called witnesses
18 from Columbia, South Carolina.

19 He wants you believe:

20 I can't -- I can't do nothing. I
21 can't call no witnesses. I can't talk to anybody.

22 That's not true.

23 You know that's not true.

24 He put on a case; called my victim
25 to the stand.

CLOSING ARGUMENTS BY COUNSEL

1062

1 So that's not true.

2 He called her to the stand and
3 told her:

4 Let's talk about these phone
5 records.

6 He wants to make a big deal out of
7 these phone records because he thinks:

8 That's the way I can divert the
9 fact that she was kidnapped.

10 Because if you're kidnapped, you
11 can't make no phone calls. You can't receive phone
12 calls.

13 She did pick up the phone.

14 She told you:

15 I picked up the phone because that
16 man told me to pick up the phone.

17 This man is interesting. He's
18 actually pretty smart.

19 He had her in that car.

20 He knew there was no witnesses.

21 He told her to pick up that phone;
22 tell everybody everything was on the up, hoping:

23 Ain't nobody called 911.

24 But while she was picking up that
25 phone from Matthew, RB was running inside.

1 calling the police.

2 He was hoping that phone
3 conversation would maybe delay that and keep that from
4 happening.

5 So then, she picks up the phone.
6 She scared to death. Talks to him. Tells him exactly
7 what that defendant said, and then put the phone down.

8 And then, where'd the phone end
9 up?

10 In his car, in the front pocket.

11 Now, you saw Mr. Hazzard had all
12 those phone records.

13 How about this case at 2:15?

14 How about this case at 2:30?

15 How about this phone conversation
16 at three o'clock?

17 Did you notice he didn't say crap
18 about what happened after 3:30.

19 Because, you know what?

20 It's text after text; phone call
21 after phone call.

22 She told you they were in constant
23 contact.

24 He's driven down here five hours
25 to see me.

CLOSING ARGUMENTS BY COUNSEL

1064

1 But you didn't hear him ask one
2 question to her about those phone records after 3:30.

3 There won't nothing to ask about.

4 And the only thing to bring up
5 was:

6 She didn't have access to it.

7 There weren't one phone call made
8 out of that phone, or he would have asked about it.

9 And that phone didn't get picked
10 up again either, or he would have asked about it.

11 Everything is so on the up and up.

12 And he ain't doing nothing.

13 And she ain't kidnapped.

14 But there ain't one phone record
15 that says crap about her picking on the phone -- or
16 making a phone call after she was put in that car.

17 You didn't notice one question
18 about that.

19 2:30. 3:17.

20 All this is on the up and up.

21 There weren't nothing going on
22 then. It was on the up and up.

23 This is all good.

24 If you're kidnapped, why are you
25 using the phone?

1 Well, she won't using the phone.

2 And he didn't ask one question
3 about after 3:30 when she was put in that car.

4 Let me tell you something:

5 If she was making phone calls and
6 getting phone calls, he would have been eating her up on
7 it, but she won't, because she didn't have access to that
8 phone.

9 So, he didn't want to bring that
10 to your attention.

11 Like he told BE

12 What I think is important and what
13 you think is important is two different things.

14 And I think it's important to
15 bring out in front of this jury that everything's on the
16 up and up, and you text him at 2:30, and everything's all
17 good.

18 But let's just stay away from what
19 goes on after 3:30; because then there ain't no phone
20 calls and there ain't no texting going on.

21 And you know what that looks like?

22 It looks like everything ain't all
23 on the up and up when a 14-year-old girl ain't texting,
24 calling, and receiving calls, from 3:30 till the time she
25 gets that phone call.

1 Then it looks like a kidnapping.

2 And let's -- let's try to stay away from that detail.

3 That ain't -- That's not what I'm
4 trying to bring out up here.

5 Now, she says -- or the police say
6 that:

7 That phone rang in that car.

8 She said that he took the phone
9 and turned it off.

10 Folks, I don't know if he turned
11 that phone back on, or what happened during that phone --
12 when it got in his car.

13 But the one thing that we do know,
14 that there's no question about, is that:

15 It was found in this defendant's
16 car, miles from where she was, at the BP.

17 And ironically, this is -- this is
18 what's really so interesting, as Mr. Hazzard would say:

19 Everything all on the up and up.
20 He's cruising around. He's doing the drug game.
21 Everything is good.

22 He drops this girl off.

23 And bam, all of a sudden he knows
24 how to get out of town then.

25 All of a sudden, he's heading up

1 Sea Mountain Highway. Time to rock and roll again.
2 The fun's over then, folks.
3 He was ready to leave town then.
4 For somebody cruising around in
5 the drug game -- all this.
6 And you know what's important is:
7 That officer told you he followed
8 him from Second Avenue.
9 He didn't jump behind him on no
10 major highway.
11 He jumped behind him in the City
12 of Myrtle Beach and followed him.
13 The guy didn't look like he was
14 lost to me.
15 He took a straight path to the
16 inside of North Myrtle Beach.
17 I said:
18 Was there any signs around there?
19 Naw. You don't get a sign until
20 about Sea Mountain Highway.
21 He don't know where he's at.
22 He's so lost. He drive's slow.
23 He drops her off.
24 And all of a sudden, bam, he can
25 got to Second Avenue on his way to Tabor City.

1 He knows how to get around then.

2 That's something else too, folks.

3 He's leaving town. Everything's

4 on the up and up. He ain't done nothing wrong.

5 Police put the blue light on him.

6 He's still moving. He's -- He's

7 thinking -- At that point, he's thinking, I'm sure.

8 Uh -- Uh -- Uh -- So you're giving

9 him some time to think.

10 He pulls in that BP.

11 Now watch the videotaped.

12 That ain't just one police car

13 behind him, because at that point, he didn't stop for the

14 blue light, so they're calling for backup; because they

15 don't know what's going to happen now.

16 So now, they've got the officer

17 following him, a couple of more officers, one coming from

18 this direction; okay.

19 He pulls in that BP.

20 The first thing he does -- I mean,

21 he had already made up in his mind he was taking off.

22 He got right out of the car --

23 watch that video -- and takes off running.

24 Everything's on the up and up.

25 I ain't done nothing wrong.

1 Now I'm going back to work -- to
2 Hardees.

3 But when the police come, it's
4 like:

5 Bolt. I mean, he didn't even slow
6 down.

7 Watch that video.

8 He got out of that car and took
9 off with two or three officers behind him.

10 Now he wants you to believe:

11 Well, I thought they were stopping
12 me for drinking. And I had a open container.

13 Well, A:

14 There weren't a open container in
15 the car? So that doesn't make sense.

16 B:

17 His story about:

18 Well, I was drinking.

19 Let me tell you something:

20 That man had three police cars
21 behind him with the blue lights on. He knew they won't
22 stopping him for drinking.

23 He knew that.

24 And when he turned in that BP,
25 there was one coming from the opposite direction.

CLOSING ARGUMENTS BY COUNSEL

1070

1 He knew that they were not
2 stopping him for no drinking.

3 And that's why he took off
4 running.

5 He didn't take off running because
6 he thought they were stopping him for drinking.

7 And for somebody that was
8 drinking, he knew right away when he was on the ground
9 what they were talking about.

10 That girl jumped out when I jumped
11 out.

12 Every conversation after that was
13 about her jumping out; where he picked her up; where he
14 left here, which he would never come up with.

15 He knew why they were stopping
16 him.

17 He knew what was going on there.
18 And he knew her phone was in the
19 car.

20 That's why he took off.

21 He knew this didn't have nothing
22 to do with no drugs.

23 It didn't have nothing to do with
24 no drinking.

25 He knew what it was about.

1 And that's why he took off
2 running.

3 And no three cops jumped behind
4 him for drinking; and he knew it.

5 Because he knew he hadn't had that
6 much to drink. He was pretty coherent when they stopped
7 him.

8 Let me tell you something, folks:

9 When you look at the facts of this
10 case, and you look at the evidence, there's nothing
11 interesting about this case.

12 There's nothing interesting about
13 that defendant. Nothing.

14 That defendant was out that night
15 cruising around looking for trouble. Looking for
16 trouble.

17 He crossed three kids and he knew
18 he didn't have nothing to worry about. And that's when
19 he jumped out of that car and kidnapped that girl.

20 That's why they call the police.

21 And that's what got this thing
22 going.

23 Nothing else makes any sense.

24 You ain't seen nothing about no
25 drugs.

1 He didn't have no drugs on him.

2 There won't no drugs in the car.

3 None of that story came up until
4 he was locked in that car and they were questioning him
5 about that girl.

6 He picked up that girl; drove her
7 to that boat ramp with every intention to brutally rape
8 her.

9 For whatever reason, he couldn't
10 get erect.

11 He penetrated her; lasted about
12 two minutes; felt bad about it or regretted it; didn't
13 want to do it; felt like he were going to get in trouble.

14 I don't know.

15 For whatever reason, he stopped,
16 and he let her out there.

17 That's where she was found, blocks
18 from that boat ramp.

19 Then he drove off and started
20 leaving town.

21 He knew those two boys had seen
22 him. And he knew that they had probably called the
23 police.

24 And when those police were behind
25 him, it knew what it was about.

1 He knew those boys had called the
2 police.

3 And that's when he knew it was
4 over.

5 And that's why he jumped out of
6 that car and ran.

7 There won't no alcohol in that
8 car.

9 There were no drugs.

10 This case ain't got nothing to do
11 with that.

12 But they want you to believe that.

13 Because they don't want you to believe that that man
14 picked up that little girl, and kidnapped her, and raped
15 her.

16 And nothing else makes sense.

17 He wants to tell you:

18 They've gotten their story
19 together.

20 At first, their story don't match.

21 Then:

22 It's so matched, it's rehearsed.

23 Listen to that 911 tape.

24 Listen to what that boy told that
25 911 operator.

1 And then listen to what BE
2 told Lance O'Bryant, the first guy she bumped into.

3 She ain't had no access to no
4 phone; walking around there with no phone and no shoes.

5 The first thing she told him is:
6 I was kidnapped.

7 This guy rolled up; told me and my
8 friends to get on the ground; the exact story.

9 She was 5 miles away from that
10 house with no way to contact those boys.

11 The only way their stories match
12 up was because they're telling the truth.

13 They told that story 45 minutes
14 apart -- from him calling the police -- she's 5 miles up
15 the road; no access to a phone; can't talk to him.

16 The phone records would tell you
17 if she had, and so would Mr. Hazzard.

18 And the first story she told is
19 the same one he told 911.

20 I'm here to tell you the facts of
21 this case are that:

22 That little girl was kidnapped.

23 She was kidnapped and taken to
24 that boat ramp and raped and left there.

25 I'm here to tell you:

1 That defendant did it.

2 Don't get back there and get

3 caught up on:

4 There ain't no physical evidence.

5 Because there ain't no physical
6 evidence she was in that car; not a single print, not a
7 shred of DNA.

8 But it don't mean she won't in
9 that car, folks.

10 Don't get caught up on that.

11 She told you that:

12 He wasn't erect.

13 Jasper told you he was searching
14 for semen and it won't there.

15 And it shouldn't be there under
16 those facts.

17 All Jasper told you corroborated
18 what that victim had already told you, that he wasn't
19 able to finish the job.

20 Don't cut him loose because he
21 couldn't finish the job.

22 For whatever reason. he couldn't
23 do it. But he penetrated her. And he had every
24 intention of raping her.

25 And when he penetrated her, that's

1 what he did. He raped her.

2 Just because he wasn't able to get
3 satisfaction, to leave all this DNA behind that Mr.
4 Hazzard keeps telling about, don't cut him loose.

5 I'm going to ask you this:

6 To look at the facts.

7 Look at all the evidence.

8 Listen -- Listen to any of the
9 testimony that you need to hear again.

10 And I'm asking you to find that
11 defendant guilty of everything we've got him indicted
12 for.

13 We're not sending armed robbery
14 back there. That was my decision. Because I ain't
15 worried about no armed robbery.

16 I'm worried about this 14-year-old
17 girl got picked up by a stranger and raped.

18 That's what I'm worried about.

19 That's my problem.

20 Thank you for your time.

21 THE COURT:

22 Ladies and gentlemen of the jury,
23 I remind you that, during this trial, you and I have
24 certain duties to perform.

25 As the trial judge, it's my

1 responsibility to preside over the trial of the case, and
2 I also have the duty to rule on the admissibility of the
3 evidence offered during the trial.

4 You are to consider only the
5 competent evidence before you.

6 If there was any testimony ordered
7 stricken from this record in this case during this trial,
8 you must disregard that testimony.

9 You are to consider only the
10 testimony that has been presented to you from this
11 witness stand, any exhibits which may have been made a
12 part of the record in this case, and any stipulations or
13 agreements of counsel.

14 I have the additional duty to
15 charge you the law.

16 Uh -- As the presiding judge, I am
17 the sole judge of the law in this case.

18 And it is your duty as jurors to
19 accept the law and apply the law as I now state it to
20 you.

21 If you already have an idea as to
22 what the law ought to be, or what the law is, and it does
23 not agree with what I now tell you the law is, you must
24 abandon this idea, because you are sworn to accept the
25 law and apply the law exactly as I state it to you.

1 In every case tried in this court
2 before a jury, the jury becomes the sole and exclusive
3 judge of the facts in a case.

4 A trial judge cannot intimate,
5 state, comment on, or make any statement to a trial jury
6 about the facts in a case.

7 Since you, the jury, are the sole
8 judge of the facts in this case, you are not to infer
9 from what I have said during the progress of this trial
10 in ruling upon the admissibility of evidence, or
11 otherwise, or anything that I say now during the course
12 of this instruction to you, that I have any opinion about
13 the facts in this case.

14 The law does not allow me to have
15 an opinion about the facts in this case.

16 This is a matter solely for you,
17 the jury -- uh -- to determine.

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

21 The indictments charge the
22 defendant with kidnapping; criminal sexual conduct with a
23 minor, second degree; criminal sexual conduct; and
24 failure to stop for a blue light.

25 I remind you that:

1 The fact that the defendant was
2 arrested, charged, and indicted in this case, is not
3 evidence in this case and cannot be considered by you as
4 evidence of guilt in this case; nor does it create any
5 presumption or inference of guilt.

6 The documents -- uh -- referred to
7 as indictments are simply the formal written instruments
8 which contain the charges made against the defendant.

9 It is the formal document by which
10 this case is brought into this court.

11 The indictments in this case
12 allege several different offenses against the defendant.

13 The charges I've said are:

14 Indictment Number 1:

15 Kidnapping.

16 Indictment Number 2:

17 Criminal sexual conduct with a
18 minor, second degree.

19 Indictment Number 3:

20 Uh -- Criminal sexual conduct.

21 Indictment Number 4:

22 Failure to stop for a blue light.

23 Each indictment charges a separate
24 and distinct offense.

25 You must decide each indictment

1 separately on the evidence and the law applicable to it,
2 uninfluenced by your decision as to any other indictment.

3 The defendant may be convicted or
4 acquitted on any or all of the offenses charged.

5 You will be asked to write a
6 separate verdict of guilty or not guilty for each
7 indictment.

8 The defendant has pled not guilty
9 to the indictments. And that plea puts the burden on the
10 State to prove the defendant guilty.

11 A person charged with committing a
12 crime -- a criminal offense in South Carolina is never
13 required to prove himself innocent.

14 I charge you that:

15 It is an -- That this is an
16 important rule of law, that the defendant in a criminal
17 case, no matter what the seriousness of the charges may
18 be, will always be presumed to be innocent of the crimes
19 for which the indictments were issued, unless guilt has
20 been proved by evidence satisfying you of that guilt
21 beyond a reasonable doubt.

22 This presumption of innocence does
23 not end when you begin your deliberations; but it
24 accompanies the defendant throughout the trial until you
25 reach a verdict of guilt based on evidence satisfying you

1 of that guilt beyond a reasonable doubt.

2 The presumption of innocence is
3 like a robe of righteousness placed about the cloak --
4 shoulders of the defendant, which remains with the
5 defendant until it has been stripped from the defendant
6 by evidence satisfying you of the defendant's guilt
7 beyond a reasonable doubt.

8 The presumption of innocence is
9 not mere legal theory.

10 It is not just a legal phrase.

11 It is a substantial right to which
12 every defendant is entitled, unless you, the jury, are
13 satisfied from the evidence of the defendant's guilt
14 beyond a reasonable doubt.

15 The state has the burden of
16 proving the defendant's guilt beyond a reasonable doubt.

17 Some of you may have served as
18 jurors in civil cases, where you were told that it's only
19 necessary to prove that a fact is more likely true than
20 not true, such as by the greater weight or preponderance
21 of the evidence.

22 In a criminal case, the State's
23 proof must be more powerful than that.

24 It must be beyond a reasonable
25 doubt.

1 Proof beyond a reasonable doubt is
2 proof that leaves you firmly convinced of the defendant's
3 guilt.

4 There are very few things in this
5 world that we know with absolute certainty. And in
6 criminal cases, the law does not require proof that
7 overcomes every possible doubt.

8 If, based on your consideration of
9 the evidence, you are firmly convinced that the defendant
10 is guilty of the crimes charged, you must find the
11 defendant guilty.

12 If on the other hand, you think
13 there is a real possibility that the defendant is not
14 guilty, you must give the defendant the benefit of the
15 doubt and find him not guilty.

16 What is a reasonable doubt?

17 A reasonable doubt is the kind of
18 doubt that would cause a reasonable person to hesitate to
19 act.

20 There are two types of evidence
21 which are generally presented during a trial, direct
22 evidence and circumstantial evidence.

23 Direct evidence is the testimony
24 of a person who claims to have actual knowledge of a
25 fact, such as an eyewitness.

1 It is evidence which immediately
2 establishes or proves the main fact to be proved.

3 Circumstantial evidence is proof
4 of a chain of facts and circumstances indicating the
5 existence of a fact.

6 It is evidence which immediately
7 establishes collateral facts from which the main fact may
8 be inferred.

9 Circumstantial evidence is based
10 on inference, and not on personal knowledge or
11 observation.

12 The law makes absolutely no
13 distinction between the weight or value to be given to
14 either direct or circumstantial evidence.

15 Nor is a greater degree of
16 certainty required of circumstantial evidence than of
17 direct evidence.

18 You should weigh all of the
19 evidence in the case.

20 After weighing all the evidence,
21 if you are not convinced of the -- the guilt of the
22 defendant beyond a reasonable doubt, you must find the
23 defendant not guilty.

24 Necessarily, you must determine
25 the credibility of witnesses who have testified in this

1 case.

2 Credibility simply means
3 believability.

4 It becomes your duty as jurors to
5 analyze and to evaluate the evidence and determine which
6 evidence convinces you of its truth.

7 In determining the believability
8 of witnesses who have testified in this case, you may
9 believe one witness over several witnesses or several
10 witnesses over one witness.

11 You may believe a part of the
12 testimony of a witness and reject the remaining part of
13 the testimony of that same witness.

14 You may believe the testimony of a
15 witness in its entirety or reject the testimony of a
16 witness in its entirety.

17 You may consider whether any
18 witness has exhibited to you any interest, bias,
19 prejudice, or other motive in this case.

20 You may also consider the
21 appearance and manner of a witness while on the witness
22 stand.

23 The rules of evidence ordinarily
24 do not permit witnesses to testify to opinions or
25 conclusions.

1 An exception to this rule exists
2 for witnesses we call "expert witnesses".

3 A witness who, by education and
4 experience, has become expert in some art, science,
5 profession, or calling, may state an opinion as to
6 relevant and material matter in which the witness claims
7 to be an expert, and may also state the reasons for the
8 opinion.

