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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions
The Honorable Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2024-000745

THE STATE,

Respondent,

v.

KEREEN DONYELL LEE,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II. Whether the trial court correctly admitted Lee's voluntary recorded statement explaining how he exposed his erect penis to a 10-year-old, which included interviewing officer's question whether Lee was a "sex addict" in response to his noncredible explanation why his penis was erect

III. Whether the trial court correctly refused to declare a mistrial based on a witness's testimony revealing Lee had been to prison.

IV. Whether Lee was prejudiced by any of the trial court's evidentiary rulings.

V. Whether Lee's LWOP sentence is constitutional even though he is intellectually disabled.

STATEMENT OF THE CASE

A Greenville County grand jury indicted Appellant Kereen Lee for Attempted First Degree Attempted Criminal Sexual Conduct with a Minor. Lee proceeded to jury trial before the Honorable Alex Kinlaw Jr., on April 22–24, 2024. Lee was convicted as indicted and sentenced to mandatory imprisonment for life without parole. This direct appeal follows.

STATEMENT OF FACTS

The victim in this case was a 10-year-old girl (Minor). Minor's mother (Mother) was in a relationship with Lee's brother. They lived with Lee, Lee's girlfriend, and another man. (Tr.p.175). Minor did not live at the home but would come visit. (Tr.p.176). On March 31, 2020, Minor was sleeping on the living room couch. Mother explained Minor snores and sleeps with her mouth open. (Tr.p.178). Mother awoke to find Minor "emotionally wrecked, slobbing, throwing up." (Tr.p.177). Minor told Mother "something had happened" and Mother confronted Lee. (Tr.p.177). Lee denied doing anything inappropriate. (Tr.p.178). Mother called 911 and police arrived minutes later. (Tr.p.190).

Minor testified she was asleep in the living room when she "felt something hit [her] lip." (Tr.p.198). She woke up and saw Lee "standing over [her] with his private part out of his pants." (Tr.p.198). She testified Lee's penis was erect. (Tr.p.199). She screamed and Lee quickly walked away. (Tr.p.199). She ran to her mother's room and told her mother what happened. Her mother confronted and began hitting Lee. (Tr.p.200). Lee said "I didn't do anything." (Tr.p.201). Police arrived quickly and took Minor's statement. (Tr.p.204).

Officer Jake Chupp arrived within minutes. He spoke with Mother, Minor, and Lee. Lee's statement was recorded on Chupp's body-worn camera, which was admitted as State's Exhibit #1. (Tr.p.225). Lee stated he was in his room when he heard Minor scream and suggested a rat may have crawled on her. Investigator James Paris interviewed Lee again at the police station. A redacted video recording of the interview was entered as State's Exhibit #3. Lee initially denied assaulting

Minor, but eventually admitted to being in the living room when Minor screamed. He claimed his shorts were baggy and fell down, which caused his penis to fall out. He stated his penis was erect because he had just been in bed with his girlfriend. Later, after further questioning, Lee changed his story, explaining he threw a pen top at Minor, which caused her to jump, which caused his pants to fall down. Later, Lee admitted he "needed help." Lee stated he had a moment of weakness and his girlfriend was on her period. He admitted he was looking at Minor to get "worked up" and he was going to go to the bathroom to "relieve" himself. He stated if he touched Minor, he didn't mean to.

ARGUMENT

I. The trial court correctly admitted Minor's out-of-court recorded statement despite the fact that she was not fully visible throughout the video due to poor video quality.

In 2006, the legislature created a special rule of admissibility for out-of-court statements by alleged minor victims of abuse. S.C. Code Ann. §17-23-175. Admissibility is conditioned on the statement's reliability, as determined by the trial court. The statute expresses a "preference" that the interview be audio and video recorded, but does not specify any specific events or conduct which must be shown. Lee argues the trial court erred by admitting the recording of Minor's interview with police because Minor cannot be seen throughout the video due to its poor quality. The trial court correctly admitted the video because it fulfilled the statutory purpose of ensuring the statement was reliable and Minor's clearly-audible statement provided valuable evidence despite the video's imperfections. This Court should affirm.

