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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT B. NEELEY,

APPELLANT

APPELLATE CASE NO. 2023-001259

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by permitting the SANE Nurse to testify regarding details of sexual assault beyond the scope of time and place as relayed to her by the victim where the details of the purported sexual assault were not reasonably pertinent to diagnose or treat the victim's actual injuries?

STATEMENT OF THE CASE

Appellant Robert Brandon Neeley was indicted on May 8, 2023, by the Lexington County Grand Jury for first-degree burglary, kidnapping, first-degree criminal sexual conduct (CSC 1st), armed robbery, and possession of a weapon during commission of a violent offense. The charges stemmed from an incident occurring on the night of October 12, 2021. R. 14, ll. 10-23; R. 476-755.

Appellant's case proceeded to trial before the Honorable Debra R. McCaslin and a jury from July 24th through 28th, 2023. David M. Mauldin and Jean M. Popowski represented Appellant, while L. Suzanne Mayes and Ashley E. Wellman represented the State. R. 1. The jury found Appellant guilty on all counts, and the trial court imposed an aggregate sentence of 74 years as follows: consecutive sentences of twenty (20) years for first-degree burglary, thirty (30) years for CSC 1st, and twenty-four (24) years for armed robbery; and concurrent sentences of twenty (20) years for kidnapping, and five (5) years for possession of a weapon during commission of a violent offense. R. 716, l. 20—717, l. 11; R. 732, l. 11—733, l. 1; R. 756-765.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

STATEMENT OF THE FACTS

In September of 2021, 74-year-old Glenna Branham (Branham) posted a request to take away tea olive trees on an app. called "Nextdoor." Appellant Robert Neeley and his girlfriend responded to Branham's South Congaree home and took the trees for her on September 25, 2021. R. 211, ll. 20-22; R. 217, l. 20—219, l. 12. Appellant also agreed to complete repairs on Branham's irrigation system soon after, and in about a week Appellant and his girlfriend returned to work on the sprinklers. However, parts needed to be ordered before the task could be completed. R. 220, l. 13—222, l. 14.

On October 12, 2021, Appellant arrived in his truck at Branham's at 8:11 pm. R. 472, ll. 9-14. He was invited inside, and over drinks the two discussed issues he was having in his relationship with his girlfriend. At some point, conversation turned to advances by appellant toward Branham. R. 228, l. 15—231, l. 12; R. 315, l. 11—316, l. 17. According to Branham, she asked Appellant to leave but he refused. Instead, Branham was forced to the ground. With a kitchen knife and tape produced from the bag he purportedly brought with him, Appellant taped Branham's wrists and removed clothing from her lower body. Branham further alleged that, as she was being held down, Appellant digitally penetrated her. R. 234, l. 2—240, l. 10.

After Appellant reportedly offered to accept $100 to stop, the two got up from the floor. Branham clothed herself with Appellant's assistance and told Appellant they would have to go to an ATM. R. 241, ll. 12-23. The two proceeded to Branham's bedroom; Branham's purse was emptied, and she grabbed her wallet from the contents. After Appellant obtained Branham's unloaded Smith and Wesson EZ 9-millimeter from its case beside the bed, he sought two rounds of ammunition, which Branham provided. R. 242, l. 3—243, l. 24.

Appellant cut the tape from Branham's hands at the house, and then drove with Branham to a nearby ATM at Palmetto Citizens Bank at approximately 8:40 pm; Branham provided the PIN number, and Appellant obtained $200 from her account.[1] R. 245, ll. 7-21; R. 247, ll. 1-12; R. 280, ll. 1-23. Shortly after, Appellant took Branham with him to buy drugs at a house on Princeton Road, and then later drove to a location in Richland County alleged to be an abandoned property of Appellant's family. R. 251, ll. 6-24; R. 256, ll. 8-25. While parked at that location, Appellant purportedly forced Branham to perform oral sex upon him while in the car.[2] R. 259, l. 13—260, l. 21. The two then drove back to Branham's home in South Congaree. Appellant parked the car, collected his belongings inside the house, and left at approximately 11:57 pm. R. 261, l. 22—262, l. 7; R. 263, l. 16-19; R. 472, ll. 2-8.