9 You should consider any expert
10 opinion received in evidence in this case; and, like any
11 other evidence -- evidence, give it the weight you think
12 it deserves.

13 If you decide that the opinion of
14 an expert witness is not based on sufficient education
15 and experience, or if you conclude that the reasons given
16 in support of the opinion are not sound, or that the
17 opinion is outweighed by other evidence, you may
18 disregard that opinion entirely.

19 An expert witness' testimony is to
20 be given no greater weight than that of other witnesses
21 simply because the witness is an expert.

22 Further, you are not required to
23 accept an expert's opinion, even though it is not
24 contradicted.

25 I instruct you, and emphasize,

1 that:

2 The fact that the defendant did
3 not testify is not a factor to be considered by you in
4 any way in your deliberations and in your considerations
5 on the question of the guilt or the innocence of the
6 defendant.

7 It must not be considered by you
8 in any manner whatsoever.

9 A defendant has the constitutional
10 right to remain silent. And the assertion of this right
11 must not be considered by you in your deliberations.

12 I repeat:

13 Under your oath, you are to draw
14 no conclusion whatsoever from the fact that the defendant
15 in this case did not testify.

16 The fact that this defendant did
17 not testify should not even be discussed in the jury
18 room.

19 The burden of proof, as I have
20 said -- uh -- to you, is on the State.

21 The defendant is not required to
22 prove his innocence.

23 The burden of proof remains on the
24 State to prove guilt beyond a reasonable doubt.

25 The defendant is charged with

1 kidnapping.

2 The state must prove beyond a
3 reasonable doubt that:

4 The defendant knowingly and
5 unlawfully seized, confined -- confined, inveigled,
6 decoyed, kidnapped, abducted, or carried away another
7 person without authority of law.

8 To do a thing unlawfully is to do
9 it willfully against the law.

10 Knowingly means with knowledge,
11 consciously, not accidentally.

12 Seize means to take hold of
13 suddenly or forcibly.

14 Confine means to limit, restrict,
15 or enclose within bounds, imprison, or shut, or keep in.

16 Inveigle means to lure, entice, or
17 lead astray by false representations, promises, or other
18 deceitful means.

19 Decoy means to lure by, or as if
20 by, decoy.

21 A decoy is something to entice a
22 person into a trap.

23 Kidnap is to remove a person
24 against his will by unlawful force or by fraud.

25 Abduct means to carry off secretly

1 or by force for an illegal person -- purpose.

2 Carry away means to remove.

3 The State does not have to prove
4 that the defendant did all of these things.

5 Instead, if you find beyond a
6 reasonable doubt that the defendant did any of these
7 things, you may find the defendant guilty of kidnapping.

8 Something done without authority
9 of law is something which the law does not sanction,
10 permit, allow, condone, or provide justification for.

11 The kidnapping does not have to be
12 for any personal or monetary gain, or for any illegal
13 purpose, but may be for any purpose or reason whatsoever.

14 The defendant is charged with
15 second degree criminal sexual conduct with a minor.

16 The State must prove beyond a
17 reasonable doubt that the defendant engaged in a sexual
18 battery with the victim.

19 A sexual battery is sexual
20 intercourse, cunnilingus, fellatio, anal intercourse, or
21 any intrusion, however slight, of any part of a person's
22 body, or of any object into the -- uh -- genital or anal
23 openings of another person's body, except when the
24 intrusion is accompany -- accomplished for medically
25 recognized treatment or diagnostic purposes.

1 The State must then prove beyond a
2 reasonable doubt that:

3 The victim was less than sixteen
4 years of age, but at least fourteen years old; and that
5 the defendant was either in a position of familial,
6 custodial, or official authority to coerce the victim to
7 submit, or that the defendant was older than the victim.

8 The defendant is also charged with
9 criminal sexual conduct in the first degree.

10 The first element which the State
11 must prove beyond a reasonable doubt is that:

12 The defendant engaged in a sexual
13 battery with the victim.

14 Sexual battery is a -- is sexual
15 intercourse, cunnilingus, fellatio, anal intercourse, or
16 any intrusion, however slight, of any part of a person's
17 body, or of any object into the genital or anal openings
18 of another person's body, except when the intrusion is
19 accomplished for medically recognized treatment or
20 diagnostic purposes.

21 If you find that the State has not
22 shown beyond a reasonable doubt that a sexual battery
23 occurred, you would stop deliberating and your verdict
24 would have to be not guilty.

25 If you find that a sexual battery

1 did occur, you must then decide whether the State has
2 proved beyond a reasonable doubt that:

3 One:

4 The defendant used aggravated
5 force to accomplish the sexual battery.

6 Aggravated force means the use of
7 physical force or physical violence of a high and
8 aggravated nature to overcome the victim.

9 This includes the threat of using
10 a deadly weapon; or

11 Number two:

12 The victim submitted to sexual
13 battery while the victim was also the victim of forcible
14 confinement, kidnapping, robbery, extortion, burglary,
15 housebreaking, or other similar offense.

16 The defendant is charged with
17 failing to stop for a blue light.

18 In order to prove this crime, the
19 State must prove beyond a reasonable doubt that:

20 The defendant was driving a motor
21 vehicle; that the defendant was driving the motor vehicle
22 on a road, street or highway of this state; that the
23 defendant was signaled to stop by a law enforcement
24 vehicle by means of siren or flashing lights; and that
25 the defendant did not stop.

1 In determining whether there are
2 mitigating circumstances which would justify the
3 defendant's failure to stop for the blue light, you may
4 consider actual road conditions; actual roadside
5 conditions; other conditions such as lighting and weather
6 -- uh -- officer, driver, and/or passenger safety; and
7 any other circumstances you believe to reasonably
8 mitigate the violation.

9 An official signal requiring a
10 motorist to stop may be a siren or flashing lights; but
11 both are not required.

12 An attempt to increase the speed
13 of a vehicle, or in some other manner avoid the pursuing
14 law enforcement vehicle, when signaled by siren or
15 flashing lights may be considered as evidence of failure
16 to stop for a blue light.

17 However, it is merely an
18 evidentiary fact to be taken into consideration by you,
19 along with the other evidence in this case; and to be
20 given the weight that you decide it should receive.

21 Now, ladies and gentlemen, there
22 are two possible verdicts which you may find for each
23 indictment in this case:

24 Guilty, or Not guilty.

25 And there is absolutely no

1 significance whatsoever in the order in which I state
2 these possible verdicts.

3 It simply means that one must be
4 stated first.

5 Ladies and gentlemen, your verdict
6 must be a unanimous one.

7 Mr. Foreperson, when the jury
8 agrees on the verdict, you will write the verdict on the
9 verdict form and sign your name as Foreperson.

10 Then knock on the jury room door
11 and inform the bailiff that you have reached a verdict.

12 At that time, we will receive you
13 back into the courtroom.

14 Now I ask that you return to your
15 juryroom, but do not begin deliberations until you are
16 told to by the Clerk or the Bailiff.

17 There are some matters which must
18 be discussed with the attorneys before you begin your
19 deliberations.

20 Now, Mr. Foreperson, as I
21 indicated to you on yesterday, it's my practice,
22 particularly in complicated cases, to make a transcript
23 -- a verbatim transcript of my charges, which I have
24 done.

25 And I read directly from that to

1 you.

2 And I'm going to have this marked
3 by the court reporter as a Court's Exhibit, which -- and
4 it will go in with you.

5 Let me advise you that you are to
6 take the charge as a whole.

7 You are not to focus in on just
8 one part of it and ignore other parts.

9 It must be taken as a whole and
10 you could -- should consider it as a whole in your
11 deliberations.

12 Now, in a few moments I intend to
13 -- to either bring you back out for further charge, or
14 send the exhibits in to you.

15 If I send the exhibits in to you,
16 that means: begin your deliberations.

17 If I bring you back out before
18 sending in the exhibits, I will instruct you further; all
19 right.

20 Now, Mr. Roth, if you would, take
21 the jury back and make sure they're comfortable. Make
22 sure they have everything they need; okay.

23 Oh, one other thing. I am so
24 sorry.

25 I have prepared a verdict form for

1 you to use.

2 Each verdict form -- uh -- or the
3 verdict form least -- list each charge.

4 And as I said in my charge, you
5 must return a verdict as to each offense; okay.

6 And I have them all listed here.

7 Again, I had to put "Guilty" and
8 "Not guilty" for you to circle as your -- uh -- your --
9 uh -- your verdict after each charge.

10 One had to go first.

11 Please don't draw any conclusions
12 by the fact that its says "Guilty" and then "Not guilty."

13 One is as important -- uh -- as a
14 part of this verdict form as the other.

15 Mr. Roth will also take that back
16 when we -- when we bring them in the jury.

17 And that's okay. You don't need
18 it now; okay.

19 Take them in the juryroom, please.

20 (WHEREUPON: The jury empanelled
21 in the case withdrew from the courtroom at 11:21 AM,
22 November 19, 2010; and was no longer present during the
23 following proceedings.)

24 THE COURT:

25 Anything further from the State?

1 MS. LIVESAY:

2 No sir.

3 THE COURT:

4 Anything further from the Defense?

5 MR. HAZZARD:

6 No exceptions or additions from
7 the Defense, Your Honor.

8 THE COURT:

9 Very well.

10 Uh -- If you would, Counsel,
11 please -- uh -- come forward.

12 I want you to -- uh -- make sure
13 that you have all of the exhibits together. Make sure
14 that everything that's going back to the jury -- uh --
15 has been marked and is introduced; okay.

16 MS. LIVESAY:

17 Yes, sir.

18 WHEREUPON: THE JUDGE'S CHARGE WAS
19 MARKED BY THE COURT REPORTER COURT'S EXHIBIT NUMBER 8.

20 (WHEREUPON: The Court's
21 instructions were followed by each counsel and the
22 exhibits were sent in and the jury told to deliberate at
23 11:24 AM, November 19, 2010.)

24 (WHEREUPON: Alternate Juror Lynn
25 was escorted back into the courtroom at 11:26 AM,

1 November 19, 2010.)

2 THE COURT:

3 Yes ma'am, Ms. Lynn. I want to
4 tell you I appreciate your -- uh -- your service here --
5 uh -- this week.

6 Uh -- Once the deliberations
7 begins, and they are about to begin, we don't need the
8 alternate anymore.

9 Uh -- You're excused. Thank you
10 again for being here. You've been very attentive all
11 through the trial.

12 Of course, you're welcome to stay
13 and see what happens. But as far as your service as a
14 juror -- uh -- it has been completed.

15 Again, thank you.

16 ALTERNATE JUROR LYNN:

17 Thank you.

18 (WHEREUPON: The court was
19 declared at ease to await the verdict at 11:27 AM,
20 November 19, 2010.)

21 (WHEREUPON: The court was called
22 to order by the Bailiff at 1:01 PM, November 19, 2010;
23 but not all pertinent parties were yet back and present
24 in the courtroom. Mr. Hazzard was present. Ms. Livesay
25 was not yet present. Ms. Knowles was not yet present.

1 The defendant was not yet present.)

2 DEPUTY:

3 Order in the court. All Rise.

4 THE COURT:

5 Okay.

6 Mr. Hazzard, where is everyone

7 else?

8 MR. HAZZARD:

9 I don't know, Your Honor.

10 THE COURT:

11 Ms. Jo.

12 MS. GREEN:

13 You want me to go call them?

14 THE COURT:

15 Yes, if you would go back in --
16 no, back in here and see if you can find them.

17 COURT REPORTER:

18 Does anybody know what time the
19 jury had that question, because I didn't hear about it
20 until a second ago.

21 THE COURT:

22 Uh -- The jury -- you can put this
23 on the record -- At 12:30 PM, the jury handed me a note.

24 We had just had their lunch
25 delivered. It's now one o'clock.

1 Uh -- I asked them to let me know
2 as soon as they had had an opportunity to have their
3 lunch.

4 Uh -- The -- And -- And I have it
5 now, and we're waiting on the -- uh -- Solicitor to come
6 in.

7 Does that satisfy you Mr. Buckner?

8 COURT REPORTER:

9 Yes sir, Your Honor.

10 THE COURT:

11 Okay.

12 COURT REPORTER:

13 That gives me something for the
14 record.

15 THE COURT:

16 Okay.

17 COURT REPORTER:

18 Would you like me to go ahead and
19 mark that as a Court's Exhibit while we're waiting?

20 THE COURT:

21 Yes.

22 WHEREUPON: THE JURY NOTE WAS
23 MARKED BY THE COURT REPORTER AS COURT'S EXHIBIT NUMBER 9.

24 COURT REPORTER:

25 Your Honor, this will be Court's

1 Exhibit 9.

2 THE COURT:

3 See if you can call down to the
4 Solicitor's Office and get Ms. Livesay.

5 Uh -- Mr. Nobles, if you could
6 find someone who could get the -- uh -- defendant out for
7 me.

8 (WHEREUPON: Ms. Livesay came into
9 the courtroom at 1:05 PM, November 19, 2010, and
10 Defendant Elliott was escorted into the courtroom at 1:08
11 PM, November 19, 2010; and the following proceedings took
12 place.)

13 THE COURT:

14 All right.

15 Let the record reflect that the
16 defendant is now in the courtroom. So are counsel for --
17 uh -- the Defense.

18 How about Ms. Knowles? Does he
19 waive her presence, Mr. Hazzard? Does she need to be
20 here?

21 (WHEREUPON: Mr. Hazzard has a
22 brief conference with Defendant Elliott at the counsel's
23 table at 1:09 PM, November 19, 2010.)

24 MR. HAZZARD:

25 I've spoken with -- uh -- Mr.

1 Elliott. He indicates that he waived Ms. Knowles'
2 presence.

3 However, for the record, I have
4 just sent her a text message indicating --

5 THE COURT:

6 Okay.

7 MR. HAZZARD:

8 -- there's a question. And she's
9 probably on the way.

10 THE COURT:

11 All right.

12 Well, I don't think -- uh -- that
13 we have to have her here -- uh -- for this matter.

14 Uh -- I -- uh -- have before me a
15 -- a court -- uh -- question -- uh -- that was submitted
16 by the Foreman of the jury on -- at 12:30.

17 That was exactly the time that --
18 uh -- their lunch was delivered. So I spoke to the
19 Bailiff to have them go ahead and have their lunch.

20 It's now about 1:08.

21 Uh -- I didn't want them to miss
22 their lunch while it was still hot.

23 Uh -- But now we're on the record.

24 And what they have asked is that
25 -- uh -- they be allowed to listen to the 911 tape.

1 Uh -- The Foreman passed out the
2 -- the tape itself. They don't have any way of playing
3 it of course in the juryroom.

4 And I have the 911 tape, which was
5 admitted into evidence as State's Exhibit Number 1.

6 Uh -- I'll hear you on that
7 request, Mr. -- uh -- uh -- Hazzard.

8 (No response.)

9 THE COURT:

10 Any objection to it? Can -- Can
11 you see of any objection?

12 MR. HAZZARD:

13 No. It's in evidence, Your Honor.

14 THE COURT:

15 State?

16 MS. LIVESAY:

17 No. I'll play it, -- uh --.

18 THE COURT:

19 All right.

20 Second part is:

21 Please -- uh -- phone records for

22 BE cell.

23 Now, my understanding is that was
24 never placed into evidence; was it?

25 MR. HAZZARD:

REQUEST FROM JURY

1102

1 No sir.

2 THE COURT:

3 Is that right, Ms. -- uh --

4 MS. LIVESAY:

5 Yes sir. It not placed in
6 evidence.

7 THE COURT:

8 Well, I will instruct -- uh -- the
9 -- uh -- the -- the jury that we will be happy to play
10 the 911 tape for them.

11 If you would start getting that
12 ready.

13 MS. LIVESAY:

14 I will.

15 THE COURT:

16 And I will further instruct them
17 that:

18 Because the -- the records were
19 not in -- or not placed into evidence, that -- uh -- it
20 would be inappropriate to provide them now.

21 However, they --

22 MS. LIVESAY:

23 No, not for the 911 tape (trails
24 off to inaudible) --

25 THE COURT:

1 Pardon?

2 COURT REPORTER:

3 What did you say? I'm sorry.

4 MS. LIVESAY:

5 He was asking about the screen.

6 We don't need it for the 911 tape.

7 THE COURT:

8 All right.

9 I -- I was going to tell them that.

10 -- uh -- the phone records are not placed into evidence,

11 therefore they -- uh -- we cannot provide them with a

12 copy of the phone records; okay.

13 If you would, bring -- Any

14 objection to that, Mr. Hazzard?

15 MR. HAZZARD:

16 None from the Defense, Your Honor.

17 MS. LIVESAY:

18 No sir.

19 THE COURT:

20 Okay. All right

21 And this has been marked as

22 Court's Exhibit Number 9, the note itself.

23 MR. HAZZARD:

24 Or, out of an abundance of

25 caution, I guess I should say that I renew the objection

1 to the 911 tape --

2 THE COURT:

3 Okay.

4 MR. HAZZARD:

5 -- being published, Your Honor.

6 THE COURT:

7 Yes.

8 MR. HAZZARD:

9 Subject to previous objection.

10 THE COURT:

11 And that's preserved.

12 (WHEREUPON: The jury empanelled

13 in the case was escorted back into the courtroom at 1:12

14 PM, November 19, 2010; and was in fact present during the

15 following proceedings.)

16 THE COURT:

17 Mr. Bontya, I received your note.

18 I apologize for the delay in responding.

19 However, I understand that your

20 lunch was delivered at the same time this note was handed

21 out. And I certainly didn't want your lunch to get cold.

22 We of course are -- are here to

23 play the 911 tape for you. That's what you've requested.

24 Uh -- You also requested phone

25 records for BE

cell phones.

1 Let me advise you that those phone
2 records were not made an exhibit.

3 Uh -- They are not in the record.

4 Therefore, we -- it would be
5 inappropriate to provide them for you at this time; okay.

6 Uh -- Ms. Livesay, are you
7 prepared to play the tape for us?

8 MS. LIVESAY:

9 Yes, sir.

10 THE COURT:

11 Okay. Or the -- uh -- CD.

12 Uh -- Mr. Roth, if you would,
13 bring down -- uh -- the lights. And Heather, if you
14 could get the screen pulled --

15 MR. HAZZARD:

16 It's an audio --

17 MS. LIVESAY:

18 It's just audio, Your Honor.

19 THE COURT:

20 Oh, it's an audio. Okay.

21 I was thinking we had something --

22 (WHEREUPON; State's Exhibit

23 Number 1, the 911 tape, was again played for the jury in
24 open court, beginning at 1:14 PM, and concluding at 1:18
25 PM, November 19, 2010.)

REQUEST FROM JURY

1106

1 THE COURT:

2 Is that all of it?

3 MS. LIVESAY:

4 That's the completion of the tape,

5 Your Honor.

6 THE COURT:

7 Your understanding as well, Mr.

8 Hazzard?

9 MR. HAZZARD:

10 That's my understanding, Your

11 Honor.

12 THE COURT:

13 All right.

14 Is that what you needed?

15 FOREPERSON:

16 (Nods in the affirmative.)

17 THE COURT:

18 Okay. Thank you very much.

19 (WHEREUPON: The jury empanelled

20 in the case withdrew from the courtroom at 1:19 PM,

21 November 19, 2010; to continue their deliberations.)

22 THE COURT:

23 All right. We're at ease.

24 (WHEREUPON: The court was

25 declared at ease to await the verdict in this at 1:18 PM,

1 November 19, 2010, at which time The Court held a bond
2 hearing in an unrelated matter.)

3 (WHEREUPON: The court turned its
4 attention to this matter again at 2:24 PM, November 19,
5 2010.)

