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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Chesterfield County
The Honorable Paul M. Burch, Circuit Court Judge
Appellate Case No. 2014-000569

RECEIVED

SEP 18 2015

SC Court of Appeals

THE STATE,

Respondent,

v.

JULIUS CURRY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly admitted the jail phone call recordings because they were relevant corroborating evidence, and the State published the original recordings from the original server, which was the best evidence of the recordings. (Appellant's Issues 1 & 4).

II. This Court properly remanded this case for reconstruction of the recorded jail phone call recordings published to the jury at trial, and there was sufficient evidence of the relevant portion of the recordings to support the circuit court's reconstruction on remand. (Appellant's Issues 2 & 3).

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF THE FACTS

On January 9, 2014, the Chesterfield County Grand Jury indicted Appellant Julius Curry on one count of criminal domestic violence of a high and aggravated nature (CDVHAN), one count of assault and battery second degree, one count of resisting arrest with a deadly weapon, and one count of attempted murder, arising from a domestic disturbance on August 30, 2013. The case was called for a jury trial on March 3, 2014, before the Honorable Paul M. Burch, Circuit Court Judge.

Prior to trial, Appellant moved to exclude recordings of phone calls he made from the jail to one of the victims, asserting a discovery violation and undue prejudice. After listening to the recordings, Appellant withdrew his discovery objection and renewed his prejudice objection. The circuit court indicated it would consider the objection when the State attempted to introduce the recordings. (Trial Transcript [TT], pp. 31-41; Record on Appeal [R.], pp. 9-19).

Appellant's ex-girlfriend ("Victim 1")and her daughter ("Victim 2") testified Appellant assaulted them and brandished a knife on August 30, 2013, and Victim 2 ran to a neighbor's house to call police. They also testified Appellant did not cooperate with the police when they arrived, and the police were only able to subdue him after tazing him several times and struggling with him over the knife. (TT, pp. 41-107; R., pp. 19-85).

Victim 1 testified about the circumstances of the attack and events leading to Appellant's arrest, and stated he told her that night he felt he was going to die, but he was "going to take me a police officer with me." She further testified Appellant called her several times from the jail after he was arrested, and tried to convince her not to go

forward with the case. Other than one objection to leading, Appellant did not object to this testimony about the phone calls. (TT, pp. 60-88; R., pp. 44-66).

Two police officers testified about the circumstances of Appellant's arrest, including his refusal to comply with their commands to drop the knife, and the intense struggle to subdue him. During the struggle, Appellant attempted to stab one of the officers in the abdomen, and said repeatedly "I'm going to kill you," and "[y]ou're going to die tonight." (TT, pp. 109-153; R., pp. 87-131).

Lieutenant Wayne Jordan of the Chesterfield County Sheriff's Office testified he accessed and reviewed recordings of several phone calls Appellant made from the jail. He stated the software used to record the calls did not have an option to download the recordings onto a CD, but the recordings were maintained on the software owner's secure server, which he could access from his county-issued laptop. (TT, pp. 154-162; R., pp. 132-140).

When the State asked to play the recordings through Lt. Jordan's laptop, Appellant objected on the grounds of Rule 403 and hearsay. The circuit court overruled the objection, and Appellant then objected "to the fact nothing is in evidence at this point of the actual recording as well." The court also overruled that objection, indicating it would intervene if a problem arose while the recordings were playing. The recordings were then played in open court for the jury. (TT, pp. 163-165; R., pp. 141-143).

After the circuit court denied Appellant's directed verdict motion, Appellant testified he was drinking and doing cocaine on August 30, 2013, when he got into an argument with Victim 1 and slapped her. He stated the situation "got a little more heated

than I intended because things got more physical because her daughter got into it." (TT, pp. 177-178; R., pp. 155-156).

Appellant further testified he had a knife in his right hand when the first officer arrived, and when he moved his hand "to get rid of the knife," the officer tazed him. He denied making any threatening moves or statements before or after the officer tazed him, and claimed he merely started calling for Victim 1. He also admitted making the jail phone calls to Victim 1 as reflected in the recordings played for the jury. (TT, pp. 179-187, 195-199; R., pp. 157-165,173-177).

The jury acquitted Appellant on the CDVHAN charge, but convicted him of first degree assault and battery on the attempted murder, and the remaining charges as indicted. The circuit court sentenced him to consecutive sentences totally 21.5 years incarceration. (TT, pp. 264, 268-274; R., pp. 242, 246-252). This appeal followed.