A. 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, 429–30, 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.

B. Issue preservation.

This issue is not preserved for review. Lee objected to admission of the video during a pretrial hearing, and the trial court ruled the video was admissible. (Tr.pp.76–79; p.87). However, the State did not introduce the video during Minor's testimony. Rather, Lee published a portion of the video during his cross-examination of Minor. Specifically, counsel published a portion of the video wherein Minor states Lee's hands were behind his head when he assaulted her. (Tr.p.212). Minor's face is not visible in this portion of the video. By publishing a portion of the previously objected-to video, Lee waived his objection. See State v. Robinson, 396 S.C. 577, 583, 722 S.E.2d 820, 823 (Ct. App. 2012), aff'd as modified, 410 S.C. 519, 765 S.E.2d 564 (2014) (explaining a defendant may not complain of admission of evidence when he introduced the same kind of evidence on cross-examination).

Later, the State offered a redacted copy of the video during the testimony of Investigator James Paris. Lee specifically stated he had "no objection." In affirmatively stating he had no objection, Lee waived any challenge to the video. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007), aff'd, 383 S.C. 394, 680 S.E.2d 292 (2009) ("As the record reflects, Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape.").

C. Discussion.

Minor's redacted statement, Court's Exhibit #3, is on file with this court. The interview takes place in a poorly lit room, with only natural light coming from a window. Investigator Paris is seated at a table taking notes. It is apparent that Minor is to his left, hidden by a shadow. Paris's questions and Minor's answers can be clearly heard. Later, Minor moves to Paris's right in order to complete a written statement. Her face is visible at this point. Later, Minor shows Paris where the assault occurred. Her face is visible here as well, though it again becomes obscured by darkness.

Despite the poor visibility, the statement was admissible. §175 does not require perfection. In State v. White, the trial court admitted a minor victim's recorded interview even though "the video of the forensic interview contained some sound but was not clearly audible." State v. White, 416 S.C. 135, 137, 784 S.E.2d 695, 696 (Ct. App. 2016). This Court affirmed, explaining "the trial court must use its discretion in determining whether the admission of a forensic interview meets the requirement of and is consistent with the purposes of subsection 17–23–175(A)(2)." Id. at 138, 784 S.E.2d at 696.

Lee cites White's statement that the "purposes of subsection 17–23–175(A)(2) include giving the jurors direct access—audio and visual—to the victim's statements to enable the jurors to more accurately evaluate the victim's credibility." Id. at 137, 784 S.E.2d at 696 (emphasis added). Despite the video's flaws, it achieved this purpose. It also fulfilled the other primary statutory purpose: to provide concrete

documentation of out-of-court statements so that trial courts can accurately ensure the reliability of those statements.

Lee compares §175 to the DUI statute's breath and incident site video requirement. S.C. Code Ann. §56-5-2953. But §175 differs from the DUI statute in important respects. §175 governs the admissibility of the minor's "statement." The DUI statute governs the admissibility of the "video." Unlike the DUI statute, §175, by its plain language, does not require the video recording to "include" or "show" any specific events. Cf. §2953 (providing incident site recording must "include any field sobriety tests administered . . . [and] show the person being advised of his Miranda rights") (emphasis added); see also State v. Taylor, 436 S.C. 28, 33, 870 S.E.2d 168, 171 (2022) (interpreting meaning of the word "show" in DUI video statute); Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011) (explaining purpose of §2953 is "to create direct evidence of a DUI arrest"). §175 only establishes a "preference" that the statement be "preserved on film, videotape, or other electronic means . . . ." S.C. Code Ann. § 17-23-175 (A) and (F).

The video and audio recording achieved its primary purpose of aiding the trial court's determination whether the out-of-court statement is reliable and therefore admissible. The video was sufficient to allow the court to ensure that the other §175 factors were present: e.g., whether the interviewer used leading questions and whether the statement is internally coherent. And despite its imperfections, the video provided valuable evidence of Lee's guilt because it accurately portrayed Minor's near-contemporaneous account of the sexual assault.

Subsection (F) provides for the admission of an "unrecorded statement." If the video recording in this case is as useless as Lee argues, then it qualifies as an unrecorded statement under the statute and may be admissible under subsection (F) if the four enumerated factors "and additional factors the court deems important" support the court's decision that the statement is admissible. As White explains, it is within the trial court's discretion to determine whether the recorded statement satisfies the purposes of §175 and therefore should be admitted. The trial court properly admitted the video in this case.