6 THE COURT:

7 All right. We have a verdict,
8 Mr. Hazzard. Could you round -- uh -- the -- uh --

9 (WHEREUPON: At 2:27 PM, November
10 19, 2010; all pertinent parties, except for Defendant
11 Elliott and the victim BE [REDACTED] were back and
12 present in the courtroom.)

13 THE COURT:

14 All right.

15 As a procedural matter before to
16 any further, I want to make sure that we have an -- an
17 understanding.

18 I do not know what verdict is
19 being returned.

20 However, in the -- uh -- If there
21 is a -- uh -- a -- a verdict that would -- uh -- require
22 sentencing under 17 25 45, are we prepared to go directly
23 into a hearing, Ms. Livesay, as to the applicability of
24 17 25 45?

25 MS. LIVESAY:

VERDICT AND SENTENCING

1108

1 I'm sorry, Your Honor? Yes?

2 THE COURT:

3 If there is a conviction or a
4 verdict that would bring into play 17 25 45 --

5 MS. LIVESAY:

6 Yes sir.

7 THE COURT:

8 -- which is life without parole;
9 and I -- I say this because I understand you have served
10 him a notice.

11 MS. LIVESAY:

12 Yes sir.

13 THE COURT:

14 We'll have a hearing on that.

15 You understand that?

16 MS. LIVESAY:

17 Yes sir.

18 THE COURT:

19 Mr. -- Any reason we don't go
20 right into that?

21 MR. HAZZARD:

22 No sir, Your Honor.

23 THE COURT:

24 If there is.

25 Uh -- Now, I do not know.

1 I just want to have this out there
2 before we -- where is your -- uh -- client?

3 Do we have him?

4 MR. HAZZARD:

5 I assume he's in --

6 THE COURT:

7 Can we get him?

8 MR. HAZZARD:

9 I'm assuming he's in lockup, Your
10 Honor.

11 DEPUTY:

12 We can get him.

13 THE COURT:

14 Someone get him for me?

15 DEPUTY:

16 Yeah. Brook's getting him.

17 THE COURT:

18 Okay.

19 (WHEREUPON: Defendant Elliott is
20 escorted into the courtroom at 2:31 PM, November 19,
21 2010.)

22 THE COURT:

23 All right.

24 Let the record reflect that the
25 defendant is -- is here.

VERDICT AND SENTENCING

1110

1 Mr. Nobles, if you would, please
2 -- uh -- bring in the jury.

3 How about your victim, Ms.
4 Livesay?

5 MS. LIVESAY:

6 Uh -- I -- I assume that Amy went
7 downstairs to get them, Your Honor.

8 They were downstairs, standing
9 outside.

10 THE COURT:

11 Okay.

12 (WHEREUPON: Ms. Livesay leaves
13 the courtroom at 2:31 PM, November 19, 2010.)

14 THE COURT:

15 Uh -- Mr. Richardson, have Ms.
16 Livesay stay with us, please.

17 (WHEREUPON: Ms. Livesay
18 immediately returns to the courtroom at 2:32 PM, November
19 19, 2010, and Mr. Richardson leaves to find the victim.)

20 (WHEREUPON: The jury empanelled
21 in the case was escorted back into the courtroom at 2:33
22 PM, November 19, 2010; and was in fact present during the
23 following proceedings.)

24 THE COURT:

25 Mr. Bontya, has your jury reached

1 a verdict?

2 FOREPERSON:

3 Yes, Your Honor.

4 THE COURT:

5 And was it a unanimous verdict?

6 FOREPERSON:

7 Yes, it was.

8 THE COURT:

9 All right.

10 Madam clerk, would you please
11 received the verdict for me?

12 (WHEREUPON: The Clerk retrieved
13 the verdict form from Foreperson Bontya and handed the
14 form to The Court.)

15 THE COURT:

16 All right.

17 If you would, please publish.

18 CLERK:

19 Indictment Number 2009-GS-26-2889,
20 2890, 3471; 2010-GS-26-4327, State of South Carolina,
21 County of Horry, versus Mark Elliott.

22 As to the charge of kidnapping:

23 We the jury unanimously find the
24 defendant guilty.

25 As to the charge of criminal

VERDICT AND SENTENCING

1112

1 sexual conduct:

2 We the jury unanimously find the
3 defendant not guilty.

4 As to the charge of criminal
5 sexual conduct with a minor second degree:

6 We the jury unanimously find the
7 defendant not guilty.

8 As to the charge of failure to
9 stop for blue light:

10 We the jury unanimously find the
11 defendant not guilty.

12 Signed by the Foreperson, 35,
13 George Bontya, dated 11/19/2010.

14 Ladies and gentlemen of the jury,
15 if this is your verdict, so signify by raising your right
16 hand.

17 (WHEREUPON: All jurors raised
18 their right hand to affirm this was their verdict.)

19 THE COURT:

20 Let the record reflect that each
21 juror has responded affirmatively.

22 Will there be a request for
23 individual polling -- uh -- Mr. Hazzard?

24 MR. HAZZARD:

25 Defense does request individual

1 polling, Your Honor.

2 THE COURT:

3 All right.

4 Madame Clerk, if you would.

5 CLERK:

6 Okay.

7 When I call you names, if you
8 please stand?

9 Juror Number 300, Theron Shields,
10 Jr.

11 (WHEREUPON: The juror stood in
12 response to the Clerk.)

13 CLERK:

14 Is this your verdict?

15 JUROR SHIELDS:

16 Yes, it is.

17 CLERK:

18 Is this still your verdict?

19 JUROR SHIELDS:

20 Yes, it is.

21 CLERK:

22 Thank you.

23 92, Jennifer Dereani.

24 (WHEREUPON: The juror stood in
25 response to the Clerk.)

VERDICT AND SENTENCING

1114

1 CLERK:

2 Is this your verdict?

3 JUROR DEREANI:

4 Yes ma'am, it is.

5 CLERK:

6 Is it still your verdict?

7 JUROR DEREANI:

8 Yes ma'am, it is.

9 CLERK:

10 Thank you.

11 150, Stephen Heher.

12 (WHEREUPON: The juror stood in

13 response to the Clerk.)

14 CLERK:

15 Is this your verdict?

16 JUROR HEHER:

17 Yes ma'am.

18 CLERK:

19 Is it still your verdict?

20 JUROR HEHER:

21 Yes ma'am.

22 CLERK:

23 Thank you.

24 211, Lynn Lipinski.

25 (WHEREUPON: The juror stood in

1 response to the Clerk.)

2 CLERK:

3 Is this your verdict?

4 JUROR LIPINSKI:

5 Yes, it is.

6 THE COURT:

7 Is it still your verdict?

8 JUROR LIPINSKI:

9 Yes, it is.

10 CLERK:

11 Thank you.

12 346, Kenneth Vaught, Jr.

13 (WHEREUPON: The juror stood in

14 response to the Clerk.)

15 CLERK:

16 Is this your verdict?

17 JUROR VAUGHT:

18 Yes, it is.

19 CLERK:

20 Is it still your verdict?

21 JUROR VAUGHT:

22 Yes, it is.

23 CLERK:

24 Thank you.

25 238, Stephen Mishoe.

VERDICT AND SENTENCING

1116

1 (WHEREUPON: The juror stood in
2 response to the Clerk.)

3 CLERK:

4 Is this your verdict?

5 JUROR MISHOE:

6 Yes, it is.

7 CLERK:

8 Is it still your verdict?

9 JUROR MISHOE:

10 Yes, it is.

11 CLERK:

12 Thank you.

13 204, Daniel Ku -- Ku --

14 JUROR KUKIELKA:

15 Kulkielka.

16 CLERK:

17 Thank you.

18 (WHEREUPON: The juror stood in
19 response to the Clerk.)

20 CLERK:

21 Is this is your verdict?

22 JUROR KUKIELKA:

23 Yes, it is.

24 CLERK:

25 Is this still your verdict?

1 JUROR KUKIELKA:

2 Yes, it is.

3 CLERK:

4 Thank you.

5 350, Darryl Vick.

6 (WHEREUPON: The juror stood in
7 response to the Clerk.)

8 CLERK:

9 Is this your verdict?

10 JUROR VICK:

11 Yes, it is.

12 CLERK:

13 Is this still your verdict?

14 JUROR VICK:

15 Yes, it is.

16 CLERK:

17 Thank you.

18 35, George -- George Bontya.

19 (WHEREUPON: The juror stood in
20 response to the Clerk.)

21 CLERK:

22 Is this your verdict?

23 FOREPERSON BONTYA:

24 Yes, ma'am.

25 CLERK:

VERDICT AND SENTENCING

1118

1 Is it still your verdict?

2 FOREPERSON BONTYA:

3 Yes, it is.

4 CLERK:

5 Thank you.

6 CLERK:

7 313. Charles Spain.

8 (WHEREUPON: The juror stood in
9 response to the Clerk.)

10 CLERK:

11 Is this your verdict?

12 JUROR SPAIN:

13 Yes, it is.

14 CLERK:

15 Is this still your verdict?

16 JUROR SPAIN:

17 Yes, it is.

18 CLERK:

19 Thank you.

20 22, Billy Baldwin.

21 (WHEREUPON: The juror stood in
22 response to the Clerk.)

23 JUROR BALDWIN:

24 Yes.

25 CLERK:

1 Is this still your -- Is this your
2 verdict?

3 JUROR BALDWIN:

4 Yes ma'am.

5 CLERK:

6 Is it still your verdict?

7 JUROR BALDWIN:

8 Yes ma'am.

9 CLERK:

10 Thank you.

11 4, Christopher Alley.

12 (WHEREUPON: The juror stood in
13 response to the Clerk.)

14 CLERK:

15 Is this your verdict?

16 JUROR ALLEY:

17 Yes.

18 CLERK:

19 Is it still your verdict?

20 JUROR ALLEY:

21 Yes.

22 CLERK:

23 Thank you.

24 (WHEREUPON: The individual

25 polling of the jury was completed by 2:36 PM, November

VERDICT AND SENTENCING

1120

1 19, 2010, and all members reaffirmed their verdict
2 individually in open court.)

3 THE COURT:

4 Yes sir.

5 All right, Mr. -- uh -- Hazzard, I
6 will hear you on motions.

7 MR. HAZZARD:

8 At this time, Your Honor, the
9 Defense makes a motion for a new trial with regard to the
10 indictment for kidnapping.

11 The position of the Defense is
12 that:

13 The evidence produced at trial was
14 insufficient for the jury to return a verdict of guilty
15 on that charge, Your Honor.

16 THE COURT:

17 All right.

18 And I would respectfully deny your
19 motion.

20 I think there was ample evidence
21 to support the jury's finding -- uh -- in this matter.
22 And I, as I said, will deny your motion.

23 All right.

24 Is there any -- uh -- reason why
25 we would not go directly into sentencing?

1 MR. HAZZARD:

2 None from the Defense, Your Honor.

3 THE COURT:

4 All right.

5 Ms. -- uh -- Livesay, let me hear
6 from you.

7 MS. LIVESAY:

8 Your Honor -- uh -- actually, The
9 Court's indulgence. Can have just a minute?

10 THE COURT:

11 All right.

12 MS. LIVESAY:

13 Thank Your Honor.

14 THE COURT:

15 Please be seated, Mr. Hazzard.

16 (WHEREUPON: Ms. Livesay left the
17 courtroom at 2:37 PM and returned at 2:39 PM, November
18 19, 2010, when the following proceedings occurred.)

19 MS. LIVESAY:

20 Your Honor --

21 THE COURT:

22 Yes.

23 MS. LIVESAY:

24 If -- If I may -- uh -- we're
25 getting the prior certified convictions together now as

VERDICT AND SENTENCING

1122

1 well as well the notice we filed.

2 Can we have the victim go ahead
3 and speak until that can be -- make its way up here?

4 THE COURT:

5 All right. I'll hear from the
6 victim.

7 MS. LIVESAY:

8 Thank Your Honor.

9 THE COURT:

10 Ms. -- uh -- Live -- uh --
11 Livesay, why don't you first just tell me what the State
12 seeks and the basis for that. And I will let you provide
13 the proof as soon as it becomes -- it's brought up; okay.

14 MS. LIVESAY:

15 Yes, sir, Your Honor.

16 THE COURT:

17 You understand that in a
18 sentencing hearing I am not bound by the rules of
19 evidence and I can take it in any form or fashion; okay.

20 MS. LIVESAY:

21 Yes sir.

22 The -- uh -- State's seeking life
23 without parole due to the Defendant's prior record.

24 Uh -- The one stated in the motion
25 that was handed over to Mr. Hazzard and the defendant was

1 from a burglary first which consisted of a series of
2 facts including burglary first, two criminal sexual
3 conducts, Your Honor, which was a most serious.

4 Therefore, we served him with a
5 notice for life without parole for this most serious --

6 THE COURT:

7 All right. I misunderstood you;
8 or I did not understand you.

9 What prior convictions does he
10 have?

11 MS. LIVESAY:

12 Burglary first, Your Honor.

13 THE COURT:

14 Is that the only conviction?

15 MS. LIVESAY:

16 No sir, that is not the only
17 conviction.

18 That is the conviction that we're
19 going under as far as --

20 THE COURT:

21 You're going to rely upon; okay.

22 MS. LIVESAY:

23 (Nods in the affirmative.)

24 THE COURT:

25 And where was that burglary first-

VERDICT AND SENTENCING

1124

1 degree?

2 MS. LIVESAY:

3 That was in North Carolina, Your
4 Honor.

5 THE COURT:

6 All right.

7 Do you -- Can you tell me whether
8 or not that is consistent with the definition of burglary
9 first degree in South Carolina?

10 MS. LIVESAY:

11 Yes sir, it is.

12 THE COURT:

13 All right.

14 Now, I'll hear from you victim.

15 MS. LIVESAY:

16 Thank Your Honor.

17 THE COURT:

18 Oh, one other thing, Ms. Livesay.

19 When was the notice -- uh -- to
20 seek life without parole first served on the --

21 MS. LIVESAY:

22 I think it was --

23 THE COURT:

24 -- defendant or his attorney.

25 Mr. Hazzard, I am cognizant of the

1 fact that the State versus James -- or James versus State
2 has overruled the Johnson case.

3 And all we're looking for is to
4 whether or not you had actual or constructive notice 10
5 days ahead of time; okay -- 10 days before the trial
6 began.

7 All right.

8 Now what you have -- uh -- Ms.
9 Livesay?

10 MS. LIVESAY:

11 Uh -- Your Honor, I was going to
12 let the victim speak.

13 THE COURT:

14 In the way of notice, Ms. Livesay.

15 MS. LIVESAY:

16 Your Honor, I -- I'll have that
17 brought up.

18 THE COURT:

19 Okay. All right.

20 MS. LIVESAY:

21 I've got a -- I've got a clocked
22 notice that Mr. -- handed Mr. Hazzard -- but it was
23 handed over -- uh -- maybe even more than six months ago.

24 THE COURT:

25 Okay.

VERDICT AND SENTENCING

1126

1 Is that correct, Mr. Hazzard?

2 Notice was delivered to you over six months ago?

3 MR. HAZZARD:

4 The Court's indulgence, Your
5 Honor?

6 THE COURT:

7 And quite frankly, Mr. Hazzard,
8 I'm not concerned with the exact date. Uh -- I am just
9 concerned with the fact that it has been -- it was more
10 than 10 days prior to the beginning of this trial.

11 MR. HAZZARD:

12 Yes sir. That would be correct.

13 THE COURT:

14 All right. All right.

15 MS. LIVESAY:

16 Your Honor --

17 THE COURT:

18 I will hear from the victim.

19 MS. LIVESAY:

20 Thank Your Honor.

21 And -- And while she's speaking,
22 I'm going to hand up the -- uh -- certified convictions
23 from the State of North Carolina.

24 Uh -- The conviction that we're
25 going under is for the first-degree burglary.

1 But I'm also handing up the
2 convictions for second-degree sexual offense, sexual
3 degree (sic) sexual offense kidnapping, as well as
4 common-law armed robbery, Your Honor.

5 THE COURT:

6 And all of those were from North
7 Carolina?

8 MS. LIVESAY:

9 These are all certified from North
10 Carolina; yes sir.

11 These are all arising out of the
12 same event, Your Honor.

13 THE COURT:

14 All right, Mr. Hazzard, have you
15 been provided copies of this?

16 MR. HAZZARD:

17 I've been provided copies prior,
18 Your Honor, however, not ones that were specifically
19 certified.

20 And if The Court would so allow, I
21 would like to view those prior to The Court's
22 consideration of them.

23 THE COURT:

24 All right.

25 And, for the record, let me -- uh

VERDICT AND SENTENCING

1128

1 -- let me say that I have been handed up a -- uh -- what
2 purports to be a true certified copy from Superior -- the
3 Clerk of Superior Court of Columbus County bearing a seal
4 indicating that Mark Alan Elliott -- uh -- was charged
5 with first-degree burglary, and was convicted of first-
6 degree -- uh -- burglary in that jurisdiction.

7 He was charged with first-degree
8 sexual offense.

9 He was convicted of second-degree
10 sexual offense.

11 He was charged with a second
12 first-degree sexual offense. Convicted of second -- He
13 was charged with first-degree and convicted of second-
14 degree sexual offense.

15 And it would look like these all
16 have the same filing date.

17 Is that correct?

18 MS. LIVESAY:

19 Yes, sir, Your Honor.

20 THE COURT:

21 They all rose out of one event?

22 MS. LIVESAY:

23 Yes sir, they are.

24 THE COURT:

25 So I would only consider them as a

1 single event?

2 MS. LIVESAY:

3 Yes --

4 THE COURT:

5 Also, kidnapping in the second
6 degree was a charge; conviction of -- of second-degree
7 kidnapping.

8 Common-law robbery was another
9 charge, and conviction of common-law robbery, all
10 appearing to be out of a single event.

11 And the thing that con -- that
12 gives me -- uh -- concern that I believe would -- uh --
13 call for sentencing under the life without parole statute
14 would be the conviction for burglary in the first-degree,
15 Mr. Hazzard.

16 And that was the one that I will
17 consider.

18 I -- Here are the copies -- I
19 mean, the -- uh -- the -- uh -- certified copies.

20 I'll let you look at those.

21 MR. HAZZARD:

22 Thank Your Honor.

23 MS. LIVESAY:

24 Your Honor --

25 MR. HAZZARD:

VERDICT AND SENTENCING

1130

1 The initial cause that I have for
2 concern, even with regard to the one listed as first-
3 degree burglary, is:

4 You're talking about -- It says
5 penalty of what appears to be 51 to 71 months, which is
6 four years to just shy of -- well, four years, three
7 months just shy of six years.

8 It's really -- The Statute 17 25
9 45 specifies that the law itself in the adjoining or a
10 different jurisdiction must be substantially similar with
11 regard to the elements.

12 And -- uh -- the Defense requests
13 an actual proof of the elements for first-degree burglary
14 pursuant to North Carolina Statute for that conviction,
15 Your Honor.

16 THE COURT:

17 All right. Did you have that for
18 me, Ms. Livesay?

19 MS. LIVESAY:

20 I can get it for you, Your Honor.

21 THE COURT:

22 All right. Would you have
23 someone -- some of your staff do that?

24 MS. LIVESAY:

25 Uh -- Just very briefly too, Your

1 Honor, before we move one step further. would you like me
2 to hand out the -- uh -- notice to have to was given?

3 THE COURT:

4 Yes.

5 MS. LIVESAY:

6 Okay.

7 Uh -- Let me show it to --

8 THE COURT:

9 All right. I'm -- I want to make
10 the North Carolina convictions a part of the record.

11 MS. LIVESAY:

12 Thank Your Honor.

13 Uh -- September 16th of 2009.

14 THE COURT:

15 All right.

16 It -- Mr. Hazzard -- uh -- I have
17 the notice that -- uh -- you acknowledged that it was
18 received -- uh -- by you and your client 10 -- at least
19 10 days before this trial?