On motion by the State, this Court remanded the case to the circuit court for reconstruction of the jail phone audio recordings played in open court during trial. After a hearing, the circuit court found all parties mistakenly believed the court reporter was recording the recordings as they were published to the jury in open court, and issued an order reconstructing the substance of the recordings based on summaries compiled by a law enforcement officer at the time he originally listened to the recordings prior to trial. The court also expressly found the probative value of the recordings published to the jury outweighed any prejudice to Appellant. (Reconstruction Hearing Transcript [RHT], pp. 1-22 [with Court's Exhibit 1]; Order filed April 13, 2015; R., pp. 254-279 ; 281-282).

ARGUMENT

I. The circuit court properly admitted the jail phone call recordings because they were relevant corroborating evidence, and the State published the original recordings from the original server, which was the best evidence of the recordings. (Appellant's Issues 1 & 4).

Appellant asserts the circuit court erred in allowing the State to play the jail phone call recordings at trial because the State did not introduce the recordings "in evidence," and the court failed to make a Rule 403 determination regarding the recordings' probative value versus their prejudicial impact. These assertions are meritless.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support, or are controlled by an error of law. *Id.*

A. Recordings as Evidence

Appellant's assertion the recordings were "never offered in evidence" is patently wrong. While a physical CD or other media containing copies of the recordings was not entered in evidence because the software did not afford such an option, the **original** recordings on the software company's server were played in open court before the jury. Thus, the substance of the recordings was "in evidence" to the same extent a witness' verbal testimony is "in evidence."[1]

[1]During closing argument, defense counsel acknowledged the recordings were in evidence, and stated the jury could listen to them again because "the court reporter has them." (TT, p. 217; R., p. 195). This substantiates the fact the recordings were played before the jury, and everyone, including defense counsel, thought the court reporter's recorder was running while the recordings were played.

Further, the original recordings, played directly off the server on which they were recorded, constituted the best evidence of the recordings. A recording consists of sounds set down by mechanical or electronic recording, and an **original** of a recording is the recording itself. Rule 1001(1) and (3), SCRE. "To prove the content of a writing, recording, or photograph, the **original** writing, recording, or photograph is required . . . ." Rule 1002, SCRE (the best evidence rule) (emphasis added); *see also* State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889, 895-896 (Ct. App. 2014) (discussion of "best evidence" rule).

Appellant did not, and does not, challenge the authenticity of the recordings, or the testimony indicating the State was unable to obtain a physical copy of the recordings for trial because the third-party owned recording software did not provide an option to do so. Therefore, the **original** recordings on the server were properly admitted "in evidence," and published to the jury.

B. Rule 403

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. As a general rule, all relevant evidence is admissible unless the danger of unfair prejudice substantially outweighs the evidence's probative value. Rule 402, SCRE; Rule 403, SCRE.

The appellate court reviews a trial court's decision regarding the comparative probative value and prejudicial effect of evidence under Rule 403 for abuse of discretion, and should only reverse that decision in exceptional circumstances. State v. Collins, 409 S.C. 524, 763 S.E.2d 22, 28 (2014), reh'g denied (Sept. 24, 2014); *see also* State v.

Williams, 409 S.C. 455, 761 S.E.2d 770, 775 (Ct. App. 2014)("'If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.'") (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 207 [Ct. App. 2008]). In reviewing the trial court's decision, the appellate court is obligated to give great deference to the trial court's judgment, and when evidence is highly probative, corroborative, and material in establishing the elements of the offenses charged, its probative value outweighs its potential prejudice, the appellate court should not invade the trial court's discretion in admitting it. Collins, 763 S.E.2d at 27-28.

Evidence merely damaging to "a defendant's case is not a basis for excluding probative evidence" under Rule 403, because "[e]vidence that is highly probative invariably will be prejudicial to the defense." United States v. Udeozor, 515 F.3d 260, 264-65 (4th Cir. 2008). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)); *see also* State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119, 123 (2000); United States v. Mohr, 318 F.3d 613, 618 (4th Cir. 2003) (exclusion is appropriate when the probative value of the evidence is substantially outweighed by the prejudicial effect, and the "trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative values of the offered evidence.") (internal quotation marks omitted); United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir.1989)