Lee argues Minor's statement is not admissible under subsection (F) because a video exists, and (F) only applies where there is no recording at all. He argues the "proper way" to introduce Minor's statement would be though testimony. This argument conflicts with his prior argument that the purpose of the statute is to produce audio and visual evidence of the out-of-court statement. Lee's reading of §175 would produce absurd results, permitting out-of-court statements which were not recorded at all through less reliable oral testimony but rigidly excluding recorded statements which accurately document out-of-court statements but which are flawed in some way. This interpretation would not be consistent with the statutory purpose of providing for admissibility of reliable out-of-court statements by alleged child victims. See State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose."). This Court should affirm.

II. The trial court correctly admitted Lee's voluntary recorded statement explaining how he exposed his erect penis to a 10-year-old, and Lee was not prejudiced by inclusion of the interviewing officer's question whether Lee was a "sex addict" in response to his noncredible explanation why his penis was erect.

Lee argues the trial court should not have admitted a portion of his recorded statement wherein the interviewing officer asks whether he is a "sex addict." The question was part of a back-and-forth exchange between Lee and the interviewer regarding graphic subject matter and was relevant to place Lee's highly probative statement into context. The State did not argue or elicit evidence attempting to prove Lee actually was a "sex addict." This Court should affirm.

A. 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, 429–30, 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.

B. Discussion.

The exchange took place during Lee's interview with the police investigator wherein he and the officer discuss overtly sexual matters regarding the accusation that Lee attempted to put his penis in a child's mouth. State's Exhibit #3. Specifically, the investigator was seeking clarification as to why Lee's erect penis was out of his pants in the same room as a 10-year-old child. The investigator told Lee that, as a 30-something-year-old man, his penis does not become erect every

time "the wind blows." Lee disagreed, explaining his penis becomes erect "on its own." This prompted the investigator's question whether he was a "sex addict."

By agreeing to speak with police, Lee opened himself up to pointed questions. The question was intended to elicit a response from Lee, not to show he actually was a "sex addict." The State did not attempt to introduce evidence to prove Lee was a sex addict, and the solicitor did not argue Lee was a sex addict or "refer" to Lee as a sex addict. Thus the video did not violate Rule 404(b). The investigator was questioning Lee about the central facts of the case. He asked the question, received a response, and moved on.

Lee's statement to police had high probative value. Lee's statement and Minor's statement were by far the most important pieces of evidence. The jury was entitled to hear his explanation. See Rule 403, SCRE (explaining evidence may be excluded when its probative value is "substantially outweighed by the danger of unfair prejudice").

The danger of unfair prejudice must be viewed in relation to other graphic evidence introduced at trial. The jurors were exposed to overtly sexual language and disturbing accusations. There is not a reasonable probability their findings of fact were improperly influenced by the investigator's use of the phrase "sex addict." See State v. Workman, 443 S.C. 369, 378, 905 S.E.2d 119, 123 (2024) (error is harmless where it had "little, if any, likelihood of having changed the result of the trial"). This Court should affirm.

III. The trial court correctly refused to declare a mistrial based on a witness's testimony revealing Lee had been to prison.

Lee argues the trial court abused its discretion by refusing to declare a mistrial when Mother—in response to a question by defense counsel—testified Minor stopped living with her when Lee moved in when he was released from prison. The trial court properly denied the motion because the testimony did not warrant the extreme remedy of mistrial. This Court should affirm.

A. Standard of review.

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Bantan, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010).

B. Discussion.

On cross-examination, defense counsel questioned Mother about her living situation and how long Minor had been living with Mother's mother. Mother responded Minor and her other child went to live with her mother "when Kereen Lee got out of prison." (Tr.p.180). Lee moved for a mistrial. The State opposed the motion, arguing defense counsel was aware of Lee's criminal history and should have asked his question more carefully. (Tr.p.182). The State requested a curative instruction, to which Lee objected. The court denied Lee's mistrial motion and gave a curative instruction. The court instructed the jury that "the last answer that was given by this witness was incorrect and should be stricken . . . from your mind . . . ." (Tr.p.187).

The trial court did not abuse its discretion. "The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." Bantan, 387 S.C. at 417, 692 S.E.2d at 203. A mistrial should be granted only when "absolutely necessary" in cases of "manifest necessity and with the greatest caution for very plain and obvious reasons." Id. The trial court should exhaust other methods to cure possible prejudice before aborting a trial. Id.