20 MR. HAZZARD:

21 That's correct, Your Honor.

22 THE COURT:

23 All right. And it indicates that
24 the prior conviction that -- uh -- the State will rely on
25 is burglary in the first-degree.

VERDICT AND SENTENCING

1132

1 All right.

2 Now, Ms. Livesay, while waiting on
3 the -- uh -- on the North Carolina statute, let me hear
4 from your victim.

5 MS. LIVESAY:

6 Thank Your Honor.

7 WHEREUPON: THE CERTIFIED RECORD
8 WAS MARKED BY THE COURT REPORTER AS COURT'S EXHIBIT
9 NUMBER 10.

10 THE COURT:

11 Your Honor, this will be Courts
12 Exhibit Number 10.

13 THE COURT:

14 Okay.

15 COURT REPORTER:

16 Did you have another one? I think
17 you had two.

18 THE COURT:

19 I had the notice and the -- uh --
20 certified copy of the convictions.

21 WHEREUPON: THE NOTICE OF SEEKING
22 LIFE WAS MARKED BY THE COURT REPORTER AS COURT'S EXHIBIT
23 11.

24 COURT REPORTER:

25 And Number 11, Your Honor.

1 THE COURT:

2 Okay.

3 Mr. Hazzard, while we're waiting
4 on that, do you have any -- uh -- disagreement -- uh --
5 with The Court's understanding that burglary -- uh -- in
6 the first degree is a most serious offense as defined in
7 17 25 45 (c) 1 under the statute?

8 MR. HAZZARD:

9 I don't know about the (c) 1 part,
10 but I know 17 25 45 it is listed as a most serious
11 offense.

12 THE COURT:

13 All right.

14 MR. HAZZARD:

15 The Defense does not --

16 THE COURT:

17 Okay.

18 MR. HAZZARD:

19 -- have any -- find any fault with
20 that.

21 THE COURT:

22 And is there any doubt that
23 kidnapping, likewise, is a most serious offense?

24 MR. HAZZARD:

25 Defense -- uh -- disagrees with

VERDICT AND SENTENCING

1134

1 that, or concurs with that, Your Honor.

2 THE COURT:

3 All right.

4 We going to hear from her?

5 MS. LIVESAY:

6 Yes, sir, Your Honor.

7 THE COURT:

8 All right. I hear anything
9 should have done like to say.

10 Yes ma'am?

11 MS. [REDACTED]

12 I realize that --

13 COURT REPORTER:

14 Ma'am, could you come forward just
15 to this podium so I can make sure I pick you up?

16 Thank you.

17 MS. [REDACTED]

18 During my time in this courtroom
19 this week, I haven't been able to convey my emotions to
20 you or really anyone else in this courtroom.

21 I've tried to hold myself together
22 to the best of my abilities. And I don't expect anyone
23 to fully understand what I have been through because it's
24 a personal experience.

25 I don't -- I realize that no one

1 has any personal interest in my particular case. Sorry.

2 Throughout the past year and a
3 half I've had to constantly look over my shoulder.

4 I've had to remove myself from a
5 public school setting because of the things that I'm
6 worried about; just stepping outside of the house to walk
7 to the mailbox.

8 I can't -- It's hard for me to
9 simply speak to a stranger in the grocery store because
10 I'm worried that if the conversation goes too far,
11 something might happen.

12 I would like nothing more than for
13 the defendant to stay in jail for the rest of his life
14 because at this point I fear for my personal safety.

15 He now knows my name, where I
16 live, friends and family, and I don't want to have to
17 continue to look over my shoulder and watch every move
18 that I make, and be scared, knowing that he could
19 possibly -- you know -- be out at any moment.

20 Uh -- I haven't been able to have
21 normal relationships with people.

22 The relationships that I did have
23 prior to all this have diminished in a way.

24 Uh -- Obviously every teenager has
25 insecurities, but mine have sky-rocketed.

VERDICT AND SENTENCING

1136

1 And I'm kind of at a loss for
2 words.

3 I thank you and everyone else for
4 taking time out of their days to be here. And I just --
5 I would like for you to take into consideration the --
6 the small amount of things that I have said to you and
7 the emotion that I have tried to show.

8 Thank you.

9 THE COURT:

10 You're welcome.

11 Anything further, Ms. -- Ms.

12 Livesay?

13 MS. LIVESAY:

14 Nothing from the State, Your
15 Honor.

16 THE COURT:

17 All right.

18 Mr. Hazzard, while we're waiting
19 -- and I do want to compare the North Carolina statutory
20 elements, or common-law elements, depending on how they
21 prosecuted this -- this -- uh -- matter in North Carolina
22 -- uh -- before I sentence.

23 But I'll -- I'm going to hear you
24 in mitigation while we wait; okay.

25 MR. HAZZARD:

1

2 MR. HAZZARD:

3

4 Your Honor, with regard to the
5 facts and circumstances of this case, obviously The Court
6 has been in a unique position to hear directly from Mark
7 Elliott as to what occurred.

8

9 With regard to mitigation, my
10 understanding is with regard to the prior convictions
11 that placed him here today facing life without parole --
12 uh -- Mr. Elliott has always indicated that he was
13 involved in a consensual relationship with a married
14 woman.

15

That --

16

THE COURT:

17

18 But you do understand that -- that
19 -- uh -- it is a mandatory sentence if in fact the --

20

MR. HAZZARD:

21

I --

22

THE COURT:

23

24 -- the North Carolina statute or
25 common law is -- uh -- the same, or has the same elements
as burglary in this State?

26

THE COURT:

27

28 Defense is well aware of that
29 fact, Your Honor.

30

VERDICT AND SENTENCING

1138

1 THE COURT:

2 All right.

3 MR. HAZZARD:

4 Well aware of that fact.

5 But with regard to the underlying
6 conviction, he indicates that he was in a consensual
7 relationship -- uh -- with a married woman.

8 That her husband, who was a North
9 Carolina State Trooper -- uh -- came home and caught them
10 in bed together.

11 And as results of that -- uh -- it
12 went from being a consensual relationship to a claim that
13 he had broken into the home and had forced himself upon
14 her.

15 I believe Mr. Elliott's greatest
16 regret in life, he says, is not having gone to trial on
17 those charges; not defending himself on those charges;
18 not seeking the truth and putting it before a jury on
19 those charges.

20 As a result of that -- uh -- he
21 obviously had the one strike for a most serious offense,
22 and exercised extreme -- extremely poor judgment -- uh --
23 regarding the events that occurred on the morning of June
24 29th, 2009.

25 Uh -- As I have told him -- As I

1 tell many of my clients, and as I see from my clients on
2 a daily basis, the decisions that we make in a second can
3 drastically, and in this case inalterably change the rest
4 of your life.

5 Uh -- I will not go into the facts
6 of the case.

7 The triers of facts have heard
8 everything; paid attention over the better part of five
9 days, and returned a verdict that I do not quibble with,
10 and I do not believe Mr. Elliott quibbles with in that
11 regard.

12 We thank them for their service --
13 uh -- and thank them for hearing us, and as the judges of
14 the fact -- of the facts, giving an honest and complete
15 and thorough review.

16 I thank you from the bottom of my
17 heart for that, because that is all any defendant is
18 entitled to, is to have an unbiased trial -- uh -- as far
19 as the trier of the law and the trier of the facts.

20 Uh -- We stand here before The
21 Court ready to receive the sentencing.

22 And I would ask The Court to
23 inquire where Mr. Elliot wishes to speak; and if so, to
24 allow him to speak at this time.

25 THE COURT:

1 I certainly will.

2 Mr. Elliott -- uh -- do you have
3 anything that you would like to say to me?

4 (Mr. Hazzard has a brief
5 conference with Mr. Elliott at counsel table.)

6 MR. HAZZARD:

7 Okay.

8 Mr. Elliott indicates he would
9 like to address The Court -- uh -- but that he needs some
10 time to gather himself, Your Honor.

11 THE COURT:

12 Well, we'll --

13 MR. HAZZARD:

14 To get a hold of himself.

15 THE COURT:

16 -- take a moment, if that's
17 necessary.

18 COURT REPORTER:

19 And Ms. Knowles, would you put
20 that speaker right in front of him because he's got a
21 very low voice; okay?

22 THE COURT:

23 Ms. Lively --

24 MS. LIVESAY:

25 Yes sir.

1 THE COURT:

2 Is someone getting that statute
3 for me -- the North Carolina statute?

4 MS. LIVELY:

5 Yes, sir, Your Honor. We -- I've
6 got -- uh -- a part of what you need, but -- uh -- I'm --
7 we're looking into it to get you everything to make sure
8 we're very clear, Your Honor.

9 MR. HAZZARD:

10 Your Honor, for the record, my
11 client indicated that he is obviously -- uh --
12 emotionally overwhelmed at this time.

13 He does not believe that he will
14 be able to -- to speak.

15 I do know that -- uh -- I do know
16 that -- uh -- if he were able to speak, he would speak
17 regarding his family and regarding his life history --
18 you know -- growing up in and around the Tabor City area,
19 and the loved ones that are going to be left behind
20 because of this -- uh -- and those who -- he will miss,
21 and obviously hey will miss him.

22 I mean, he -- he has a lot of good
23 members of his family, Your Honor -- uh -- good people.

24 And they will obviously at this
25 point do without his -- uh -- support and encouragement

VERDICT AND SENTENCING

1142

1 from this time.

2 THE COURT:

3 Is that what you wanted to say,

4 Mr. Elliot?

5 DEFENDANT:

6

7 Yes, Your Honor.

8 THE COURT:

9 All right. Very well.

10 All right, let's be at ease for
11 just a moment. Let Mr. Elliott stay here with us.

12 I want to give the Solicitor an
13 opportunity to get the statute for me, or do you have it?

14 MS. LIVESAY:

15 Yes sir.

16 THE COURT:

17 Ms. Livesay --

18 MS. LIVESAY:

19 Yes sir.

20 THE COURT:

21 -- burglary in the first degree as
22 defined by the State of North Carolina is as follows:

23 There shall be two degrees in the
24 crime of burglary as defined at the common law.

25 If the crime be committed in a

1 dwelling house or in a room used as a sleeping apartment
2 in a building and any person is in actual occupation of
3 any part of said dwelling house or sleeping apartment at
4 the time of the commission of the crime, it shall burg --
5 be burglary in the first three.

6 If such crime be committed in a
7 dwelling house or sleeping apartment not actually
8 occupied by anyone at the time of the commission of the
9 crime, or if it be committed in any house within the
10 curtilage of a dwelling house or in any building not a
11 dwelling house but in which a room is used as a sleeping
12 apartment and not actually occupied at such time as -- uh
13 -- of the commission of a crime, it shall be burglary in
14 the second degree.

15 For the purpose of defining the
16 crime of burglary, larceny shall be deemed a felony
17 without regard to the value of property in question.

18 The problem I have, Ms. -- Ms.
19 Livesay is that:

20 Burglary in the first degree in
21 this State requires that there be an entry -- an unlawful
22 entry into a dwelling house, which is the same as the
23 North Carolina statute.

24 But in order for there to be
25 burglary in the first degree, there must also be a -- uh

1 -- an aggravating circumstance.

2 That aggravating circumstance
3 would be such things as being armed with a weapon either
4 entering or leaving.

5 It would include entering a -- a
6 dwelling house in the night time.

7 It would -- uh -- uh -- There are
8 any number of -- uh -- of -- of additional elements.

9 But there must be a -- uh -- a --
10 an aggravating circumstance in addition to entering a
11 dwelling house.

12 Otherwise it would be a -- uh --
13 burglary in the second degree, which in this state is a
14 serious offense and not a most serious offense.

15 Now, tell me your thoughts on
16 that.

17 Tell me -- Tell me about that?

18 Where are we going?

19 We -- Do you agree with me that
20 under the theory upon which the State has proceeded life
21 without parole is only applicable if in fact there has
22 been at least one most serious offense and that would
23 require that the burglary in North Carolina -- first-
24 degree burglary would be the same as first-degree
25 burglary in South Carolina, or there is a combination of

1 a most serious and a -- uh -- serious -- most serious and
2 a serious, which could include burglary in the second
3 degree.

4 But from what I understand, you're
5 going forward on burglary in the first-degree.

6 I see Mr. Richardson coming
7 around. And I'll be glad to hear from either of you.

8 But do you see my concern about
9 the difference in North Carolina's first-degree burglary
10 and South Carolina's first three burglary; the absence of
11 the affecting circumstance?

12 MS. LIVESAY:

13 Your Honor -- uh -- it's the
14 State's position that in South Carolina an aggravating
15 circumstance under burglary first would be that
16 somebody's at home while the crime is committed in their
17 dwelling.

18 THE COURT:

19 All right. Well, let's look at
20 that. I mean, I -- I'm not sure about that. Uh -- I'm
21 not familiar with that at all.

22 Uh -- What's the burglary statute?

23 MR. HAZZARD:

24 In South Carolina?

25 THE COURT:

VERDICT AND SENTENCING

1146

1 Well, I can look it up.

2 If you would, Claire, look in my
3 list.

4 As a matter of fact, I can see it
5 right here, 16 11 311.

6 16 11 311 is burglary in the first
7 degree. And it says this:

8 A person is guilty of burglary in
9 the first-degree if the person enters the dwelling
10 without consent and with intent to commit a crime -- uh
11 -- in the dwelling and either when effecting entry or
12 while in the dwelling or in -- in immediate flight, he or
13 another participant in the crime is armed with a deadly
14 weapon, causes physical injury to a person who is not a
15 participant in the crime, uses threats, uses threat --
16 use or threatens the use of a dangerous instrument, or
17 displays what is or appears to be a knife, pistol,
18 revolver, rifle, shotgun, machine gun, or other firearm,
19 or the burglary is committed by a person with two -- with
20 a prior record of two or more convictions for burglary or
21 housebreaking or a combination of them, or the entering
22 or remaining occurs in the nighttime.

23 Now, doesn't burglary, as that is
24 intended or defined in this State -- burglary in the
25 first degree, which is the more serious offense --

1 doesn't it require more than the North Carolina statute?

2 That is, it requires a showing of
3 an aggravated circumstance?

4 Help me here.

5 THE COURT:

6 We -- We would agree with that,
7 Your Honor.

8 The facts of the case in North
9 Carolina obviously included a kidnapping, a common law
10 robbery, all of that was out one incident.

11 It's the State's contention, Your
12 Honor --

13 THE COURT:

14 Was their a weapon used, or
15 anything like that, that clearly -- uh --

16 MS. LIVESAY:

17 He --

18 THE COURT:

19 -- or -- uh -- it -- it --

20 MS. LIVESAY:

21 The facts are of such, Your Honor,
22 where with the common law robbery, a kidnapping, as well
23 as a burglary first, all arose out of the same entire
24 facts, Your Honor, in that case.

25 THE COURT:

VERDICT AND SENTENCING

1148

1 Causes physical injury to a person
2 who is not a participant in the crime.

3 I -- I am just really concerned
4 about the requirement -- uh -- that it be the same
5 offense -- or a offense with the same elements as what we
6 have here.

7 THE COURT:

8 But the State's contention is:

9 Those elements that are of a
10 burglary first in North Carolina were met in the North
11 Carolina case just by the simple fact that the incident
12 included a kidnapping as well as a common law robbery.

13 That was a situation where it was
14 a State Trooper's wife. The house is broken into. And
15 she was raped.

16 Obviously, the degree included
17 aggravated circumstances for South Carolina purposes.

18 It included the common law robbery
19 and the kidnapping, which was certainly aggravating
20 circumstances.

21 Now, does the statute in North
22 Carolina require the aggravating circumstances?

23 No.

24 But the case included aggravated
25 circumstances. And the law in North Carolina actually

1 makes the statute for first-degree for the person to
2 actually be in the dwelling.

3 So I submit that it was
4 aggravating circumstances?

5 The facts meet that requirement.

6 We have a kidnapping.

7 We have a rape.

8 We have a common-law robbery,
9 which meets the elements for South Carolina burglary
10 first.

11 MR. HAZZARD:

12 And Your Honor, that's all well
13 and good. However, The Court is bound by the comparison
14 of the two statutes with regard to what is required in
15 each.

16 Also there is no verdict form or
17 no -- uh -- sentencing sheet that I have seen that
18 indicates that there was any finding of any aggravating
19 circumstance; nor does their first-degree burglary
20 require that, which is what triggered my thought process
21 that:

22 If it were truly analogous to the
23 South Carolina first-degree burglary, I don't think he'd
24 be -- have been looking at 4 years, 3 months to -- you
25 know -- 5 years, 11 months, Your Honor.

VERDICT AND SENTENCING

1150

1 MS. LIVESAY:

2 Your Honor, in North Carolina the
3 statute actually requires the person to be home.

4 I mean, we're -- we're talking
5 aggravating circumstances.

6 I mean, when we're truly looking
7 at the essence of the statue, I think anybody would agree
8 an aggravating circumstance would be to break into my
9 house while I'm in the house.

10 That is true with burglary first.

11 THE COURT:

12 And I agree with you. I think
13 that is North Carolina's aggravating circumstances.

14 MS. LIVESAY:

15 Yes, Your Honor, that somebody is
16 in the house.

17 Here we don't even require you to
18 be home.

19 I mean, if we're truly looking at
20 the essence, if I had my choice, I would certainly rather
21 have an aggravating circumstance that the person be at
22 home.

23 That is much more severe -- much
24 more violent -- than a statue -- We're talking about:

25 Well, they broke in the house in

1 South Carolina but nobody was home.

2 Obviously, the violence of it is
3 met by the fact that somebody broke into the home, and
4 there was somebody occupying the home while the breaking
5 and the entering was happening, Your Honor.

6 MR. HAZZARD:

7 It is what it --

8 MS. LIVESAY:

9 I think that increases, if not
10 shows the violence of the act.

11 And -- And that is truly what
12 we're looking at.

13 We're looking at two most serious
14 offenses, because they are truly violent offenses.

15 MR. HAZZARD:

16 And were the aggravating offenses
17 for each analogous, then perhaps she would have point,
18 Your Honor.

19 THE COURT:

20 They -- They are analogous.

21 THE COURT:

22 This --

23 MS. LIVESAY:

24 We're talking about --

25 THE COURT:

VERDICT AND SENTENCING

1152

1 This is the point I have. I mean,
2 this is the problem I have

3 It took a less -- It takes a less
4 -- a lesser degree of proof -- a lesser showing to
5 convict for first-degree burglary in North Carolina than
6 it does in South Carolina.

7 If North Carolina was different in
8 that it charged -- it required a greater proof, I would
9 have no problems applying the North Carolina statute.

10 But I have real issues with the
11 fact that the North Carolina statute would essentially be
12 burglary in the second degree if it were committed in
13 South Carolina when we look at the North Carolina
14 elements.

15 The North Carolina elements are
16 second-degree burglary in South Carolina, which is a
17 serious, but it's not a most serious offense.

18 MS. LIVESAY:

19 I understand, Your Honor.

20 The facts in North Carolina were
21 such where there was a conviction or there was time
22 served, 12 years for the total of the burglary, the two
23 CSC's, the kidnapping, as well as the common law robbery.

24 The State's motion is:

25 That defendant served 12 years on

1 -- on those convictions.