The next morning, Branham's friend arrived and called 911. R. 161, ll. 10-15. Branham provided statements to police and was taken to the hospital. Once evaluated and medically cleared by the emergency room physicians, Branham was examined by Shannon Vincent, a forensic nurse examiner (SANE Nurse). R. 541, ll. 3-11; R. 544, l. 16— 545, l. 5; R. 552, ll. 1-10. Branham relayed to the SANE Nurse details of the events that she recalled from the night before; the SANE Nurse documented Branham's statement and injuries. R. 557, l. 5—586, ln. 22; R. 735-743. (Court's Exhibit #2, SANE Exam Report).

The case proceeded to trial from July 24th through 28th, 2023, before the honorable Debra McCaslin (Trial Court) and a jury. David Mauldin and Jean Popowski represented Appellant, while Suzanne Mayes and Ashley E. Wellman represented the state. R. 1. During pre-trial motions, pursuant to Rule 803(4), SCRE, the State sought admission of twenty (20)

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[1] Receipt from Branham's account indicated $3100 remained after the $200 was withdrawn. R. 320, l. 3— 321, l. 14.

[2] Branham spit the ejaculate into a napkin obtained from the center console. R. 261, ll. 15-21.

statements Branham made to the SANE Nurse and typed into the SANE Examination Report after Branham was cleared by the emergency room on October 13, 2021. R. 57, l. 13—58, l. 14. Appellant opposed, arguing the statements made by Branham to the SANE Nurse were not made for purposes of treatment or diagnosis, especially since she was already released by doctors for examination and collection of evidence by the SANE Nurse. R. 58, l. 15—59, l. 9. After hearing arguments from both the State and Appellant for each statement, the Trial Court admitted eleven (11) of the statements. R. 59, l. 22—81, l. 11. Specifically, the Court ruled as follows:

> I find that all the statements the State intends to introduce provide the doctor or the SANE nurse with specific areas to focus on or specific conditions to search for when performing her SANE examination and they are pertinent to the diagnosis and treatment of the victim.

R. 81, ll. 12-17. During trial, Appellant again raised his objection immediately prior to the SANE Nurse's testimony; the Trial Court noted Appellant's objections for the record, acknowledged the matter was discussed pre-trial, and permitted the State to proceed. R. 540, l. 11—541, l. 1.

During its closing argument to the jury, the State again referred to the SANE Nurse's testimony. R. 658, l. 11—659, l. 21. The jury ultimately found Appellant guilty on all charges, and the trial court imposed an aggregate sentence of 74 years' incarceration. R. 716, l. 20— 717, l. 11; R. 732, l. 11—733, l. 1; R. 756-765.

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by permitting the SANE Nurse to testify regarding details of sexual assault beyond the scope of time and place as relayed to her by the victim, where the details of the purported sexual assault were not reasonably pertinent to diagnose or treat the victim's actual injuries.

The Trial Court reversibly erred by permitting the State to elicit hearsay testimony from the SANE Nurse, who relayed details of the purported sexual assault as told to her by Branham. These details went beyond the time and place restrictions of Rule 801(d)(1)(D), SCRE, and were not reasonably pertinent to diagnose or treat Branham's actual injuries, especially since the SANE Nurse performed her forensic examination after Branham was already medically examined and cleared by physicians in the emergency room. Therefore, the trial court erred in allowing such out-of-court statements to the SANE Nurse into evidence as they fell beyond the exception of Rule 803(4), SCRE, and thus remained inadmissible hearsay. Further, Appellant was prejudiced by the admission of hearsay statements corroborating details of the alleged sexual assault as they served to impermissibly bolster the credibility of Branham's version of events. Accordingly, Appellant's case should be reversed and remanded for new trial.

The Trial Court abused its discretion by permitting the SANE Nurse to make several impermissible hearsay statements in her testimony. "'Hearsay' is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is inadmissible. Rule 802, SCRE.

"The primary method of providing corroborating testimony regarding an alleged sexual assault is through the specific rule created for CSC cases—Rule 801(d)(1)(D), SCRE. This rule "limits corroborating testimony . . . to the time and place of the assault(s)" and considers it to be nonhearsay whereas "any other details or particulars, including the perpetrator's identity," are generally considered hearsay and must be excluded unless they fall within an exception. State v.