Mother's testimony did not present the "manifest necessity" of mistrial. See State v. Hurell, 424 S.C. 341, 357, 818 S.E.2d 21, 29 (Ct. App. 2018) (affirming denial of mistrial where witness "inadvertently told the jury [defendant] had been in prison"). The comment did not suggest Lee had a history of abusing children. The jury had already heard there was limited room in the house and that Minor or her siblings slept on the couch or in an outbuilding when they visited. (Tr.p.176). The jury also heard that Mother lived with Lee's brother, James Lee, her partner of 19 years. (Tr.p.179). The natural conclusion would be that Minor moved to her grandmother's house because there was simply no room at James Lee's house after he made room for his brother Kereen.

Further, the trial court gave a curative instruction, telling the jury Mother's "last answer . . . was incorrect and should be stricken not only from your mind, but I'm instructing Madam Court Reporter to strike it from the record." (Tr.p.187). "If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." State v.

Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129–30 (Ct. App. 2005). This Court should affirm.

IV. Lee was not prejudiced by any of the trial court's evidentiary rulings.

Even if this Court finds error in any of the three evidentiary issues, the error would be harmless. No rational juror could have viewed the evidence in this case and found Lee not guilty. Not only was Minor's testimony consistent, credible, and corroborated, Lee's statement erased any doubt as to his guilt. Lee all but confessed to this crime. He admitted he took out his erect penis near a 10-year-old child, explaining he was looking at her to gratify his sexual urges. None of his attempts at explaining away his conduct come close to a credible explanation. Defense counsel conceded in closing that Lee took his erect penis out near a 10-year-old child and seemingly conceded Lee touched the child's lips with his penis, arguing only that Lee did not have the intent to commit CSC. None of the alleged errors could have reasonably affected the result of trial.

V. Lee's LWOP sentence is constitutional even though he is intellectually disabled.

Lee argues his mandatory life without parole statute is cruel and unusual punishment because he is intellectually disabled. His sentence is constitutional because it is proportionate with the crime and his prior record and mandatory LWOP upon conviction of a third "serious" offense is consistent with contemporary values as evidenced by the act itself. This Court should affirm.

A. Standard of review.

When considering the constitutionality of a statute, the appellate court presumes the statute is constitutional, and must uphold the statute unless it finds beyond a reasonable doubt it does not conform to the constitution. Owens v. Stirling, 443 S.C. 246, 260–61, 904 S.E.2d 580, 587 (2024). The party challenging the constitutionality of a statute must prove it is unconstitutional. Id.

B. Discussion.

The Eighth Amendment only prohibits sentences which are grossly out of proportion to the severity of the crime. State v. Green, 412 S.C. 65, 85, 770 S.E.2d 424, 435 (Ct. App. 2015). Whether a criminal penalty violates the Eighth Amendment is judged by prevailing standards of decency. See Atkins v. Virginia, 536 U.S. 304, 311 (2002) (holding death penalty may not be imposed on mentally retarded individuals, citing state statutes); but see Owens, 443 S.C. 246, 273, 904 S.E.2d 580, 594 n.12 (plurality opinion) ("We disagree the concept of 'evolving standards' should apply in a method of execution case under article I, section 15. Under this provision of our constitution, the 'standard' is the definition of 'cruel,'

which has not changed over time."). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Atkins at 312; see also Owens at 279, 904 S.E.2d at 597 (explaining legislature is presumed to have considered whether methods of execution were cruel).

S.C. Code §17-25-45 provides for mandatory life imprisonment upon conviction of three statutorily-defined "serious" offenses. This longstanding provision has never been "rejected by the citizenry." Owens at 288, 904 S.E.2d at 602 (discussing meaning of "unusual" punishment). It is but one example of mandatory sentences prescribed by our state legislature, and of long-accepted recidivist sentencing schemes. See Graham v. State of W. Virginia, 224 U.S. 616, 623–31 (1912) (explaining the "propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England," and holding recidivist sentencing does not constitute cruel and unusual punishment).

Our supreme court has repeatedly upheld mandatory sentences against claims that they violate the constitution. See State v. De La Cruz, 302 S.C. 13, 15, 393 S.E.2d 184, 186 (1990) (explaining the "penalty assessed for a particular offense is, except in the rarest of cases, purely a matter of legislative prerogative, and the legislature's judgment will not be disturbed" and "[j]udicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction"); State v. Standard, 351 S.C. 199, 206, 569 S.E.2d 325, 330 (2002) (holding mandatory LWOP is constitutional even

though predicate offense was committed when defendant was a juvenile); State v. Burdette, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999) (mandatory LWOP does not violate separation of powers). And as the court noted in Standard, "the United States Supreme Court has rejected the argument that mandatory penalties, including life imprisonment without parole (excepting capital punishment), are unconstitutional just because they prevent the consideration of mitigating factors." Standard, 351 S.C. at 204, 569 S.E.2d at 328 n.5; see Harmelin v. Michigan, 501 U.S. 957, 995 (1991).