2 He was out little more than a year
3 before he picked up these convictions.

4 THE COURT:

5 And I agree with you.

6 MS. LIVESAY:

7 If The Court --

8 MR. HAZZARD:

9 If they felt that they could --

10 MS. LIVESAY:

11 Could I finish?

12 THE COURT:

13 Go ahead.

14 MR. HAZZARD:

15 Sure. Go ahead.

16 MS. LIVESAY:

17 If The Court doesn't feel
18 comfortable and satisfied, then that is what the life
19 without parole statute is out for, a sex offender who
20 repeats offenses after 12 years of being incarcerated.

21 He's out a little over a year and
22 picks up this little girl -- the exact same statutes --
23 the exact same charges.

24 Then, I - I don't know that we've
25 got a case that would meet it, Your Honor.

1 MR. HAZZARD:

2 And with regard to the law that
3 applies, the State had every option of referring to and
4 using these other convictions -- you know -- because, as
5 The Court will knows, they have -- there are a -- a
6 myriad of comparables -- of -- uh -- ways that you can do
7 it.

8 You can do most serious and most
9 serious.

10 Most serious and two seriouses.

11 A serious and two seriouses.

12 If they felt that they had two
13 seriouses such as the CSC and one of the -- and the
14 burglary second -- what constitutes basically a burglary
15 second, they could have placed us on notice for that,
16 Your Honor.

17 They could have done that.

18 Nobody stopped them from doing
19 that and using any other -- any other offense that they
20 felt was applicable, whether most serious or serious.

21 But as The Court has pointed out,
22 to use a conviction that requires a lesser burden of
23 proof -- or lesser -- a lesser requirement than our
24 first-degree burglary?

25 Just because theirs is called

1 first-degree, as The Court has very saliently pointed
2 out, it's really a watered-down second degree.

3 And to say that that constitutes a
4 most serious offense is not proper, Your Honor.

5 MS. LIVESAY:

6 Your Honor, the State had no idea,
7 or didn't certainly think that a first-degree burglary
8 when somebody -- their home is broken into while they are
9 in their house.

10 Obviously, at that point, their
11 life is threatened.

12 I had no idea that that would be
13 looked at as a lesser violent offense than breaking into
14 somebody's house who's not home, the cars are gone, the
15 lights are off, and that's -- that's considered more
16 violent.

17 I had no idea that that -- that
18 was going to be the case.

19 In my mind, and it's the State's
20 argument, that:

21 When you break into a home that is
22 occupied, you have -- that is a violent act.

23 I don't think anybody would
24 disagree with that.

25 And now we're making this decision

VERDICT AND SENTENCING

1156

1 -- or The Court has decided that that is less violent
2 than breaking into a home that is unoccupied.

3 THE COURT:

4 It -- It's not the facts of this
5 case. It's the offense that he pled to or was convicted
6 of that is controlling.

7 And that's what I have to go by.

8 I find that the life without
9 parole provisions of 17 25 45 are not applicable in this
10 case in that:

11 The offense in North Carolina
12 which is relied upon by the State is not burglary in the
13 first offense (sic) -- or would not the burglary in the
14 first offense (sic).

15 In South Carolina, it would be for
16 burglary in the second offense (sic), which is not a most
17 serious, which would require another -- or a third
18 offense.

19 However, I do find this to be
20 shocking and appalling -- uh -- conduct on the part of
21 the defendant.

22 There is no doubt in my mind that
23 you seized this young girl, a young girl was 14 at the
24 time.

25 I don't know what was going on in

1 her mind, but I would have certainly imagined that she
2 thought that she was probably going to be killed -- uh --
3 before she was released.

4 That's the way these things
5 usually end up.

6 Uh -- As to the matter of sexual
7 assault, perhaps you did not penetrate her. But I think
8 you had all intentions of doing it.

9 And I'm going to sentence you
10 accordingly.

11 Uh -- The sentence of The Court;
12 that:

13 You be confined to the State
14 Department of Corrections for a period of 30 years, which
15 I believe is the maximum sentence that I can give you
16 under kidnapping.

17 Thank you, sir.

18 MS. LIVESAY:

19 Thank Your Honor.

20 THE COURT:

21 Ladies and gentlemen of the jury,
22 it has been a pleasure to have you in my courtroom.

23 Uh -- I hope that this has been an
24 informative, a learning experience that you have -- you
25 have enjoyed.

1 Uh -- You're not often called upon
2 as jurors; but let me say that -- uh -- it is a -- a --a
3 great thing to have you here.

4 We -- We have so many cases that
5 are resolved just because you're here; far more than we
6 could possibly try.

7 And those cases would never go
8 away were you not here. And I want to thank you for
9 being here.

10 I hope that I see you around the
11 county and about.

12 Uh -- I -- I'm around and about
13 the county all the time.

14 If you see me and you recognize me
15 -- uh -- please don't hesitate to approach me, and speak
16 to me, and tell me you were on -- on my jury, and if you
17 would, share your experiences.

18 It's been a pleasure.

19 Thank you for being here.

20 Your jury service has been -- uh
21 -- served. And -- uh -- you would not be required to
22 return -- uh -- for jury service for three years now at
23 least.

24 Thank you for being here.

25 All right.

1 (WHEREUPON: The jury empanelled
2 in the was released from the courtroom at 3:17 PM,
3 November 19, 2010; and was no longer present during the
4 following proceedings.)

5 THE COURT:

6 Thank you, ladies, gentlemen -- uh
7 -- for doing a good job.

8 You have both -- All three of you
9 worked very hard this week.

10 I appreciate your helping us get
11 this thing through.

12 Uh -- Look forward to seeing you
13 again.

14 MS. LIVESAY:

15 Thank Your Honor.

16 MR. HAZZARD:

17 Thank Your Honor.

18 THE COURT:

19 Good luck to you all.

20 WHEREUPON: There being nothing
21 further, this matter was concluded at 3:19 PM, November
22 19, 2010.

23

24

25

CERTIFICATE

I, the undersigned, H. Eugene Buckner, CVR, Official Court Reporter at Large in and for the State of South Carolina, do hereby certify that the foregoing proceeding was taken on the 15th, 16th, 17th, 18th, and 19th days of November, 2010;

That the within judicial proceedings are, to the Best of my ability, an accurate and verbatim transcription of the hearing;

I further certify that I am neither Counsel nor Solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 29th day of April, 2011.

H. Eugene Buckner

H. EUGENE BUCKNER, CVR
OFFICIAL COURT REPORTER AT LARGE
15TH JUDICIAL DISTRICT
STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA)

County of HORRY COUNTY)

IN THE COURT OF COMMON PLEAS

Mark Allen Elliott #00343763)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

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 LEE CORRECTIONAL FACILITY, LEE COUNTY, SC
2. Name and location of Court which imposed sentence HORRY COUNTY OF
GENERAL SESSIONS
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2009-GS-26-02889

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HORRY COUNTY
2013 MAR 27 AM 9:35
MELANIE HUGGINS-BAIRD
CLERK OF COURT

- (b) _____
 (c) _____

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

- (a) NOVEMBER 19, 2010 - 30 years in SCDC
 (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?

YES

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

- (a) the name of each Court to which you appealed:
 i. SOUTH CAROLINA COURT OF APPEALS
 ii. _____
 iii. _____
 (b) the result in each such Court to which you appealed:
 i. AFFIRMED
 ii. _____
 iii. _____
 (c) the date of each such result:
 i. MARCH 13, 2013
 ii. _____
 iii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. N/A
 ii. _____
 iii. _____

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

- (a) N/A

- (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) INEFFECTIVE EVIDENCE FOR KIDNAPPING
 (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) SEE Attachment 1
 (b) SEE Attachment 2
 (c) _____
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. N/A
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. N/A
 ii. _____
 iii. _____

ATTACHMENT 1

11(a)(1) Applicant will submit that Counsel allowed the attorney he had removed off his case, to be his assistant during applicants trial. (SEE TRANSCRIPT FOR ARRAIGNMENT) pg. 10) line 13)

11(a)(2) Applicant will submit that Counsel did not ask Juror to be excused. After Juror admitted he use to be in the bail bonding business. And he (juror) was affiliated and had contact with applicants relative whom works at the jail, where applicant was being held at. (SEE TRANSCRIPT FOR JURY SELECTION) pgs 244 - lines 17-23) pgs 246 - line 21-25)

11(a)(3) Applicant will submit that Counsel did destroy his credibility by making reference to him as being in the drug game, and that applicant was not telling the truth in counsels closing argument. (SEE TRANSCRIPT FOR CLOSING ARGUMENT) pg. 989) line 14-20)

11(a)(4) Applicant will submit that Counsel did not submit phone records into evidence: That Jury wrote note asking:

- 1) May they hear the 911 tape reporting the kidnapping
- 2) May they review the phone records (SEE TRANSCRIPT FOR JURY'S QUESTIONS) pgs. 1100 - 1105)

ATTACHMENT 2

- 11(b)(1) During trial the alleged victim testified to the fact that while she was in the car with the applicant he never struck or hit her, or anything like that. Also, that the applicant never pulled a knife or weapon on her. (SEE TRANSCRIPT FOR BRITTANY EBERHARDT TESTIMONY) (p. 598) lines 4-15)
- 11(b)(2) Alleged victim testified that she received a phone call from her boyfriend (MATTHEW) while she was in the car with the applicant. (SEE TRANSCRIPT FOR BRITTANY EBERHARDT TESTIMONY) (p. 601) line 7)
- 11(b)(3) Alleged victim testified that applicant told her to get in the car. That applicant did not grab her by the arm, pull or shove her. (SEE TRANSCRIPT FOR BRITTANY EBERHARDT TESTIMONY) (p. 635) lines 1-7) (p. 635-638)
- 11(b)(4) Alleged victim's testimony is that she spoke to her boyfriend (Matthew) for at least (3) three times, twice when she was in the presence of the applicant, and once afterwards. (SEE TRANSCRIPT FOR DISCUSSION OUTSIDE OF JURY'S PRESENCE) (p. 656) (lines 19-21)
- 11(b)(5) IN closing Arguments counsel explains that applicant was standing on the driver's side near the back of his car. An alleged victim testified she was standing on the passenger side near the back of the applicants car. Applicant then simply says: Go get in the car. And that is how this kidnapping is accomplished. (SEE TRANSCRIPT FOR DISCUSSION OUTSIDE OF JURY'S PRESENCE) (p. 656) (lines 19-21)

ARGUMENTS) pg. 998) (lines 2-10)

11(b)(6) IN closing arguments COUNSEL argues that alleged
Victim was in applicants car through no form of force,
or coercion, or any visible weapon of any sort whatsoever.
(SEE TRANSCRIPT FOR CLOSING ARGUMENTS) (pg. 1005) (lines 21-23)

- iv. _____
- (c) the disposition thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- 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?

N/A

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

- (a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

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

- i. N/A
- 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) This is my initial PCR Application
 (b) The ineffective assistance provided by my trial counsel can best
 (c) be addressed through my PCR application

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? YES
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

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. MR. RONALD W. HAZZARD, 203 Laurel St. Conway SC 29526
SC
 ii. MS Melinda Knowels
203 Laurel St. Conway SC 29526
 iii. MR. BREEN RICHARD STEVENS
P.O. Box 11589 Columbia SC 29211-1589
 (b) the proceedings at which each such attorney represented you:
 i. Arraignment
TRIAL
 ii. Arraignment
TRIAL
 iii. APPEAL

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

My conviction and indictment to be vacated, remanded
for new trial. Additionally, I wish for the opportunity to
further resolve my charges through assistance of effective counsel.

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Lee)

13
1843
VERIFICATION

I, Mark Allen Elliott, 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 attached in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this 25
 day of March, 2013.

Maureen Wilson (L.S.)
 Notary Public

My Commission Expires: 3/8/2020

FILED
 JERRY COUNTY
 2013 MAR 27 AM 9:35
 MELANIE HUGGINS-WARD
 CLERK OF COURT

13

184.3

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

I, MARK ALLEN ELLIOTT, 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.

Mark Allen Elliott
Applicant

SWORN or affirmed to and subscribed before me this

23 day of March 2013

Mamie Wilson
Notary Public

My Commission Expires:

3/8/2020

FILED
JURY COUNTY
2013 MAR 27 AM 9:35
MELANIE HUGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2013-CP-26-1843
COUNTY OF HORRY	)	
	)	
Mark Allen Elliott,	)	
S.C.D.C. No. 343763,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed March 27, 2013, the Respondent would show this Court:

I.

The Applicant is currently incarcerated in the South Carolina Department of Corrections pursuant to Order from the Horry County Clerk of Court. The Applicant was indicted at the July 2009 term of the Horry County Grand Jury for kidnapping (2009-GS-26-2889). Ronald W. Hazzard, Esquire, and Melinda Knowles, Esquire represented the Applicant.

The State took the case to trial, and on November 19, 2010 the Applicant was found guilty. The Honorable Larry B. Hyman, Jr. sentenced the Applicant to thirty (30) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Breen R. Stevens, Esquire of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Mark Elliott, Op. No. 2013-UP-112 (S.C. Ct. App. filed March 13, 2013). The Remittitur was sent on April 3, 2013.

Attached herewith and incorporated herein by reference are the records of the Horry

County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

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

1. Ineffective assistance of counsel.
 - a. "Counsel allowed the attorney he had removed off his case to be his assistant during Applicant's trial."
 - b. Counsel failed to have a juror excused who was previously a bail bondsman.
 - c. Counsel referred to Applicant as "being in the drug game."
 - d. Counsel failed to put phone records into evidence.
2. Ineffective evidence of kidnapping.
 - a. Applicant puts forth six (6) enumerated allegations that the evidence was insufficient to sustain a conviction.

Any claims not specifically enumerated in the Application or amendments thereto will be opposed by the State at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

III.

Respondent interprets Applicant's allegations as ineffective assistance of counsel. Respondent asserts the Applicant's allegations that his attorney was ineffective are without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v.

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits 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. See Sharper v. State, 279 S.C. 264, 265, 305

S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent submits that Applicant's second ground for Post-Conviction Relief should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Applicant's allegations regarding

the sufficiency of the evidence are not appropriately addressed in PCR. Therefore, the State requests these allegations be dismissed.

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

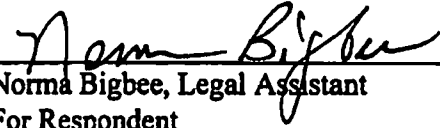
10/24, 2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
	)	2013-CP-26-1843
	)	
MARK ALLEN ELLIOTT, #343763	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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 on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 24TH day of October, 2013.


 Norma Bigbee, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**
2 COUNTY OF HORRY) CASE NO: 2013-CP-26-1843
3 PCR HEARING'

4
5 **B E F O R E:** The Honorable John C. Hayes
6 October 27, 2014

7 MARK ALLEN ELLIOTT,
8 Petitioner,
9 vs.
10 STATE OF SOUTH CAROLINA,
11 Respondent.

ORIGINAL

12
13 **APPEARANCES:**

14 Daniel Selwa, Esq.
15 For the Petitioner.

16
17 Joshua Thomas, Esq.
18 For the Respondent.

19
20
21 Court Reporter:
22 Natalie Dahl, RPR
23
24
25

1 I-N-D-E-X

2 WITNESS PAGE

3 MARK ALLEN ELLIOTT

4 Direct Examination by Mr. Selwa..... 4

5 Cross-Examination by Mr. Thomas..... 14

6

7 MELINDA KNOWLES

8 Direct Examination by Mr. Thomas..... 17

9 Cross-Examination by Mr. Selwa..... 19

10

11 RONALD HAZZARD

12 Direct Examination by Mr. Thomas..... 22

13 Cross-Examination by Mr. Selwa..... 33

14

15 E-X-H-I-B-I-T-S.

16

17 PETITIONER'S EXHIBITS MARKED & ADMITTED

18 1 Phone Records 37

19

20

21

22

23

24

25

CALL OF THE CASE
P-R-O-C-E-E-D-I-N-G-S

MR. THOMAS: The next case is Mark Allen Elliott versus State of South Carolina, Case No. 2013-CP-26-1843. Mr. Elliott was indicted in July of 2009 for kidnapping, criminal sexual conduct first degree, criminal sexual conduct with a minor second degree, failure to stop and resisting arrest. He was represented by Ronald Hazzard and Melinda Knowles. He went to trial November 15th through the 19th, 2010. He was convicted of kidnapping, a directed verdict on some of the other charges and a not guilty on everything else.

He was sentenced by the Larry B. Hyman to 30 years for the kidnapping charge, and represented on appeal by Bri Stephens. The Court of Appeals affirmed that result in Unpublished Opinion 15-UP-112, and a remittitur was returned in April 3rd of 2013. On March 27, 2013, he filed this application for PCR alleging ineffective assistance of counsel, for allowing -- an attorney that had been working on the case was relieved, failure to strike a juror, references to him being in the drug gang from his counsel, and a failure to submit phone records to the jury. He's represented on that charge by Daniel Selwa; he is present and State is ready to proceed.

DIRECT EXAMINATION - MARK ELLIOTT

1 THE COURT: Mr. Selwa, do you want to
2 particularize what the issues are or did Mr. Thomas
3 cover them?

4 MR. SELWA: I think we'll proceed on all of those
5 at this time.

6 THE COURT: Call your first witness.

7 MR. SELWA: I'll call Mark Elliott to the stand.

8 (MARK ELLIOTT, having been duly sworn,
9 testified as follows:)

10 THE CLERK: State your name for the record and
11 spell your last.

12 THE WITNESS: Mark Elliott, E-L-L-I-O-T-T.

13 DIRECT-EXAMINATION

14 BY MR. SELWA:

15 Q Mr. Elliott, you are here for a post-conviction
16 relief, correct?

17 A Correct.

18 Q And you are alleging that your counsel was
19 incompetent or ineffective for you; is that right?

20 A Correct.

21 Q Can you tell the Court what your claims are about
22 your trial counsel?

23 A Yes. At the time of trial, my counsel, Ron
24 Hazzard, he was mentioning concerns about phone records
25 that the alleged victim -- at the time she used the

DIRECT EXAMINATION - MARK ELLIOTT

1 telephone to contact people on several different
2 occasions, but during the time it was in my presence,
3 they never called and said they were kidnapped or
4 anything was being done to them. And so the jury -- at
5 the deliberation, the jury sent a note to the judge
6 saying they wanted to review the phone records to
7 confirm what my trial counsel was saying was correct,
8 and my trial counsel, he did not submit the phone
9 records into evidence for the jury to look at them.

10 Q You were originally charged with what crimes?

11 A I was convicted off?

12 Q No, charged with.

13 A Kidnapping, criminal sexual conduct, criminal
14 sexual conduct with a minor, resisting arrest and
15 failure to stop for blue light.

16 Q And that is two different criminal sexual
17 conducts, right, criminal sexual conduct and one with a
18 minor?

19 A Right, with the same person.

20 Q And this incident involved, basically, three
21 young individuals, which they claim you robbed and then
22 kidnapped one of them; correct?

23 A Right.

24 Q And the rape, or the criminal sexual conduct that
25 is alleged against you, that occurred when the female

DIRECT EXAMINATION - MARK ELLIOTT

1 party allegedly got in the car?

2 A Correct.

3 Q And we're talking today about the phone records
4 from that individual that got in your car; is that
5 correct?

6 A Correct.

7 Q And can you tell me what the significance of
8 those phone records were?

9 A They would have proved that during the time that
10 she was in my presence, that she was using the
11 telephone, that I never kidnapped or made her get in
12 the car, because she used the phone to call her
13 boyfriend and other friends and acquaintances at the
14 time.