("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

In this case, the circuit court overruled Appellant's objections to the recordings, including his 403 objection, stating: "if I find a problem pops up [while the recordings play] I will have to step in. There could be ramifications." (TT. pp. 163-164; R., pp. 141-142). Implicit in the circuit court's rulings during trial is a finding the recordings were admissible, any prejudice to Appellant did not outweigh the probative value, and the court would intervene if something in the recordings was problematic in that regard. In addition, the circuit court did make a specific probative/prejudice finding after the reconstruction hearing. (Order filed April 13, 2015; R., pp. 281-282)

While not binding authority, the Fourth Circuit Court of Appeals' unpublished opinion in United States v. Robinson, 489 Fed. Appx. 676 (2012), is factually similar and instructive. In Robinson, a fellow inmate testified the defendant asked him to convey threats to potential witnesses against the defendant, and the prosecution offered the recording of a call the defendant made from jail referencing those threats. The Fourth Circuit found the recording corroborated the inmate's testimony, the probative value outweighed the prejudicial effect, and the district court properly admitted it. The court also stated the threats "to potential witnesses suggested that Robinson was conscious of both his guilt and the strength of the prosecution's case." *Id.* at 676-677. Similarly, the recordings at issue in this case corroborated Victim 1's testimony about the substance of the telephone calls, and Appellant's attempt to convince the victims to drop the charges against him suggested he was fully aware of his guilt and strength of the case against him.

Appellant's reliance on State v. Hill, 394 S.C. 312, 714 S.E.2d 879 (Ct. App. 2011), is misplaced because it is factually and legally distinguishable. In Hill, after the jury convicted the defendant of multiple charges, the circuit court learned two written statements the defendant gave to law enforcement, which were not introduced, or even read to the jury during trial, apparently got mixed in with evidence that had been admitted, and the jury considered them as "important evidence" during deliberations. *Id.* at 883. The Court of Appeals reversed the convictions, finding the written statements constituted an extraneous influence on the jury, and it was not harmless because the statements differed from the defendant's trial testimony, which impermissibly and substantially impugned the defendant's credibility. *Id.* at 886-888.

In this case, however, the recordings at issue **were** published to the jury during trial, and therefore, could **not** be an extraneous influence on the jury's deliberations. Further, when he testified at trial, Appellant admitted making the telephone calls to Victim 1, and that it was his voice on the recordings played in court. (TT, pp. 198-199; R., pp. 176-177). In fact, he never denied saying anything contained in the published recordings. Accordingly, contrary to the written statements at issue in Hill, the recordings did not improperly impugn Appellant's credibility.

The fallacy of Appellant's contention the recordings were not entered into evidence simply because there was no physical item containing them is amply demonstrated by a comparison to verbal witness testimony. Taken to its logical conclusion, Appellant's argument would apply with equal force to such testimony when the offering party does not submit a physical item containing the testimony at the time the witness testifies, and a verbatim transcript is not available for some reason, which is

nonsensical.[2] If something is published in open court before the jury, including testimony and recordings, it is "in evidence" for the jury's consideration, and before the court for all purposes. Appellant does not cite, and the State cannot find, any authority to the contrary.

The recordings published to the jury in this case corroborated Victim 1's testimony Appellant called her from the jail, and attempted to convince her and Victim 2 to drop the charges, as well as indicated Appellant's knowledge of guilt. Victim 1 was subject to cross-examination by Appellant, and she was present for the entire trial in the event Appellant wanted to recall her during his case.[3] (TT, p. 163; R., p. 141). Therefore, the circuit court properly allowed the State to publish the original recordings to the jury, and its ruling should be affirmed.[4]

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[2]This comparison is also relevant to the remand and reconstruction issue discussed below.

[3]Victim 1 did testify in rebuttal after Appellant presented his case, and Appellant did not even cross-examine her at that time, much less inquire about the recordings. (TT, pp. 200-201; R., pp. 178-179).

[4]Even if it was error to admit the recordings, it was harmless beyond any reasonable doubt in light of the overwhelming evidence of Appellant's guilt on the charges for which he was convicted. It is also clear the recordings did not adversely influence the jurors because the jury acquitted Appellant of CDVHAN, and found him guilty of the lesser included offense of first degree assault and battery on the attempted murder charge. *See* State v. Tapp, 398 S.C. 376, 728 S.E.2d 468, 475 (2012) ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.") (citations and internal quotation marks omitted).

II. This Court properly remanded this case for reconstruction of the jail phone call recordings published to the jury at trial, and there was sufficient evidence of the relevant portions of the recordings to support the circuit court's reconstruction on remand. (Appellant's Issues 2 & 3).

Appellant asserts this Court erred in remanding the case for reconstruction of the jail phone call recordings published to the jury at trial, because the recordings were never admitted into evidence, and the circuit court erred in finding the recordings could be reconstructed. Again, Appellant's assertions have no merit.[5]

South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal, and the appellate courts have authority to remand the case to the trial court for reconstruction of the record. State v. Ladson, 373 S.C. 320, 644 S.E.2d 271, 273 - 274 (Ct. App. 2007) (remand for reconstruction appropriate when no parts of the trial transcript were available); *see also* Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (recognizing a court's power to remand for a reconstruction hearing), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200, 203 (2002) (when a transcript is lost or destroyed, an appellate court may remand to have the record reconstructed).

The inability to prepare a verbatim transcript, in and of itself, does not necessarily mandate reversal, and the appellant must demonstrate specific prejudice flowing from an incomplete or reconstructed record. Ladson, 644 S.E.2d at 273 (finding majority of jurisdictions adhere to those principles); *see also* China v. Parrott, 251 S.C. 329, 162 S.E.2d 276, 278 (1968) (where a portion of the court reporter's notes were lost, the trial judge properly considered affidavits from counsel and the court reporter in reconstructing

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[5]Admission of the recordings in this case is discussed above in Issue I.

the record); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9, 12 (Ct. App. 2012) ("Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired."). A reconstructed record on appeal must allow for "meaningful appellate review," and a new trial is appropriate only if the appellant establishes "the incomplete nature of the transcript prevents the appellate court from conducting such a review.'" Ladson, 644 S.E.2d at 274 (*quoting* In re D.W., 171 N.C.App. 496, 615 S.E.2d 90, 94 [2005]).

All relevant matter presented "to the lower court or tribunal" may be designated by the parties for inclusion in the Record on Appeal. *See generally* Rule 209, SCACR; Rule 210, SCACR. Appellant also contends on appeal that the circuit court failed to conduct a proper prejudice/probative analysis. This contention makes the substance of the recordings central to appellate review, and the reconstructed recordings can properly be included in the Record on Appeal for appellate court consideration.[6]

Citing cases in which the entire trial transcripts were unavailable, Appellant also contends accurate reconstruction of the recordings was impossible. This case is clearly distinguishable from the cases Appellant cites.

In Deaton v. Leath, 279 S.C. 82, 302 S.E.2d 335 (1983), the defendants had the plaintiffs arrested for trespassing and disorderly conduct. The plaintiffs were convicted

[6]There is no indication Appellant sought to obtain the substance of the recordings prior to filing his initial brief approximately nine months after the appeal was filed. It is clear the recordings were available a week before the appeal was filed, and if requested during the early stages of the appeal, they may have still been available on the third-party's server. By the time the State received Appellant's initial brief and learned the court reporter had not recorded the recordings as they were played in court, however, the recordings had been erased from the server in the ordinary course of business, and were not recoverable.

of the charges in a municipal court trial and timely appealed to circuit court, but due to an equipment malfunction in the trial court, no trial transcript was available. The municipal court granted the plaintiffs' motion for a new trial, they were acquitted at the second trial, and then filed a malicious prosecution action against the defendants. On appeal from summary judgment in favor of the defendants, the Supreme Court affirmed. *Id.* at 336. Remand for reconstruction of the first trial transcript, or whether reconstruction would have been possible, were not issues in the appeal, and the Supreme Court did not even allude to either issue. Thus, Deaton is inapplicable on its face.

In State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (2007), the defendant was convicted *in absentia*, and arrested on a bench warrant over ten years later. After sentencing, the defendant appealed and moved to remand to reconstruct the *in absentia* trial transcript, but the court reporter had already destroyed the tapes in accordance with the applicable court rule. The Supreme Court denied the motion and dismissed the appeal, finding the defendant's almost eleven year fugitive status precluded appellate review because the trial transcript was no longer available, and remand would be futile given the amount of time between conviction and sentencing. *Id.* at 555.

This case is significantly different from Serrette. There was no significant delay between the trial and appeal, and except for the substance of the recordings, which constituted a small portion of the trial as a whole, the entire transcript was available for appellate review.[7] Further, there is no real dispute the recordings in this case were played

[7]At the point the recordings were played in court, the transcript simply states "an audio recording was played for the jury in open court." (TT, pp. 164-165; R., pp. 142-143). This is very common in trial transcripts, even when the court reporter does continue recording while an audio is played. Those portions of the trial are generally not transcribed absent a specific request.

in open court before the jury, and it is clear the circuit court, the State and defense counsel all mistakenly assumed the court reporter continued to record as the recordings were played. Thus, the State had no reason to move to re-open the case to admit the recordings because they already were in evidence, and this Court's remand for reconstructing the recordings did not re-open the record.

Contrary to Appellant's contention, accurate reconstruction of this small portion of the record was possible with the reconstruction hearing testimony of Lieutenant Christopher Page, and the original notes he took while listening to the recordings prior to the trial. In addition, the trial transcript clearly indicates only three recordings were played in court, as well as the specific dates of those recordings, which significantly narrows the focus for reconstruction and appellate purposes.

Prior to playing any recordings at trial, the solicitor indicated the recordings presented by the State were "in reference to this case and [Victim 1's] testimony or non-testimony regarding this case." The first recording was from September 13, 2013, during which Appellant talked about making sure Victim 2 did not appear in court, and tried to get Victim 1 to drop the charges. In the conversation, Victim 1 described what Appellant did to her and Victim 2, and told Appellant she was worried he would kill her if he got out of jail. (TT, pp. 163-164, RHT, pp. 7-10, RHT Court's Exhibit 1, p. 1; R., pp. 141-142, 260-263, 278).

The second recording was from September 17, 2013. During that call, Appellant again told Victim 1 not to go to the court hearing, and to quit saying he deserved time in prison. (TT, pp. 164-165; RHT, pp.11-12, RHT Court's Exhibit 1, p. 2; R., pp. 142-143, 264-265, 279).

The third and final recording was from September 21, 2013, during which Appellant once again told Victim 1 she and Victim 2 had to drop the charges against him. The State did not play Appellant's statement during the call indicating he would plead to probation. (TT, p. 165, RHT, pp. 12-13, RHT Court's Exhibit 1, p. 2; R., pp. 143, 265-266, 279).

The published recordings went directly to the solicitor's assertion they involved Victim 1 testifying or not testifying against Appellant. Notwithstanding Appellant's conclusory assertion of unfair prejudice, the limited recordings played for the jury simply corroborated Victim 1's trial testimony about the phone calls, which was then further corroborated by Appellant's admission he did make the phone calls and it was him talking during them.[8]

Using Appellant's logic, it is difficult to envision any scenario allowing remand and reconstruction. Cases in which there are "inaudible" or "missing" portions of the trial transcript could never be reconstructed for appellate purposes in the face of a defendant's claim those portions preclude meaningful appellate review. Thus, virtually any equipment malfunction during trial resulting in something less than a complete, verbatim transcript could mandate reversal and a new trial.

Remand for reconstruction of the recordings was appropriate, and the evidence presented during the reconstruction hearing was sufficient for the circuit court to adequately reconstruct the recordings' substance. As reconstructed, the record affords

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[8]The trial transcript reveals one of the calls Appellant claims was unduly prejudicial because Victim 1 stated Appellant said he was going to kill the police the night of the assault, occurred on September 15, 2013, and was not played for the jury. In any event, Victim 1 testified at trial about Appellant's threat to kill the police.

Appellant the opportunity for meaningful appellate review. Therefore, the reconstructed recordings should be considered by the appellate court for purposes of this appeal.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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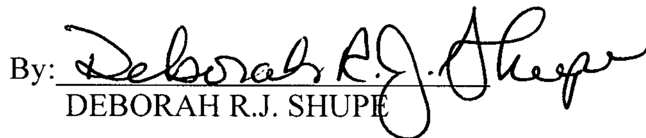
By: 
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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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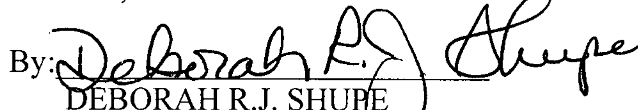
By: 
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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing 2 copies in the United States mail, postage prepaid, addressed to:

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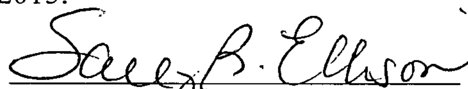
I further certify all parties required by Rule to be served have been served.

This 18th day of September, 2015.



SALLY B. ELLISON
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