Simmons, 423 S.C. 552, 563, 816 S.E.2d 566, 572 (2018) (quoting Thompson v. State, 423 S.C. 814, 814 S.E.2d 487 (2018)).

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if—
>
> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged Branham and the statement is limited to the time and place of the incident.

Rule 801(d)(1)(D), SCRE.

Thus, corroborative testimony is limited in criminal sexual conduct (CSC) cases to the time and place of the alleged assault. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010) (interpreting and applying Rule 801(d)(1), SCRE). "The corroborative testimony cannot include 'details or particulars' regarding the assault." Id. "Should the proponent desire more information beyond the permissible "time and place" evidence, a rule or statute must allow for the admission of the additional evidence. Typically, as in this case, the additional evidence constitutes hearsay." Simmons, 423 S.C. at 563, 816 S.E.2d at 572 (citing Rule 801, SCRE).

In the case at bar, testimony elicited by the State from the SANE Nurse exceeded the limits placed upon corroborative testimony in CSC cases. Specifically, the State went beyond asking her where and when Branham told her the incident occurred. Thus, the issue here is whether the SANE Nurse's testimony, "which relayed statements far beyond the time and place of the alleged sexual assaults, falls within the hearsay exception regarding '[s]tatements made for purposes of medical diagnosis or treatment.'" Id. (quoting Rule 803(4), SCRE). Specifically, Rule 803(4), SCRE provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

Rule 803(4), SCRE. Thus, based upon the language of the Rule, "[t]his hearsay exception requires that the statements be provided for the purpose of and be reasonably pertinent to medical diagnosis or treatment." Simmons, 423 S.C. at 563, 816 S.E.2d at 572.

In other words, "Rule 803(4), SCRE, may well apply in a CSC case, but there must be a nexus between the information provided by the patient and the diagnosis or treatment of the patient. . . . In this regard, 'a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim.'" Id. 423 S.C. at 564, 816 S.E.2d at 572 (quoting State v. Burroughs, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997)). "However, '[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses.'" Id. 423 S.C. at 564, 816 S.E.2d at 572–73 (quoting State v. Brown, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985)); see also State v. Camele, 293 S.C. 302, 304-05, 360 S.E.2d 307, 308 (1987) ("A physician's testimony as to a patient's history should only include those statements related to him by the patient upon which the physician relied in reaching medical conclusions.").

In the case at bar, the trial court permitted the State to elicit testimony from the SANE Nurse regarding detailed information provided by Branham about the purported sexual assault that fell

beyond the scope of what could reasonably be relied upon to reach a medical conclusion. For example, the SANE Nurse testified to the following:

> She said that she had been in her home. That he had—she walked up to the door, he came behind her, grabbed me and pulled my top off. He had both his arms around my belly and I turned around and fought. He kicked my legs out from under me and I crashed to the floor, then he jumped on me and grabbed my hands. He taped my hands together. When he took my clothes off and he jumped back on me, he put two fingers in me—in my vagina. He grabbed my hair and pushed me down on him and said suck it. I didn't know what to do. He said what are you doing and I said I don't know what to do. He said grab it and used my hand to grab it and pump it up and down, then he said now suck it, and I sucked. He finally came and I had swallowed some of it.

R. 558, ll. 1-14. Notably, the SANE Nurse's testimony shifted from third-person to first-person narration, indicating the majority of this testimony was a verbatim recitation of Branham's statement from the SANE Nurse's report. R. 736-737. Moreover, the statement contained details of the purported assault that were beyond what would reasonably be necessary for medical diagnosis and treatment. Even if some of the statement indicated where Branham may have had pain or bruising in some of the areas described, the details of *how* she received them was not reasonably pertinent for the SANE Nurse to diagnose or treat whether Branham actually had such injuries.

To the contrary, the SANE Nurse simply utilized the information focus on areas to look for and recover evidence to preserve and possibly use in a later prosecution. This included photographs of bruising, scratches, and petechia. R. 560, l. 22—581, l. 23. Even when the SANE Nurse relayed Branham's statements that she gargled with mouthwash and showered prior to being examined, the Nurse acknowledged that she still went through the same process of collecting swabs "because there's always a chance that we may still get something." R. 559, l. 10—560, l. 21. In other words, the SANE Nurse's examination of Branham *after* Branham was already medically examined and cleared by doctors in the emergency room was to fulfill the function of a forensic crime scene

specialist whose "crime scene" was a human being's body—her role was to attempt to locate evidence of a purported crime, collect it, and preserve it for future prosecution. The gratuitous information of Branham's detailed summary of the alleged attack transformed the SANE Nurse's testimony from one of medical diagnosis and treatment of injuries presented into hearsay "used as a tool to prove facts properly proved by other witnesses." Id. Accordingly, the Trial Court erred in admitting Branham's bolstering hearsay statements through the SANE Nurse's testimony.