15 Q Okay. And what are you alleging that she was in
16 your car for?

17 A She was giving me directions to take her where
18 someone wanted to buy drugs at.

19 Q So this was basically a drug deal that was --

20 A Correct.

21 Q -- was occurring?

22 A Correct.

23 Q And what would the -- the phone records would
24 have established that she didn't call for help?

25 A Right. She was using the phone during the time

DIRECT EXAMINATION - MARK ELLIOTT

1 she was with me.

2 Q And she was allowed to do that?

3 A Right. Because if I had kidnapped you, or
4 allegedly kidnapped you, why would I let you use your
5 telephone, life line, so to speak.

6 Q To your knowledge, did she call 911 during any
7 point?

8 A No. No. No.

9 Q Did she call anyone else for help?

10 A No.

11 Q Did she receive a call?

12 A From a friend, a boyfriend.

13 Q And was that one of the other individuals in that
14 three-party group?

15 A Right. Her boyfriend, at the time, called and
16 she told him that she would be back in a few minutes.

17 Q But she claimed that you raped her, correct?

18 A Correct.

19 Q Then the other three -- two boys claimed that you
20 kidnapped her?

21 A Correct.

22 Q And she corroborated that story by saying you
23 also kidnapped her?

24 A Correct.

25 Q Mr. Hazzard, when he was your attorney, he

DIRECT EXAMINATION - MARK ELLIOTT

1 identified these phone records in the record, correct?

2 A He talked about them and had them present at the
3 time of the trial.

4 Q And he failed to introduce them; is that right?

5 A Correct.

6 Q Did the jury ask to see them at the end?

7 A Yeah. They wrote the judge a note during
8 deliberation. They wanted to review the phone records,
9 and the judge called us in, and at the time Ron
10 Hazzard, trial counsel, said he didn't submit the phone
11 records in evidence, so they were unable to review
12 them.

13 Q So the phone records were not admitted?

14 A Right.

15 Q And the phone records, what would they have
16 shown?

17 A They would have shown that at the time she was in
18 the car with me, she used the phone and received phone
19 calls.

20 Q And had they -- had the jury heard that or been
21 able to review those phone records, do you think the
22 outcome of the trial would be different?

23 A Yes. Because if they would have, they would
24 never have asked to see them. So they wanted to see if
25 the phone records would have made a difference, but

DIRECT EXAMINATION - MARK ELLIOTT

1 they were unable to see them because they were not
2 introduced into evidence.

3 Q Okay. And in the phone records, were there any
4 references to any calls to 911?

5 A No, there wasn't.

6 Q And did she admit on the stand to calling her
7 boyfriend?

8 A Yeah, she admitted she called and used the phone
9 several times. At one point in time she said, You have
10 my phone records so what is the use of asking these
11 questions, and it's also in the transcript showing
12 these things.

13 Q Did she make any calls or receive them?

14 A She did both.

15 Q And the phone records reflected that?

16 A Right.

17 Q All right. Now, while she was with you, they
18 alleged that you raped her, and you were found not
19 guilty of that?

20 A Correct.

21 Q And they also found you not guilty of failing to
22 stop for blue lights?

23 A Correct.

24 Q And so the kidnapping charge that you were
25 convicted of would have turned a lot on whether or not

DIRECT EXAMINATION - MARK ELLIOTT

1 she called for help?

2 A Right.

3 Q Because she testified that she had the phone; is
4 that right?

5 A Right.

6 Q And that you never had taken that away from her;
7 is that correct?

8 A Correct.

9 Q And your testimony today is that you never took
10 the phone away from her, correct?

11 A Correct.

12 Q Had the jury been able to review the records and
13 see that she never called for help or, in fact, made
14 calls during that time, do you think that the jury
15 would have found you not guilty on that as well?

16 A I do.

17 Q Do you feel that Mr. Hazzard's failure to admit
18 that into the record prejudiced you so much so that you
19 would have found not guilty of all charges?

20 A I do.

21 Q What are your other claims against your trial
22 counsel?

23 A In closing arguments, he made a statement -- also
24 in the transcript -- saying that no one in this case is
25 telling the truth, the alleged victims are not telling

DIRECT EXAMINATION - MARK ELLIOTT

1 the truth, my client, Mark Elliott, is not telling the
2 truth because he is in a drug gang, and no one in a
3 gang is not going to tell the truth. I think that
4 prejudiced me because you are telling the jury that I'm
5 a drug dealer and doing things illegal, so they feel if
6 you are doing this, you could have possibly been doing
7 this as well.

8 Q So his reference to you as a drug dealer,
9 basically, you are claiming that that was
10 inappropriate?

11 A Right.

12 Q Do you think that swayed the jury's decision?

13 A It could have. I feel like it did.

14 Q Was there any testimony during the course of the
15 trial that would back up that statement or allegations
16 that you were in a drug gang?

17 A No.

18 Q Do you feel that prejudiced your case?

19 A I do.

20 Q Now, your other claim was that you had
21 Ms. Knowles on the case as well; is that correct?

22 A Correct.

23 Q And what is your claim against Ms. Knowles?

24 A Well, at first I had been appointed an attorney,
25 they appointed Melinda Knowles. Probably by the third

DIRECT EXAMINATION - MARK ELLIOTT

1 day of her being my counsel, she was removed off my
2 case and I was appointed Ron Hazzard. But when I came
3 to -- before trial I was notified that Ms. Knowles
4 would be assisting Ron with my case, and I didn't feel
5 she should have been there, because whenever she was
6 appointed the first time, she was not doing a good job,
7 and I didn't feel --

8 Q Why was she removed the first time?

9 A She said she didn't feel comfortable doing it,
10 because she felt I wasn't telling the truth.

11 Q Was she removed by a court order, or the Public
12 Defender's Office --

13 A The Public Defender's Office removed.

14 Q And so she was able to actually argue some
15 motions in that case?

16 A Correct.

17 Q On your behalf?

18 A Right.

19 Q And did you have objection to that?

20 A Not really.

21 Q But you have objections now?

22 A Right. Because after I realized that she didn't
23 -- she wasn't really doing anything to help me, Mr. Ron
24 Hazzard was really the trial attorney, but she put in
25 her say-so.

DIRECT EXAMINATION - MARK ELLIOTT

1 Q You had another claim about a juror; is that
2 correct?

3 A Yeah.

4 Q What was your claim about a juror?

5 A One of the jurors that was allowed to be on my
6 case, at the time he was a bails bondsman. He told the
7 judge that he was a bail bondsman and that he and my
8 brother worked at the detention center, had run-ins or
9 conversations. He didn't say what type of
10 conversations, but he said he knew him, and the judge
11 asked him would that have a problem with him making a
12 decision, and he said no, but I felt like it would have
13 because I didn't know what type of conversations he and
14 my brother had.

15 Q Are you referencing a situation where your
16 brother was in jail or --

17 A Detention officer.

18 Q Your brother is a detention officer?

19 A Right.

20 Q So your brother and the bail bondsman did not get
21 along?

22 A That is what I'm saying, I don't know what type
23 of conversations they had.

24 Q Did he serve as a juror?

25 A Yeah, the bail bondsman, he did.

CROSS-EXAMINATION - MARK ELLIOTT

1 Q And you think that he was impartial?

2 A I do.

3 Q Do you think that prejudiced your case?

4 A I do.

5 Q Are there any other claims that you want to bring

6 to the Court's attention at this time?

7 A Huh-huh, that's it.

8 MR. SELWA: Please answer any questions Attorney

9 General may have.

10 CROSS-EXAMINATION

11 BY MR. THOMAS:

12 Q Mr. Elliott, how many meetings did you have with

13 Mr. Hazzard before your trial?

14 A About six.

15 Q How many meetings with Ms. Knowles?

16 A Two.

17 Q During those --

18 THE COURT: Did he say six?

19 MR. THOMAS: How many?

20 THE WITNESS: During the trial or before?

21 Q (MR. THOMAS) Before trial.

22 A Probably about six.

23 THE COURT: Thank you.

24 Q (MR. THOMAS) During those meetings, you had a

25 chance to go over the State's evidence with them and

CROSS-EXAMINATION - MARK ELLIOTT

1 talk about the discovery?

2 A They didn't have all the evidence at that time
3 when we was speaking.

4 Q Did they ever get all of it?

5 A Right before trial they did.

6 Q Did they go over it with you, then?

7 A Some of it.

8 Q And you got a chance to tell them your version of
9 events that transpired that night?

10 A Correct.

11 Q And your version was basically that she asked you
12 to go help her find drugs?

13 A She told me she knew where -- she was looking for
14 pills at the time. I didn't have any pills. She told
15 me someone wanted to buy cocaine, so that is what at
16 the time.

17 Q And you told that to Mr. Hazzard?

18 A Right.

19 Q So safe to say -- what was your all's defense
20 theory? What did he tell you your defense would be?

21 A I mean, I picked her up and took her where she
22 wanted to go.

23 Q She did testify at trial that she was using the
24 phone while she was riding around with you?

25 A Correct.

CROSS-EXAMINATION - MARK ELLIOTT

1 Q And Mr. Hazzard cross-examined her pretty
2 thoroughly on that, didn't he?

3 A Correct.

4 Q But at the end of the day, her phone was in your
5 car when you were arrested?

6 A She left it in the car, yeah.

7 Q And you -- when you were stopped by the police,
8 you took off running?

9 A Correct.

10 Q Did you ever tell Ms. Knowles you didn't want her
11 arguing any of your motions at trial?

12 A I did.

13 Q About this relationship with your brother and the
14 juror, they worked together at the jail?

15 A The juror was a bail bondsman; my brother worked
16 at the jail.

17 Q Any indication to you that your brother and this
18 juror had any sort of bad relationship?

19 A That's why I was uncomfortable, because I didn't
20 know what type of relationship they had.

21 Q But you don't know if it was a good relationship
22 or bad relationship?

23 A Correct.

24 MR. THOMAS: That is all I have.

25 MR. SELWA: No redirect.

DIRECT EXAMINATION - MELINDA KNOWLES

1 THE COURT: You can step down. Thank you.

2 MR. SELWA: No further witnesses at this time.

3 THE COURT: State have any?

4 MR. THOMAS: At this time the State would call
5 Melinda Knowles to the stand.

6 (MELINDA KNOWLES, having been duly sworn,
7 testified as follows:)

8 THE CLERK: State your name for the Court and
9 spell your last name.

10 THE WITNESS: Melinda Knowles, K-N-O-W-L-E-S.

11 DIRECT-EXAMINATION

12 BY MR. THOMAS:

13 Q Thank you, Ms. Knowles, for being here today. I
14 guess, briefly, if you could, give us an overview of
15 your experiences as a criminal lawyer.

16 A I have been -- actually a public defender
17 starting in 2007. I worked there for approximately
18 seven-and-a-half years and recently went into private
19 practice.

20 Q And how did you come to be involved in
21 Mr. Elliott's case?

22 A Mr. Elliott was assigned to me as a public
23 defender.

24 Q Did there ever come a time when you asked to be
25 relieved from that case?

DIRECT EXAMINATION - MELINDA KNOWLES

1 A No, sir.

2 Q And did he ever tell you at any point he was
3 uncomfortable with you being on his case?

4 A No, sir.

5 Q You argued a few motions; do you remember those?

6 A I do. Yes, I do recall arguing the Jackson V.
7 Denno that we had filed.

8 Q Who was lead counsel in this case, you or Mr.
9 Hazzard?

10 A Mr. Hazzard.

11 Q How many meetings did you have with Mr. Elliott
12 before trial?

13 A At least a half dozen, and that's been so long
14 ago that without having the file in front of me, I
15 can't tell you, but at least -- at least six to eight.

16 Q You feel like from those meetings you were
17 sufficiently prepared for trial?

18 A Oh, yes.

19 Q During your meetings with him, what did you
20 discuss about a defense theory?

21 A He told us his version of what happened, and the
22 defense's strategy at that point was to argue that this
23 was not a kidnapping type of situation, this was just a
24 drug deal gone bad. He seemed at that time to be okay
25 with that, that is what he wanted us to argue.

CROSS-EXAMINATION - MELINDA KNOWLES

1 Q So you guys discussed the fact that you were
2 going to basically talk about his involvement as a drug
3 dealer or sort of trying to act as an intermediary
4 here?

5 A Yes, sir.

6 Q This might be a question for Mr. Hazzard, but if
7 you know, feel free to tell us. Why did the phone
8 records not get submitted as an actual exhibit?

9 A I think that the phone records and that whole
10 discussion was covered at length during the
11 cross-examination of the main witness, which was the
12 alleged victim.

13 Q And you remember Mr. Hazzard cross-examining her
14 and the boyfriend on the telephone --

15 A Oh, yes. I remember that vividly.

16 MR. THOMAS: I think that is all I have. Thank
17 you. Answer any questions Mr. Selwa has.

18 THE COURT: Mr. Selwa.

19 CROSS-EXAMINATION

20 BY MR. SELWA:

21 Q At any point during the course of representing
22 Mr. Elliott, were you taken off the case or stopped
23 working on the case?

24 A I don't recall ever being taken off of the case.

25 Q Okay. Are you aware of Mr. Elliott asking that

CROSS-EXAMINATION - MELINDA KNOWLES

1 you be taken off the case at any point?

2 A No, sir.

3 Q Did he ever express to you, personally, any
4 concerns about your representation of him?

5 A Not that I recall, but like I said, that was
6 several years ago.

7 Q What was the purpose behind two counsels on the
8 case?

9 A The purpose was -- at the time that he went to
10 trial, which was I believe in 2009, I started as a
11 public defender in 2007. At that time, I had not had a
12 lot of trial experience. Mr. Hazzard was a well versed
13 trial attorney, knew what he was doing, and in order to
14 get him a fair -- a fair trial, we wanted to be sure
15 that that issue was covered and that he was given two
16 trial counsels at that time.

17 Q And is that normal procedure for your office or
18 the Public Defender's Office?

19 A I mean, I have sat second chair on a number of
20 occasions. I don't know if you call it "normal
21 procedure," but it definitely does happen.

22 Q But there is no order taking you off the case?

23 A Not that I recall.

24 Q And did your immediate supervisor or your boss,
25 basically, did she take you off the case at any point?

CROSS-EXAMINATION - MELINDA KNOWLES

1 A I don't recall that. I think that she just added
2 Mr. Hazzard, and we tried the case together.

3 Q Okay. Ms. Knowles, do you think if the phone
4 records would have been admitted, they would have
5 persuaded the jury in a different direction?

6 A Unfortunately, I don't think so. I think, like I
7 said earlier, I think that that issue was covered at
8 length by Mr. Hazzard on cross-examination, and the
9 jury heard all that the jury could when it came to that
10 very issue. I don't think that it would have made much
11 of a difference if they were introduced.

12 Q What do you recall the significance was of asking
13 to review that in their deliberation?

14 A I don't know.

15 Q Did that strike you as odd that they would ask to
16 review it?

17 A No. You can't really predict how 12 people see
18 certain issues.

19 Q Is there any information in the phone logs that
20 would have given the jury some extra information that
21 they did not receive from cross-examination?

22 A I don't think so, because the best that I can
23 recollect, Mr. Hazzard covered that issue, like I said,
24 at length. I can't recall how long the
25 cross-examination was, but it was pretty lengthy.

DIRECT EXAMINATION - RONALD HAZZARD

1 Q And when the jury did come and ask to review
2 those records, do you recall that time?

3 A Vaguely.

4 Q If you can, do you recall specifically or why
5 they asked for it, or did they generally ask for the
6 records to review?

7 A I think it was a general inquiry they wanted to
8 make.

9 Q And they did not review those records, correct,
10 because they weren't admitted?

11 A Correct.

12 MR. SELWA: No further questions. Thank you.

13 THE COURT: Redirect?

14 MR. THOMAS: None, Your Honor.

15 THE COURT: You can step down. Call your next
16 witness.

17 MR. THOMAS: The State calls Ronald Hazzard to
18 the stand.

19 (RONALD HAZZARD, having been duly sworn,
20 testified as follows:)

21 THE WITNESS: Ronald William Hazzard,
22 H-A-Z-Z-A-R-D.

23 DIRECT-EXAMINATION

24 BY MR. THOMAS:

25 Q Good morning.

DIRECT EXAMINATION - RONALD HAZZARD

1 A Good morning, sir.

2 Q Could you open up and give us your overview of
3 experience in practicing as a criminal lawyer?

4 A Started practicing law in 2008 (sic), and since
5 that time I've always practiced criminal defense,
6 everything from parking tickets, DUIs to murder.

7 Q And how did you become involved in Mr. Elliott's
8 case?

9 A At some point -- Court's indulgence.

10 (A brief pause in the proceedings.)

11 A At some point in 2009, around August of 2009, I
12 was added as counsel of record for Mr. Elliott.

13 Q Why were you added as counsel? Why didn't
14 Ms. Knowles handle it herself?

15 A Because he was facing a lot of charges and a lot
16 of time. The prosecution made it known that based on
17 the prior record and the charges that he had pending,
18 which was a criminal sexual conduct first or criminal
19 second with minor, three counts of attempted armed
20 robbery, kidnapping, along with failure to stop for
21 blue light, there was a possibility if things did not
22 go well that he could obviously serve a sentence of
23 life without parole. I believe that Orrie West, the
24 circuit public defender, wanted someone with a little
25 more experience on it, and I think that that bolstered

DIRECT EXAMINATION - RONALD HAZZARD

1 Ms. Knowles' confidence to have someone with a little
2 more experience.

3 Q Do you recall there being a moment where
4 Mr. Elliott asked for her not to work on the case?

5 A No, sir -- in fact.

6 Q And how many -- sorry.

7 A In fact, part of pretrial motions, as I recall, I
8 believe it was on November 15, 2010, that was something
9 that was addressed on the record as part of the
10 pretrial motions before Judge Hyman.

11 Q And so how many meetings did you have with
12 Mr. Elliott, ballpark figure?

13 A I would say approximately eight. First contact
14 with him was on November 24th of 2009, and that was a
15 telephone conference while he was in the Horry County
16 Detention Center. My first jail meeting with him was
17 on November 30th of 2009, and we stayed in pretty
18 regular contact whether by phone or through conferences
19 from that time up through the trial of his case.

20 Q And I'm assuming you or somebody from your office
21 filed the standard Rule 5 Brady motions?

22 A Correct.

23 Q Could you briefly tell us an overview of what the
24 State provided in response to that?

25 A Well, Mr. Elliott is correct in saying that,

DIRECT EXAMINATION - RONALD HAZZARD

1 unfortunately, despite the requirements of Rule 5,
2 everything is never received within 30 days. We were
3 still receiving stuff, as memory serves, right up until
4 approximately two weeks prior to the trial of the case,
5 but they did eventually provide everything we needed
6 and what that entailed was this. There were 911
7 recordings of the call to 911 that was made by someone
8 other than Ms. [REDACTED] the victim. There were
9 interviews of Ms. [REDACTED] and the two young men, those
10 were video recordings, we received those. There was a
11 dash camera that -- dash camera footage that involved
12 the attempted arrest of Mr. Elliott and subsequent
13 apprehension of Mr. Elliott. There was the recordings
14 of the -- basically the radio chatter between the
15 police officers while they were looking for Mr. Elliott
16 or looking for whoever they thought the suspect was.
17 There was Mr. Elliott's recorded interview -- video
18 recorded interview with the police, and I think, in
19 fact, there were two of those, and some of the concerns
20 we had with regard to that because of some of the
21 things mentioned in that interview both by the police
22 and Mr. Elliott, the need to redact those prior to
23 trial, and phone records, Ms. [REDACTED] phone records.
24 I specifically requested them for a -- a 24-hour
25 period.