Lee argues §17-25-45 is unconstitutional as applied to him because he is intellectually disabled. Lee analogizes the intellectually disabled to children and argues courts must consider the culpability of each individual defendant before imposing an LWOP sentence. Lee cites the South Carolina Supreme Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), which in turn relied upon the United States Supreme Court cases of Miller v. Alabama, 567 U.S. 460 (2012), and Graham v. Florida, 560 U.S. 48 (2010). These cases establish an exception to the general rule that mandatory LWOP statutes are constitutional, holding that juveniles may not be sentenced to mandatory life without parole sentences without individualized consideration of their culpability in light of their youth. These decisions are premised on the fact that juveniles have not fully developed and therefore have "heightened capacity for change . . . ." Aiken, 410 S.C. at 539, 765 S.E.2d at 575.

This rationale does not apply to the intellectually disabled. Because intellectual disability is a permanent condition, such individuals do not possess the "heightened capacity [to] change" this aspect of their personality. Thus the rationale of Aiken works against, not for, Lee. See People v. Coty, 178 N.E.3d 1071, 1084 (2020) (explaining intellectual disability is a "predominantly static condition" and therefore the "rehabilitative prospects of youth do not figure into the sentencing calculus for [intellectually disabled defendant]"); Miller v. Alabama, 567 U.S. 460, 481 (2012) (explaining "a sentencing rule permissible for adults may not be so for children . . . . life without parole is permissible for nonhomicide offenses—except . . . for children").

This fact harmonizes with the purpose of recidivist statutes: an individual's repeated violation of the law demonstrates that person does not have the capacity or desire to conform his behavior to the law's requirements, and therefore must be removed from society. Lee argues incapacitation alone cannot justify his sentence. But this is the precise purpose of §17-25-45. Again, this purpose applies with greater force to the intellectually disabled. Coty, 178 N.E.3d at 1083 ("With respect to this intellectually disabled defendant, we note that some of the very factors that the Court in Atkins found reduced culpability—diminished capacity (1) to understand and process information, (2) to communicate, (3) to abstract from mistakes and learn from experience, (4) to engage in logical reasoning, (5) to control impulses, and (6) to understand others' actions and reactions—are what make him a continuing danger to reoffend.") (internal citation omitted).

LWOP is categorically different from a death sentence. Harmelin, 501 U.S. at 994 ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); Rummel v. Estelle, 445 U.S. 263, 272 (1980) ("Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the [life sentence] meted out to Rummel [for property crimes under recidivist statute]."). Contrary to Lee's assertion, LWOP, unlike death, is not "irrevocable." A person sentenced to LWOP may still be paroled if the Department of Corrections so requests, or where "due to the person's health or age he is no longer a threat to society . . . ." S.C. Code Ann. § 17-25-45(E).

Lee compares his condition to that of a child. But he was convicted of attempted sexual assault against an actual child, an egregious offense. Even without §17-25-45, Lee would have been subject to a mandatory minimum of 25 years' incarceration or life imprisonment. S.C. Code Ann. § 16-3-655. That Lee committed this crime after twice being convicted of statutory "serious" crimes and imprisoned shows he is exactly the type of person §17-25-45 was designed for. That Lee's mandatory LWOP sentence is solely a product of his recidivism further distinguishes this case from Aiken and Atkins. This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the conviction and sentence of the lower court should be affirmed.

Respectfully submitted,

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APPEAL FROM GREENVILLE COUNTY

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The Honorable Alex Kinlaw, Jr., Circuit Court Judge

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THE STATE, Respondent,

v.

KEREEN DONYELL LEE, Appellant.

PROOF OF SERVICE

I, Susan Spencer, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Jordan Wayburn, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 17th day of September, 2025.

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From: Susan Spencer
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Subject: The State v. Kereen Donyell Lee (2024-000745)
Attachments: LEE Kereen - Initial Brief of Respondent.pdf

Good afternoon Mr. Wayburn,

Attached please find the Initial Brief of Respondent and Designation of Matter in The State v. Kereen Donyell Lee (2024-000745). This brief will be filed today with the Court of Appeals via the AIS OneDrive system. If you will, please confirm receipt.

Thank you

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