Appellant was also prejudiced by the SANE Nurse's improper corroborating hearsay and bolstering. The jury heard the impermissible statements not only when the SANE Nurse testified, but also when the State specifically referenced her testimony in its closing argument in an effort to strengthen the veracity of the Branham's allegation. R. 658, l. 11—R. 659, l. 21. Since the statements were not properly admitted pursuant to Rule 803(4), SCRE, and contained statements regarding conduct beyond the time and place of the alleged assault, the SANE Nurse's testimony regarding Branham's hearsay statements devolved to that of corroborative bolstering. See, e.g., Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010). This was especially devastating where the credibility of Branham's version of events was critical to the State's case. Id. 386 S.C. at 569, 689 S.E.2d at 633. Although cumulative to Branham's testimony, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Accordingly, admission of the evidence mandates reversal of the conviction." State v. Barrett, 299 S.C. 485,487, 386 S.E.2d 242, 243 (1989); see also Smith, 386 S.C. at 567, 689 S.E.2d at 632 (quoting with approval Dawkins v. State, 346 S.C. 151, 156-57, 551 S.E.2d 629, 263 (2001)).

II. The Trial Court erred by ruling the victim's statement to the SANE Nurse was admissible through the SANE Nurse's testimony pursuant to Rule 106, SCRE, when, during the victim's cross-examination she was presented with her own statement to the SANE Nurse simply to refresh her recollection.

The Trial Court erroneously held Branham's statement to the SANE Nurse was admissible through the SANE Nurse's testimony pursuant to Rule 106, SCRE. Branham's statement was neither admitted nor used for impeachment pursuant to Rule 613(b), SCRE; rather, it was simply used by Appellant during cross-examination of Branham to refresh Branham's recollection. By this point, the State had already elicited testimony from Branham of the details she alleged regarding the assault and had full opportunity on redirect examination to explore the context of why Branham did not recall the specific fact she previously told the SANE Nurse. Therefore, the Trial Court erred by allowing the State to elicit Branham's statement to the SANE Nurse regarding the details of the assault through the testimony of the SANE Nurse.

Rule 106, of the South Carolina Rules of Evidence provides as follows:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 106, SCRE. "Rule 106 is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context." State v. Cabrera-Pena, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004); see also State v. Oglesby, 384 S.C. 289, 294, 681 S.E.2d 620, 622 (Ct. App. 2009) ("Rule 106, SCRE, seeks to avoid the unfairness inherent in the misleading impression created by taking a conversation out of context."). It "applies in instances when a party introduces a writing or recorded statement into evidence. Given the purposes behind Rule 106, fairness and completeness, it is also applied where a party's use of a writing or recorded statement is 'tantamount to the introduction of the [document] into evidence.'"

State v. Taylor, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998) (internal citations omitted) (interpreting and applying Rule 106, SCRE, and referring to the substantially similar Rule 106, Fed.R.Evid.) (quoting Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529 (11th Cir. 1986)). Moreover, in South Carolina, the rule of completeness applies to oral statements as well. Cabrera-Pena, 361 S.C. 372, 380, 605 S.E.2d 522, 526 (2004) ("the common law of this state extends the rule of completeness to oral communications.").

Finally, "[w]here Rule 106, SCRE, applies, it does not require all of the document to be introduced, merely any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. Only that portion of the remainder of a statement which explains or clarifies the previously admitted portion should be introduced." Taylor, 333 S.C. at 171, 508 S.E.2d at 876 (internal citations and quotes omitted). In other words, even when applicable, the rule of completeness does not automatically permit the opposing party to admit the remainder of a partially admitted statement into evidence; rather, it is necessarily limited in scope to admit only that which would help explain the previous portion.