DIRECT EXAMINATION - RONALD HAZZARD

1 This incident occurred in the early morning hours
2 of a certain date. I had asked for her records from
3 12:00 p.m. the day before until 12:00 p.m. the day of,
4 meaning the 24-hour period covering that morning
5 period, and we did, in fact, receive those as well.

6 Q And did you get an opportunity to talk with
7 Mr. Elliott about the evidence that the State had, go
8 over with him what discovery came up with?

9 A Oh, yeah, many occasions. The issues that we had
10 -- the first offer on table for Mr. Elliott was a
11 sentence of 25 years. That subsequently -- 25 years
12 with possibility of life without parole. As we began
13 working on the case and working through the case, that
14 became an offer of 20 years, and then just before
15 trial, the final offer was a 17-year sentence, no life
16 without parole issue obviously involved. So any
17 time -- obviously there was a plea offer, and we
18 discussed all of that. We discussed at length, you
19 know, Mr. Elliott's prior record and the use of the
20 State's intent to use that prior record to try to prove
21 that he was eligible for life without parole if he were
22 convicted of the criminal sexual conduct or the
23 kidnapping. In fact, I provided Mr. Elliott with
24 copies of all of the relevant statutes as far as the
25 charges he was facing, the life without parole, how

DIRECT EXAMINATION - RONALD HAZZARD

1 that comes about, what constitutes a serious and most
2 serious offense, and how the State intended to prove
3 that.

4 We discussed every possible thing at great length
5 because I did not want him to -- I wanted his decision
6 as to whether to go to trial or not to be as knowingly
7 as humanly possible. Besides meeting with him at the
8 detention center, we also spent a lot of time here in
9 the courtroom in lockup because there were several --
10 I would say three, four hearings that we were involved
11 in. One was for a Schmerber test that we got to
12 actually sit down for about 30 minutes before the
13 hearing, and probably about an hour after the hearing
14 discussing everything about the case. When we were
15 able to get him in for a bond hearing, spent a lot of
16 time discussing that.

17 There was also a very unusual video deposition
18 that was done of one of the witnesses who was not
19 going to be available at trial, Lance O'Briant, O,
20 apostrophe, B-R-I-A-N-T. And I believe Mr. Elliott --
21 Ms. Knowles and I spent a lot of time, probably about
22 90 minutes, talking in the courtroom in lockup both
23 before and after the video deposition.

24 Q As far as the phone records go, what was your
25 strategy behind using those in your defense?

DIRECT EXAMINATION - RONALD HAZZARD

1 A Okay. The significance of the phone records was
2 this. Ms. [REDACTED] and the two young men had come
3 down, as memory serves, earlier that day from North
4 Carolina. Ms. [REDACTED] was riding with a female friend
5 and the friend's family. It was the friend's parents,
6 the friend, and Ms. [REDACTED]

7 Apparently, I believe, she had been instructed
8 not to have any contact with her boyfriend, but once
9 she got on the road, or at some point, she apparently
10 contacted the boyfriend, said they were headed to the
11 beach and so the boyfriend and his buddy come down.
12 So it is Ms. [REDACTED] her friend and her boyfriend
13 and boyfriend's male friend.

14 During the evening hours, the friend and the
15 friend's parents eventually turn in fairly early
16 leaving Ms. [REDACTED] her boyfriend and his male
17 friend there hanging out. The significance of the
18 phone records is that although their testimony was
19 that they were simply there at the beach house just
20 having a good time, before the incident with
21 Mr. Elliott occurs, there are several telephone
22 conversations over an extended period of time between
23 Ms. [REDACTED] and her boyfriend. We had a defense
24 theory that the reason they were having these
25 telephone conversations was because one or both at

DIRECT EXAMINATION - RONALD HAZZARD

1 different times, and specifically the boyfriend I
2 remember, was out trying to score drugs. I remember
3 cross-examining her on the fact that if he were there
4 in the yard with you, like you say, all just sat there
5 in the yard and hung out, why would you be on the
6 telephone with him if you are in the same proximity.

7 So that was the significance of the phone records
8 on the front-end. What was -- what were they doing,
9 they were looking for drugs. They come across
10 Mr. Elliott. The State's theory is that Mr. Elliott
11 then robbed the three of them. Our position was that
12 he did not rob them; he, in fact, stopped because they
13 flagged him down to ask where they could find drugs,
14 and he in turn said I'm from this area, I can probably
15 get what you want you need or get you to someone, hop
16 in the car with me. The girl gets in the car him,
17 they leave.

18 The second significance of the phone records is
19 that while Ms. [REDACTED] is in Mr. Elliott's company,
20 this took a period of time. I mean, they were gone
21 for a period of time, "they" being Mr. Elliott and
22 Ms. [REDACTED] Ms. [REDACTED] boyfriend starts calling
23 repeatedly, repeatedly. Where are you? What are you
24 doing? Where are you? To the point, if I recall, she
25 actually turned the phone off. I do not recall

DIRECT EXAMINATION - RONALD HAZZARD

1 whether she called anyone, but I know that she talked
2 to him several times while she was in the car with
3 Mr. Elliott. That was the significance of the phone
4 records from Mr. Elliott on the back-end, which was
5 that if this were a kidnapping, she obviously would
6 not have had access and use of the telephone, and the
7 phone records did clearly show that.

8 Q And you had an opportunity to cross-examine her
9 on that?

10 A Yes, sir.

11 Q As well as the boyfriend?

12 A I don't recall that as well, but I'm sure I did,
13 yes, sir.

14 Q So I guess the question is why not introduce the
15 actual physical record as an exhibit?

16 A I should have. I should have introduced them.
17 Because it wasn't an issue of trial strategy as far as
18 wanting to save the final closing argument, because we
19 ended up -- "we" being the defense -- ended up putting
20 everybody from SLED to prove that there was no DNA of
21 Mr. Elliott on Ms. [REDACTED] or on her clothing. So we
22 already lost the last close.

23 I think I was thinking the phone records were a
24 little hard to read. They weren't like the ones you
25 get in the mail, it was raw data from the service

DIRECT EXAMINATION - RONALD HAZZARD

1 provider. It took a little while to sit down and pour
2 over it. Had I entered them into evidence, I would
3 not have been able to highlight the pertinent portions
4 that showed phone calls from Ms. [REDACTED] to her
5 boyfriend, from the boyfriend to Ms. [REDACTED] and I
6 remember thinking I didn't want to confuse the jury in
7 that regard, but that is obviously the thing that they
8 honed in on, those phone records. So, yes, I should
9 have put them in evidence.

10 Q Was there anything in the record that you didn't
11 bring out on cross-examination, though?

12 A I don't believe so, sir, no.

13 Q As far as the jury selection goes, what was your
14 theory behind not striking that juror that said he had
15 a relationship with Mr. Elliott's brother?

16 A Based on the -- Judge Hyman's questioning of the
17 juror, he did not state that he had any malice or
18 ill-will towards Mr. Elliott or Mr. Elliott's brother,
19 not that I discerned. In fact, you know, I thought
20 that having him on there might be helpful. I didn't
21 pick up on any indicator that he would not be -- not
22 only not be fair and impartial, you know, I was
23 thinking he might have a little more pause for
24 Mr. Elliott since he knew and worked with one of
25 Mr. Elliott's family members.

DIRECT EXAMINATION - RONALD HAZZARD

1 Q Did Mr. Elliott express any concerns about him
2 being on the jury?

3 A Not that I recall. I don't recall him having a
4 concern or expressing a concern.

5 Q Let's go over your closing argument. I guess it
6 is safe to say his version of events is that he was out
7 helping them find drugs?

8 A Correct.

9 Q Did you discuss with him how you would use that
10 in your defense strategy at trial?

11 A Yes, we discussed it. We obviously had to
12 discuss it. One of the big issues with Mark was the
13 issue of consent as far as him -- as far as him being
14 with this young lady at 2:00, 3:00 4 o'clock in the
15 morning, him being with this girl at 2:00, 3:00, 4
16 o'clock in the morning. I told him my position was
17 that we had to have some explanation as to why this
18 young girl you don't know is riding around in the car
19 with you at 3:00, 4 o'clock in the morning. Mindful,
20 you are charged with CSC first and CSC second with a
21 minor. So, you know, it can't be about some kind of
22 consensual sex, obviously that is not something that
23 would be very helpful to you. In fact, the DNA results
24 showed that they did not, in fact, have sex.

25 So you get back to the jury, in my mind, the jury

CROSS-EXAMINATION - RONALD HAZZARD

1 will want to know why this young girl, under age, is
2 riding in your car at 3:00 or so o'clock in the
3 morning. He had said that is why Ms. [REDACTED] and the
4 two young guys stopped him in the first place, so we
5 told the jury the truth, that is what it was about.

6 Q So that reference to him being in the drug game,
7 that is something you talked about with him, that was
8 part of the defense strategy?

9 A Most definitely.

10 MR. THOMAS: I think that is all I have.

11 CROSS-EXAMINATION

12 BY MR. SELWA:

13 Q Mr. Hazzard, just to clear some things up, you
14 stated that you had been an attorney since 2008?

15 A No. I've been an attorney since 1988.

16 THE COURT: I was confused about that, thank you
17 for clarifying.

18 A But I started in the Public Defender Office in
19 2008, so.

20 Q Mr. Hazzard, do you feel it was significant that
21 the jury did not believe the charges about the criminal
22 sexual conduct, and then in turn questioned and asked
23 for the phone records?

24 A Yes.

25 Q Do you feel that their review of the phone

CROSS-EXAMINATION - RONALD HAZZARD

1 records may have changed their decision?

2 A Personally, yes, considering the way everything
3 went down. On the front-end of the trial, you are
4 looking at these incredibly huge charges, you know, the
5 CSC first, CSC second with a minor, three counts of
6 attempted armed robbery that the State never went
7 forward on, and the kidnapping, you know, and to have
8 been able, through the evidence, to have the jury come
9 back not guilty on both counts of CSC, have the Court
10 direct a verdict on failure to stop for blue light,
11 looking at them coming back not guilty on both counts
12 of CSC, I believe had they had the phone records to
13 look back on in the jury room -- obviously they didn't
14 believe Ms. [REDACTED] when she said she was sexually
15 assaulted, so the question then becomes were they
16 looking for the information they would need to not
17 believe her when she said she was kidnapped. I mean,
18 yes, them asking for the phone records, to me, is huge.

19 Q Okay. And how old was the victim when this
20 occurred?

21 A I don't recall. I know she was underage, but.

22 Q Would she have been around 14?

23 A Possibly. That sounds about right, 14 somewhere
24 in there.

25 MR. SELWA: May I approach the witness? Do you

CROSS-EXAMINATION - RONALD HAZZARD

1 recognize these?

2 MR. HAZZARD: Court's indulgence, Your Honor.

3 (Witness examines document.)

4 A These phone records look like what were provided
5 to me for Ms. [REDACTED] phone record during the period
6 I requested.

7 Q Do you recognize those to be a true and accurate
8 reflection of her phone records of that night?

9 A (Witness examines document.) I mean, I will take
10 it that they are such. I cannot verify them myself.
11 And I apologize for not having the actual file here,
12 Your Honor, because I work in Georgetown County and
13 this is an Horry County case. I'll be more than happy
14 to review the actual file itself and provide the actual
15 copies that were given to us by the Solicitor's office.

16 Q Were you subpoenaed to bring these phone records?

17 A I don't recall whether the subpoena said to bring
18 anything else with me, I'm sorry.

19 MR. SELWA: Court's indulgence, just one second.

20 (A brief pause in the proceedings.)

21 Q Do these phone records reflect the night in
22 question that the alleged kidnapping occurred?

23 A I believe so.

24 Q Do you recognize that number as the numbers that
25 belonged to the alleged victim?

CROSS-EXAMINATION - RONALD HAZZARD

1 A My memory is not that good. The phone records
2 appear to be those phone records. They probably are,
3 but I can't -- my memory is not that good, sir.

4 Q On Page 7 of these records, do you recognize the
5 writing on there?

6 A (Witness examines document.) This may be
7 Ms. Knowles' writing. I know it is not my writing.

8 Q And I know that you stated that you had limited
9 memory about that, but do you recall highlighting those
10 specific areas?

11 A I apologize, sir. Yes, I definitely highlighted
12 periods of time, and this is around 3:00 a.m., which
13 would have been very crucial as far as factually in the
14 case talking about inbound calls, routed calls, yes,
15 sir.

16 Q And do these reflect, to the best of your
17 knowledge, the actual records that you would have
18 admitted that you had --

19 A Yes, sir.

20 MR. SELWA: At this time, I move to admit these
21 as Petitioner's Exhibit 1.

22 MR. THOMAS: I think our only objection is that
23 he hadn't authenticated them. I mean, Mr. Hazzard
24 can't positively identify them, so no foundation.

25 THE COURT: Well, I'm going to allow them.

CROSS-EXAMINATION - RONALD HAZZARD

(Petitioner's Exhibit 1 marked and admitted.)

THE COURT: Redirect?

MR. THOMAS: No, Your Honor.

THE COURT: You can step down. I appreciate your time.

MR. HAZZARD: Yes, sir.

THE COURT: Anything else from the State?

MR. THOMAS: That will be all witnesses for the State.

THE COURT: Mr. Selwa?

MR. SELWA: Nothing further.

THE COURT: Any brief statement or argument? I know the issues, and I heard the testimony.

MR. SELWA: I think we summed it up pretty well. It turns on credibility and believability, and I think that -- a majority of the claims against him, he was found not guilty. The jury specifically asked for these records, and they were not admitted and trial counsel admitted they should have been and felt that the trial may have been different had they been admitted, so we are asking, Your Honor, that Mr. Elliott receive a fair trial here, asking for you to grant the PCR.

THE COURT: All right. State, brief comments?

MR. THOMAS: Briefly. Mr. Hazard testified that

CROSS-EXAMINATION - RONALD HAZZARD

1 his thinking initially was they were kind of confusing
2 and difficult to read, so we would submit that is a
3 strategic reason. There has been no prejudice shown
4 because the substance of the records was fully
5 developed through the testimony of everybody. We
6 submit that Applicant has not met his burden.

7 THE COURT: All right. Okay. Well, I'll take it
8 under advisement.

9 (Whereupon, the proceedings concluded.)
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1 CERTIFICATE OF REPORTER

2
3 State of South Carolina)

4 County of Horry)

5
6 I, Natalie Dahl, Official Court Reporter for the
7 State of South Carolina, do hereby certify that the
8 foregoing is a true, accurate and complete Transcript
9 of Record of the proceedings had and evidence
10 introduced in the matter of the captioned case,
11 relative to appeal, in the Court of Common Pleas for
12 Horry County, South Carolina, on the 27th day of
13 October, 2014.

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

16
17 June 15, 2015

18
19
20 

21 Natalie Dahl, RPR

22 Court Reporter
23
24
25

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SPRINT NEXTEL CORPORATION
CDMA Network



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(704) 224-5099	(704) 224-8623		Outbound	6/28/09 14:18:49	6/28/09 14:18:49	0	294
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 14:19:21	6/28/09 14:19:21	0	294
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 14:20:28	6/28/09 14:20:28	0	294
(704) 224-5099	(704) 224-6473	(704) 224-6473	Outbound	6/28/09 15:11:52	6/28/09 15:12:24	32	690
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 15:22:48	6/28/09 15:22:48	0	291
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 15:23:52	6/28/09 15:23:52	0	292
(704) 224-5099	(704) 224-6473	(704) 224-6473	Outbound	6/28/09 16:53:02	6/28/09 16:58:01	299	690
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:05:58	6/28/09 17:05:58	0	295

CALLING_NBR	CALLED_NBR	DIALED_DIGITS	M_R_#	START_DATE	END_DATE	DURATION(SEC)	REPOLL_#
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:06:25	6/28/09 17:06:25	0	295
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 17:06:53	6/28/09 17:06:53	0	291
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:07:00	6/28/09 17:07:00	0	291
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:07:35	6/28/09 17:07:35	0	296
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:08:18	6/28/09 17:08:18	0	298
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:08:48	6/28/09 17:08:48	0	291
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 17:13:32	6/28/09 17:13:32	0	291
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:15:32	6/28/09 17:15:32	0	291
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:15:59	6/28/09 17:15:59	0	295
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 17:16:44	6/28/09 17:16:44	0	292
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:16:44	6/28/09 17:16:44	0	298
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:18:07	6/28/09 17:18:07	0	291
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:25:04	6/28/09 17:25:04	0	292
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:25:32	6/28/09 17:25:32	0	296
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 17:30:00	6/28/09 17:30:00	0	298
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 17:30:32	6/28/09 17:30:32	0	293
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 17:31:13	6/28/09 17:31:13	0	295
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 17:32:03	6/28/09 17:32:03	0	296
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:40:00	6/28/09 17:40:00	0	292
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:40:42	6/28/09 17:40:42	0	298
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 17:42:04	6/28/09 17:42:04	0	292
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 17:42:44	6/28/09 17:42:44	0	292
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:42:50	6/28/09 17:42:50	0	298
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:43:16	6/28/09 17:43:16	0	293
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:44:50	6/28/09 17:44:50	0	291
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:45:20	6/28/09 17:45:20	0	291
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:46:15	6/28/09 17:46:15	0	298
(704) 224-5099	(704) 224-4917		Outbound	6/28/09 17:46:42	6/28/09 17:46:42	0	295
(704) 224-4917	(704) 224-5099		Inbound	6/28/09 17:56:26	6/28/09 17:56:26	0	296
(704) 224-8623	(910) 352-9931	(704) 224-5099	Routed_Call	6/28/09 17:58:04	6/28/09 17:58:06	2	588
(704) 224-8623	(910) 352-9978	(704) 224-5099	Routed_Call	6/28/09 17:58:10	6/28/09 18:00:23	133	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 17:58:19	6/28/09 18:00:16	117	690
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 17:58:56	6/28/09 17:58:56	0	298
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 17:59:38	6/28/09 17:59:38	0	294
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 18:06:11	6/28/09 18:06:11	0	292
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 18:06:54	6/28/09 18:06:54	0	292

