

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 08-3119

September Term, 2009

FILED ON: FEBRUARY 26, 2010

UNITED STATES OF AMERICA,  
APPELLEE

v.

EVERETTE LEE HAYES, JR.,  
APPELLANT

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Appeal from the United States District Court  
for the District of Columbia  
(No. 1:03-cr-00500-JR-1)

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Before: GINSBURG and KAVANAUGH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

**J U D G M E N T**

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). It is

**ORDERED** and **ADJUDGED** that the judgment of the District Court be affirmed.

Responding to reports of gunshots, two police officers came upon Everette Hayes, naked, wielding a nine-millimeter Beretta pistol. Hayes was subsequently convicted of being a felon in possession of a firearm. Hayes challenged his conviction, arguing that his trial counsel was ineffective in failing to introduce cell phone records to corroborate his claim that he was carrying a cell phone rather than a gun during his encounter with the police. Hayes' argument is unpersuasive: Two officers saw Hayes holding the gun, one officer testified to having been shot at by Hayes, and the police later recovered a gun from the scene. In light of that evidence, there was no "reasonable probability" that "the result of the proceeding would have been different" if Hayes' counsel had sought to introduce his cell phone records. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR R. 41.

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Michael C. McGrail  
Deputy Clerk