In the case at bar, Rule 106, SCRE, was wrongly applied. First, the witness who was testifying was Branham—the person who made a statement to the SANE Nurse. On cross-examination, she was asked if she recalled what she previously said to SLED Agent April Sykes (Agent Sykes) and later to the SANE Nurse regarding her cell phone after the alleged assault. When she did not, Appellant simply used Branham's video statement to Agent Sykes to refresh her recollection. R. 333, l. 6—335, l. 21; R. 337, ll. 2-20; R. 338, ll. 14-23; R. 342, ll. 4-6; R. 344, ll. 14-17; R. 345, l. 7—346, l. 9; R. 347, ll. 6-18. Moreover, although Appellant could have later sought admission of the statement through Rule 613(b) of the South Carolina Rules of Evidence, he did not do so. In other words, despite the State's invitation to do so, Branham's statements—either the

written in the SANE Report itself, or the video statement to Agent Sykes—were never admitted into evidence. R. 337, ll. 22-25; R. 341, ll. 3-10. As such, Rule 106, SCRE was inapplicable because it only "applies in instances when a party introduces a writing or recorded statement into evidence." Taylor, 333 S.C. at 171, 508 S.E.2d at 876.

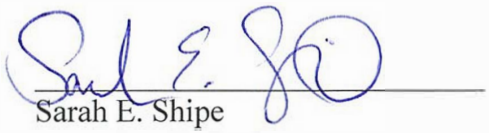
Second, even if Rule 106, SCRE, was applicable, the State would be permitted to introduce only "that portion of the remainder of a statement which explains or clarifies the previously admitted portion..." Id. Here, while the Trial Court initially indicated it would allow the State "to correct what the whole sentence is" under the rule of completeness, the SANE Nurse was nonetheless permitted to relay details of the purported sexual assault to the jury that had nothing to do with her cell phone. R. 339, l. 9—345, l. 2; R. 558, l. 1—561, l. 1; R. 582, ll. 1-5. This was well beyond the scope of what would be permissible even if Rule 106, SCRE, applied.

Furthermore, the State was likewise wrongly permitted to elicit such testimony through the wrong witness. If the State wanted to fully explain to the jury why Branham may or may not remember telling either Agent Sykes or the SANE Nurse about her cell phone after the assault, the proper witness through which to do so was Branham on redirect examination. And in fact, the State did exactly that. R. 352, l. 21—354, l. 10. Yet, under the auspices of Rule 106, SCRE, the Trial Court still permitted the State to admit large portions of Branham's hearsay statement detailing the sexual assault to the SANE Nurse before the jury through the SANE Nurse's testimony as well. Not only was this error, but also it highlights the prejudice to Appellant: by permitting the State to use Branham's statement to the SANE Nurse regarding details of the purported sexual assault, the State was effectively permitted to bolster Branham's corroborative testimony with impermissible hearsay including details beyond the scope of time and place and did not fall under a hearsay exception. See Issue I, *supra*; see also Barrett, 299 S.C. 485,487, 386 S.E.2d 242, 243 (1989);

Smith, 386 S.C. at 567, 689 S.E.2d at 632 (quoting with approval Dawkins v. State, 346 S.C. 151, 156-57, 551 S.E.2d 629, 263 (2001)). Accordingly, Appellant was prejudiced by the Trial Court's error.

CONCLUSION

For the foregoing reasons, Appellant Robert Brandon Neeley respectfully requests reversal of his convictions, and remand for a new trial.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of January, 2025.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

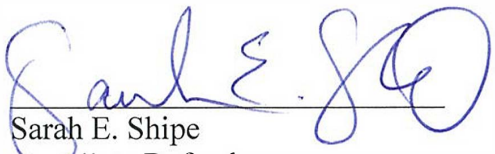
ROBERT B. NEELEY,

APPELLANT

APPELLATE CASE NO. 2023-001259

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 9th day of January, 2025.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

From: Warren, Kaylynn
To: Mark Farthing
Cc: Shipe, Sarah; Caroline Collins
Subject: 2023-001259 The State v. Robert B. Neeley
Date: Thursday, January 9, 2025 9:23:00 AM
Attachments: 2023-001259 The State v. Robert B. Neeley Final Brief of Appellant.pdf

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Good Morning,

Attached for service in the above-referenced case is the Final Brief of Appellant which will be filed today, January 9, 2025, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
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