CALLING_NBR	CALLED_NBR	DIALED_DIGITS	M_R_#	START_DATE	END_DATE	DURATION (SEC)	REPOLL_#
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 18:10:30	6/28/09 18:10:30	0	295
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 18:10:52	6/28/09 18:10:52	0	294
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 18:20:19	6/28/09 18:20:19	0	291
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 18:20:42	6/28/09 18:20:42	0	293
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 18:21:30	6/28/09 18:21:30	0	292
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 18:23:12	6/28/09 18:23:12	0	296
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 18:31:42	6/28/09 18:31:42	0	293
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 18:32:32	6/28/09 18:32:32	0	298
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 18:35:23	6/28/09 18:35:23	0	292
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 18:36:22	6/28/09 18:36:22	0	292
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 19:06:10	6/28/09 19:06:10	0	291
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 19:07:41	6/28/09 19:07:41	0	293
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 19:43:24	6/28/09 19:43:24	0	295
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 19:43:45	6/28/09 19:43:45	0	298
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 19:56:09	6/28/09 19:57:13	64	690
(704) 224-8623	(910) 352-9884	(704) 224-5099	Routed Call	6/28/09 19:56:12	6/28/09 19:57:21	69	588
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 20:03:19	6/28/09 20:03:19	0	293
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 20:04:04	6/28/09 20:04:04	0	293
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 20:04:59	6/28/09 20:04:59	0	292
(704) 224-8623	(704) 224-5099		Inbound	6/28/09 20:06:21	6/28/09 20:06:21	0	297
(704) 224-5099	(704) 224-8623		Outbound	6/28/09 20:06:45	6/28/09 20:06:45	0	294
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 20:28:13	6/28/09 20:29:26	73	690
(704) 224-8623	(910) 352-9832	(704) 224-5099	Routed Call	6/28/09 20:28:15	6/28/09 20:29:34	79	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 20:31:58	6/28/09 20:33:52	114	690
(704) 224-8623	(910) 352-9888	(704) 224-5099	Routed Call	6/28/09 20:32:00	6/28/09 20:34:00	120	588
(704) 490-2686	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 20:53:29	6/28/09 20:53:32	3	690
(704) 490-2686	(704) 224-5099	(704) 224-5099	Routed Call	6/28/09 20:53:33	6/28/09 20:53:56	23	588
(704) 490-2686	(11704) 224-5099	(704) 224-5099	Routed Call	6/28/09 20:53:33	6/28/09 20:53:56	23	588
(704) 909-1708	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 20:55:57	6/28/09 20:56:01	4	690
(704) 909-1708	(704) 224-5099	(704) 224-5099	Routed Call	6/28/09 20:56:01	6/28/09 20:56:18	17	588
(704) 909-1708	(11704) 224-5099	(704) 224-5099	Routed Call	6/28/09 20:56:01	6/28/09 20:56:18	17	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 20:56:33	6/28/09 20:57:04	31	690
(704) 224-8623	(910) 352-9989	(704) 224-5099	Routed Call	6/28/09 20:56:37	6/28/09 20:57:13	36	588
(704) 909-1708	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 21:00:55	6/28/09 21:01:15	20	690
(704) 909-1708	(910) 352-9957	(704) 224-5099	Routed Call	6/28/09 21:00:56	6/28/09 21:01:24	28	588
(704) 490-2686	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 21:09:47	6/28/09 21:10:05	18	690

CALLING_NBR	CALLED_NBR	DIALED_DIGITS	M_R_#	START_DATE	END_DATE	DURATION (SEC)	REPOLL_#
(704) 490-2686	(910) 352-9809	(704) 224-5099	Routed_Call	6/28/09 21:09:50	6/28/09 21:10:13	23	588
(704) 224-5099	(704) 224-8623	(704) 224-8623	Outbound	6/28/09 21:10:19	6/28/09 21:10:53	34	690
(704) 224-5099	(704) 224-8623	(704) 224-8623	Outbound	6/28/09 21:11:08	6/28/09 21:11:43	35	690
(704) 224-8623	(910) 352-9994	(704) 224-5099	Routed_Call	6/28/09 21:15:00	6/28/09 21:15:51	51	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 21:15:00	6/28/09 21:15:42	42	690
(704) 224-5099	(704) 224-8432	(704) 224-8432	Outbound	6/28/09 22:11:30	6/28/09 22:17:36	366	690
(704) 663-9952	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 22:54:50	6/28/09 22:55:06	16	690
(704) 663-9952	(910) 352-9965	(704) 224-5099	Routed_Call	6/28/09 22:54:53	6/28/09 22:55:14	21	588
(704) 224-5099	(704) 663-9952	(704) 663-9952	Outbound	6/28/09 22:55:10	6/28/09 22:55:25	15	690
(704) 224-5099	(704) 663-9952	(704) 663-9952	Outbound	6/28/09 22:55:30	6/28/09 22:55:37	7	690
(704) 663-9952	(11704) 224-5099	(704) 224-5099	Routed_Call	6/28/09 22:55:39	6/28/09 22:55:45	6	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 22:55:45	6/28/09 22:56:14	29	690
(704) 224-8623	(910) 352-9863	(704) 224-5099	Routed_Call	6/28/09 22:55:47	6/28/09 22:56:21	34	588
(704) 663-9952	(910) 352-9803	(704) 224-5099	Routed_Call	6/28/09 23:01:44	6/28/09 23:02:27	43	588
(704) 663-9952	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 23:01:45	6/28/09 23:02:20	35	690
(704) 224-5099		(704) 224-8623	Outbound	6/28/09 23:03:46	6/28/09 23:03:48	2	690
(704) 224-5099	(704) 224-8623	(704) 224-8623	Outbound	6/28/09 23:08:26	6/28/09 23:08:59	33	690
(704) 224-8623	(910) 352-9888	(704) 224-5099	Routed_Call	6/28/09 23:09:09	6/28/09 23:10:25	76	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/28/09 23:09:10	6/28/09 23:10:16	66	690
(704) 224-5099	(704) 224-8623	(704) 224-8623	Outbound	6/28/09 23:12:21	6/28/09 23:13:18	57	690
(704) 224-5099	(704) 224-8623	(704) 224-8623	Outbound	6/28/09 23:14:30	6/28/09 23:18:39	249	690
(704) 224-5099	(704) 932-2992	(704) 932-2992	Outbound	6/29/09 0:03:18	6/29/09 0:03:42	24	690
(704) 224-5099	(704) 224-8623		Outbound	6/29/09 0:28:31	6/29/09 0:28:31	0	293
(704) 224-8623	(704) 224-5099		Inbound	6/29/09 0:28:57	6/29/09 0:28:57	0	294
(704) 224-5099	(704) 224-8623		Outbound	6/29/09 0:31:44	6/29/09 0:31:44	0	295
(704) 224-8623	(704) 224-5099		Inbound	6/29/09 0:32:13	6/29/09 0:32:13	0	294
(704) 224-5099	(704) 224-8623		Outbound	6/29/09 0:33:12	6/29/09 0:33:12	0	293
(704) 224-5099	(704) 224-8623		Outbound	6/29/09 1:27:29	6/29/09 1:27:29	0	291
(704) 224-8623	(704) 224-5099		Inbound	6/29/09 1:28:06	6/29/09 1:28:06	0	294
(704) 224-5099	(704) 224-8623		Outbound	6/29/09 1:28:44	6/29/09 1:28:44	0	294
(704) 224-8623	(704) 224-5099		Inbound	6/29/09 1:29:05	6/29/09 1:29:05	0	294
(704) 224-5099	(704) 224-8623		Outbound	6/29/09 1:30:35	6/29/09 1:30:35	0	294
(704) 224-8623	(704) 224-5099		Inbound	6/29/09 1:32:03	6/29/09 1:32:03	0	291
(704) 224-5099	(704) 224-8623		Outbound	6/29/09 1:32:40	6/29/09 1:32:40	0	291
(704) 224-8623	(704) 224-5099		Inbound	6/29/09 1:33:04	6/29/09 1:33:04	0	291
(704) 663-9952	(704) 224-5099		Inbound	6/29/09 1:58:33	6/29/09 1:58:33	0	295

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

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Voice Mail

Call 2nd M...
Call 3rd M...
Call 4th M...

Voice mail
Voice mail

Voice mail

Voice mail

CALLING NBR	CALLED NBR	DIALED 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

CALLING NBR	CALLED NBR	DIALED DIGITS	M R #	START DATE	END DATE	DURATION (SEC)	REPOLL #
(704) 467-3808	(704) 224-5099		Inbound	6/29/09 8:31:27	6/29/09 8:31:27	0	295
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 9:43:11	6/29/09 9:43:36	25	690
(704) 224-8623	(704) 224-5099	(704) 224-5099	Routed Call	6/29/09 9:43:15	6/29/09 9:43:52	37	588
(704) 224-8623	(11704) 224-5099	(704) 224-5099	Routed Call	6/29/09 9:43:15	6/29/09 9:43:52	37	588
(704) 224-8623	(704) 224-5099	(704) 224-5099	Inbound	6/29/09 11:34:32	6/29/09 11:34:35	3	690
(704) 224-8623	(910) 352-9926	(704) 224-5099	Routed Call	6/29/09 11:34:33	6/29/09 11:34:43	10	588
(704) 699-7998	(704) 224-5099		Inbound	6/29/09 17:09:33	6/29/09 17:09:33	0	293
6-9772	(704) 224-5099		Inbound	6/29/09 19:17:21	6/29/09 19:17:21	0	291
(704) 224-7437	(704) 224-5099		Inbound	6/29/09 21:56:30	6/29/09 21:56:30	0	293
6-9772	(704) 224-5099		Inbound	6/30/09 11:25:20	6/30/09 11:25:20	0	293
(704) 224-4917	(704) 224-5099		Inbound	6/30/09 11:38:03	6/30/09 11:38:03	0	296
6-9772	(704) 224-5099		Inbound	6/30/09 13:34:13	6/30/09 13:34:13	0	292
6-9772	(704) 224-5099		Inbound	6/30/09 16:20:14	6/30/09 16:20:14	0	291
6-9772	(704) 224-5099		Inbound	6/30/09 16:22:03	6/30/09 16:22:03	0	291
6-9772	(704) 224-5099		Inbound	6/30/09 16:24:38	6/30/09 16:24:38	0	291
6-9772	(704) 224-5099		Inbound	6/30/09 16:28:24	6/30/09 16:28:24	0	291
6-9772	(704) 224-5099		Inbound	6/30/09 16:36:30	6/30/09 16:36:30	0	291
6-9772	(704) 224-5099		Inbound	6/30/09 16:38:01	6/30/09 16:38:01	0	291
6-9772	(704) 224-5099		Inbound	6/30/09 16:44:12	6/30/09 16:44:12	0	293
6-9772	(704) 224-5099		Inbound	6/30/09 16:49:07	6/30/09 16:49:07	0	293
6-9772	(704) 224-5099		Inbound	6/30/09 18:40:26	6/30/09 18:40:26	0	293
(704) 606-0629	(704) 224-5099		Inbound	6/30/09 19:49:32	6/30/09 19:49:32	0	291
6-9772	(704) 224-5099		Inbound	6/30/09 20:40:30	6/30/09 20:40:30	0	293
(704) 960-5169	(11704) 224-5099	(704) 224-5099	Routed Call	6/30/09 21:02:24	6/30/09 21:03:29	65	588
6-9772	(704) 224-5099		Inbound	6/30/09 21:14:13	6/30/09 21:14:13	0	293
(704) 305-2374	(704) 224-5099		Inbound	6/30/09 21:43:56	6/30/09 21:43:56	0	297
(704) 305-2374	(704) 224-5099		Inbound	6/30/09 21:45:07	6/30/09 21:45:07	0	293

FILED
 STATE OF SOUTH CAROLINA Horry County IN THE COURT OF COMMON PLEAS
 COUNTY OF HORRY 2014 NOV 24 PM 1:41 FIFTEENTH JUDICIAL CIRCUIT

C.A. No.: 2013-CP-26-1843
 MELANIE HUGGINS-WARD
 CLERK OF COURT

Mark Allen Elliot,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER

This is a Post-Conviction Relief Proceeding

Applicant filed this post-conviction relief application on March 27, 2013. The undersigned heard this case on October 27, 2014. Daniel Selwa, II, Esquire, represented the Applicant. Josh Thomas, Esquire, represented the State.

The Applicant is currently incarcerated in South Carolina Department of Correction pursuant to Order from the Horry County Clerk of Court. The Applicant was indicted at the July 2009 term of the Horry County Grand Jury for kidnapping (2009-GS-26-2889). Ronald W. Hazzard, Esquire, and Melinda Knowles, Esquire, represented the Applicant.

The State took the case to trial, and on November 19, 2010 the Applicant was found guilty. The Honorable Larry B. Hyman, Jr. sentenced the Applicant to thirty (30) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Breen R. Stevens, Esquire, of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. *State v. Mark Elliot*, Op. No. 2013-UP-112 (S.C. Ct. App. filed March 13, 2013). The Remittitur was sent on April 3, 2013.

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

1. Ineffective assistance of counsel.
 - a. "Counsel allowed the attorney he had removed off his case to be assistant during Applicant's trial."
 - b. Counsel failed to have a juror excused who was previously a bail bondsman.
 - c. Counsel referred to Applicant as "being in the drug game."
 - d. Counsel failed to put phone records into evidence.
2. Ineffective evidence of kidnapping.
 - a. Applicant puts forth six (6) enumerated allegations that the evidence was insufficient to sustain a conviction.

The Court interprets Applicant's allegations as ineffective assistance of counsel. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

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*, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C.115, 386 S.E.2d 624 (1989).

The reviewing court applies a two pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, citing *Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a

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reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.E. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

The Court looks first to Applicant's second ground for post-conviction relief, lack of evidence to support the jury verdict as to kidnapping. The allegation fails to state a claim cognizable under Post-Conviction Procedure Act, S.C. Code 1976, as amended, Section 17-27-10 to -160. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." (S.C. Code Ann. § 17-27-20(b); see also *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.") Applicant's allegations regarding the sufficiency of the evidence are not appropriately addressed in PCR, therefore, these allegations are dismissed.

The Court will, herein below, address Applicant allegations relating to the claim of ineffective assistance of counsel.

As to ground 1(a), Applicant has presented no evidence that Applicant's relieved counsel, Melinda Knowles, participation in his trial affected him adversely in any way or to any degree. Therefore, he has failed to prove any prejudice whatsoever based on Ms. Knowles participation at his trial. Also, Applicant could have, and should have, objected to Ms. Knowles participation prior to or at least during his trial. Applicant had the assistance of Ms. Knowles, unobjected to at trial, and now claims her participation at his trial was improper. Applicant has, by his failure to do so timely, waived any issue he may have had regarding Ms. Knowles participation in his trial.

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As to ground 1(b), it appears a juror, Theron E. Shields, Jr., was a bail bondsman and knew Applicant's brother who worked at the Horry County Detention Center (TR p. 243 L 20 through p. 247 L 2). In a colloquy with the trial judge, the Solicitor and trial counsel, as referenced, Juror Shields affirmed that this fact would not prevent him serving as a fair and impartial juror. (TR p 245 LL 8-15). Trial counsel testifies that he had no reason to strike Juror Shields based on the trial judge's questioning regarding fairness and impartiality. Trial counsel also testified nothing about the juror or his familiarity with Applicant's brother indicated a problem with Juror Shields, and trial counsel felt Juror Shields might be helpful. Trial counsel testified that Juror Shields was honest in relating his knowledge of Applicant's brother and that Applicant did not express any concerns about Juror Shields as a juror. To this latter point, Applicant testified he did not know, at the time of trial, of the juror's relationship with Applicant's brother.

Trial counsel's conduct, regarding his approach to seating Juror Shields, falls in the category of trial strategy. Here, trial counsel articulated a valid reason for employing this trial strategy which I find conforms to the reasonable attorney standard of *Cherry, supra*. See also *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (Sup. Ct. 1992).¹

As to ground 1(c), trial counsel testified, and the record reflects, that his closing argument placed Applicant in the drug game. (TR p. 989 LL 14-20). This was according to trial counsel, a theory of the case. This theory was that Applicant was present during the events leading up to the charges against Applicant because Applicant was assisting the victim in procuring drugs. Trial counsel testified he simply told the jury the truth, that the events were drug related. Here,

¹ It is worth noting that the jury acquitted Applicant of criminal sexual conduct, criminal sexual conduct with a minor, and failure to stop for a blue light.

trial counsel articulated a valid reason for his defense of Applicant, i.e. his trial strategy. See, *Whitehead*.

As to ground 1(d), trial counsel testified he should have put the victim's phone records into evidence. This was brought home when the jury asked to see the phone records. Trial counsel's hindsight and the jury's query do not require a finding of ineffective assistance of counsel. On this issue, hindsight and juror's questions are not, on their face, evidence of ineffective assistance of counsel nor is trial counsel's belief now that the phone records "may have made a difference." The heart of the Court's analysis of this issue is whether or not evidence of the phone calls was placed before the jury during trial. That is, did trial counsel effectively present what was crucial evidence, by all accounts, before the jury for its consideration. The answer to this is, yes he did.

The phone records at issue were those of the alleged victim, **Brittany** and their relation to the case arises regarding her use of her phone during the time she was alleged to be kidnapped by Applicant. The Applicant's theory being, the victim had access to her phone, made and/or received calls and did not call 911.

BE testified that during the kidnapping episode she had her phone with her and did not call the police (TR p. 576 LL 11-25) but answered her phone when it rang two or three times (TR p. 577 LL 1-7); then quit answering the phone on instruction of Applicant and turned her phone off and handed it to Applicant (TR p. 577 LL 3-25). She testified that after she handed Applicant the phone he did not thereafter let her use it. (TR p. 578 LL 7-9). Ms. also testified that when she was released by Applicant she asked for the return of her phone and Applicant did not return it. (TR p. 591 LL 1-4).

The phone records placed into evidence cover a period of time from 1:58:59 (6-29-09) to 21:45:07 (6-30-09). The time duration of the incident is unclear to the undersigned other than it happened on June 29, 2009 between 1:00 a.m. and 5:00 a.m. (TR p. 596 LL 7-10). The victim did testify that she noticed the time of 3:30 on Applicant's car clock. (TR p. 597 LL 11-12). As noted above, Applicant is alleged to have taken the victim's phone from her and did not return it. There are no outbound calls from the subject phone number (704-224-5099) from 3:17:21 to 3:18:00. After that time, there were three inbound calls over the next approximately three and one half minutes. The victim testified that an inbound call was from a friend at 3:34 a.m. for over a minute and a half (TR p. 601 LL 7-15) and a twenty second call shortly before. (TR p. 602 LL 3-7). Additionally, a third call after the minute and one-half call came in 9 seconds thereafter and was for 8 second duration.

In sum, the telephone records serve only to substantiate the victim's testimony at trial. The record confirms she did not call anyone after 3:18 a.m. and the number she called was not a 911 call or a call to the person who called her at 3:45 a.m. The victim admitted she did not call for help (TR p. 576 LL 13-24), talked to Matthew (TR p. 577 LL 2-21), then cut her phone off and handed it to Applicant (TR p. 577 LL 22-25). The victim's cell phone was in the Applicant's car when a search, pursuant to a search warrant, was executed on Applicant's car after he was apprehended. (TR p. 758 LL 18-21).

The jury's request to see the records does not create ineffective assistance of counsel by trial counsel. The victim's trial testimony, direct and cross examination, established all the phone records would show. Additionally, the phone records would not reflect on the victim's credibility as they are consistent with her testimony.

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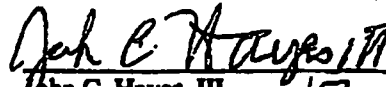
Applying the reasonable attorney test of *Strickland*, supra, I find trial counsel's representation of Applicant relative to the telephone record issue meets the standard of reasonableness.

I find Applicant has failed to carry his burden of proof and failed to prove trial counsel was ineffective in his representation of Applicant in any regard.

The Court finds that trial counsel's representation of Applicant was effective. Therefore, Applicant's application for post-conviction relief is denied and dismissed with prejudice.

Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge #7

November 14th, 2014
Conway, South Carolina

MAILED
11-26-14 to all
parties not in
default for

WITNESSES

Vant Abercrombie North Myrtle Beach Police
Department

DOCKET NO, 2009-GS-26- 2889

The State of South Carolina

County of Horry

Nancy Livesay

09H02780

COURT OF GENERAL SESSIONS

JULY, 2009 TERM

ARREST WARRANT NUMBER

J741607

CDR: 0095 16-03-0910

DOA: 6/29/2009

THE STATE

vs.

Mark A Elliott

B/ M

Tabor City, NC 28463

ATTORNEY:

Indictment for

KIDNAPPING

J. Gregory Hembree, Solicitor

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

JUL 30 2009

VERDICT

Foreperson of Petit Jury

Date:

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on July 30, 2009, the Grand Jurors of Horry County present upon their oath:

KIDNAPPING

CDR: 0095 16-03-0910

That **Mark A Elliott**, did in Horry County, State of South Carolina, on or about June 29, 2009, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away one **B.E.**, without authority of law, in violation of Section 16-03-0910, S. C. Code of Laws, 1976, as amended.

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


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR