

THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,)
Appellee)
)
v.)
)
Staff Sergeant (E-6))
BRUCE L. KELLY,)
United States Army,)
Appellant)

BRIEF ON BEHALF OF APPELLANT
ON SPECIFIED ISSUE
•
Crim. App. No. 20090809
USCA Dkt. No. 12-0524/AR

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IN THE UNITED STATES COURT OF APPEALS
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Appellee) ON SPECIFIED ISSUE
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Staff Sergeant (E-6))
BRUCE L. KELLY,)
United States Army,)
Appellant)

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Statement of the Case

On September 19, 2012, this Court granted Staff Sergeant (SSG) Bruce L. Kelly's petition for review on two issues. On October 19, 2012, appellate defense counsel filed a final brief on behalf of SSG Kelly. On November 30, 2012, government counsel filed a brief on behalf of appellee. On February 4, 2013, this Court specified the following issue and ordered briefs from the parties:

Specified Issue

**WHETHER THE EXAMINATION OF THE CONTENTS OF
APPELLANT'S COMPUTER WAS AN UNLAWFUL
INSPECTION UNDER MILITARY RULE OF EVIDENCE
313 (b) .**

Summary of the Argument

This Court should refrain from answering the Specified Issue because the government forfeited the argument that the search of SSG Kelly's computer was an inspection because it

failed to argue this before the military judge and the Army Court.

Even if this Court entertains the Specified Issue, the search was not a lawful military inspection under Military Rule of Evidence [hereinafter Mil. R. Evid.] 313(b). The search for pornography was not ordered by a commander with authorization over the property of SSG Kelly and the search did not seek to ensure military fitness, security, or readiness of a unit. Instead, a noncommissioned officer trained by law enforcement in forensic computer searches hacked into SSG Kelly's password-protected computer to search specifically for contraband. The government search of the files on SSG Kelly's personal computer was not lawful under any recognized inspection procedure, and therefore the evidence obtained must be excluded.

Statement of Facts

In addition to those facts set forth in Appellant's Final Brief, the following facts support SSG Kelly's position that the government forfeited any claim the search was an inspection pursuant to Mil. R. Evid. 313(b), and, in any event, those facts that are available establish the search of SSG Kelly's computer was not a valid inspection:

Prior to trial, SSG Kelly moved to suppress the evidence of pornography and child pornography as a result of an unlawful search and seizure. (JA 16-22). The government bore the burden

to prove that the search was reasonable. (JA 34). The government's position in its written response to the defense motion was that the search of SSG Kelly's computer was a lawful inventory. (JA 36). The government never used the word "inspection" in its written response to argue that Mil. R. Evid. 313(b) applied or to assert that the search was done to ensure the military fitness, security, or readiness of any unit. (See JA 34-38). During argument, the government only stated in passing that the inspections and inventories are "administrative in nature and can be conducted to ensure security, military fitness, and good order and discipline of a unit. . . . so long as the *inventory*" is conducted properly. (JA 137) (emphasis added). The military judge held as a matter of law that the search of SSG Kelly's computer was an inventory pursuant to Mil. R. Evid. 313(c). (JA 44).

Before the Army Court, the government did not assert that the search of SSG Kelly's computer was an inspection pursuant to Mil. R. Evid. 313(b). The Army Court held that the government search of SSG Kelly's computer was an inventory, and did not address the search as an "inspection." (JA 4). The Army Court held that All Army Activities (ALARACT) message 139/2006 did not have the effect of changing Army Regulation 638-2, Deceased Personnel: Care and Disposition of Remains and Disposition of Personal Effects [hereinafter AR 638-2] (Dec. 22, 2000). (JA 3).

Before this Court, the government has not claimed that the search of SSG Kelly's computer was an inspection pursuant to Mil. R. Evid. 313(b). (See Br. on Behalf of Appellee).

Specified Issue and Argument

WHETHER THE EXAMINATION OF THE CONTENTS OF APPELLANT'S COMPUTER WAS AN UNLAWFUL INSPECTION UNDER MILITARY RULE OF EVIDENCE 313(b).

Law and Argument as to Government Forfeiture

The Government Forfeited Any Claim the Search was an Inspection.

Before the military judge and the Army Court, the government failed to claim the search of SSG Kelly's computer was an inspection under Mil. R. Evid. 313(b). Although the government included the word "inspection" in its response to the defense motion, the government never made the claim that its search of SSG Kelly's computer was an inspection under Mil. R. Evid. 313(b). Because the government failed to argue the search was an inspection below, the argument is forfeited. *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (stating that the government's alternative theory that the search was reasonable, and thus lawful, was forfeited by the government's failure to raise it below); see also *United States v. Tracey*, 597 F.3d 140, 149-150 (3rd Cir. 2010) (holding the government's failure to argue issue waived when not raised before the district court); *United States v. Griffiths*, 47 F.3d 74, 77 (2nd Cir. 1995)

(holding that merely typing the phrase "search incident to arrest" was insufficient to preserve the argument on appeal when not developed or argued before the lower court).

If this Court entertains the belated inspection argument, SSG Kelly should still prevail, as explained below.

Law as to Inspections

Inspections in the military have "traditionally been a 'tool' for a commander to use in insuring 'the overall fitness of [his] unit to perform its military mission.'" *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981) (quoting *United States v. Wenzel*, 7 M.J. 95, 97 (C.M.A. 1979) (Fletcher, C.J., concurring)) (emphasis added) (alteration in original). "[T]he traditional military inspection which looks at the overall fitness of a unit to perform its military mission is a permissible deviation from what may be tolerated in civilian society generally -- recognizing that such procedure is a reasonable intrusion which a serviceperson must expect in a military society" *United States v. Roberts*, 2 M.J. 31, 36 (C.M.A. 1976); see also *United States v. Ellis*, 24 M.J. 370, 372 (C.M.A. 1987) (holding that "military inspections ordered for the purpose of insuring sanitation and cleanliness, security, military fitness, or good order and discipline do not violate any reasonable expectation of privacy which a

servicemember might otherwise have in the area to be inspected").

Thus, to preserve unit readiness a "military commander[] may be required to maintain regulatory systems which necessitate inspection of persons and private effects without consent." *United States v. Unrue*, 22 U.S.C.M.A. 466, 469, 47 C.M.R. 556, 560 (1973). "The reasonableness of an inspection is determined by whether the inspection is conducted in accordance with the commander's inspection authorization, both as to the area to be inspected, and as to the specific purposes set forth by the commander for ordering the inspection." *Ellis*, 24 M.J. at 372. The reasonableness of the government's actions is determined by "military necessity." See *Roberts*, 2 M.J. at 36. An inspection may "be transformed into a search requiring probable cause if it . . . was conducted in an unreasonable manner." *Ellis*, 24 M.J. at 372.

The President defined military inspections and detailed their scope:

An "inspection" is an examination of the whole or part of a unit, organization, installation, . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that

the command is properly equipped, functioning properly, maintaining proper standards of readiness, . . . sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. . . . An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. . . . Inspections shall be conducted in a reasonable fashion Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

Mil. R. Evid. 313(b).

"The inquiry under Mil. R. Evid. 313(b) focuses on whether the 'primary purpose' of the inspection was 'to determine and ensure the security, military fitness, or good order and discipline of the unit.'" *United States v. Jackson*, 48 M.J. 292, 294 (C.A.A.F. 1998) (citing *United States v. Taylor*, 41 M.J. 168, 172 (C.M.A. 1994) (stating "principal focus" is on the role of the commander)). It is permissible for the factfinder to take into account the nature of the contraband in determining that maintaining unit readiness was the primary purpose for an inspection and not criminal prosecution. *Id.* at 296.

As established in SSG Kelly's Final Brief, soldiers have a reasonable expectation of privacy in files kept on their personal computers. *United States v. Conklin*, 63 M.J. 333, 336-37 (C.A.A.F. 2006). An inspection ordered by a commander for

the proper purpose and pursuant to Mil. R. Evid. 313(b) is an exception to the rule that "official intrusions into protected areas . . . require search authorization supported by probable cause." *United States v. Long*, 64 M.J. 57, 61 (C.A.A.F. 2006). Searches by governmental actors conducted without a search authorization and deemed unlawful results in the exclusion of the evidence obtained. Mil. R. Evid. 311(a)(1)-(2).

Army Regulation 638-2 implements 10 U.S.C. § 4712 (Disposition of Effects of Deceased Persons by Summary Court-Martial), and applies only to deceased and missing personnel. AR 638-2, Summary, para. 18-1. Before forwarding a deceased or missing soldier's personal effects [hereinafter PE] to a "person eligible to receive effects," AR 638-2 permits a *Summary Court-Martial Officer* to search for and remove "[i]nappropriate items that may cause embarrassment . . . categories include . . . items that are obscene[.]" AR 638-2, para. 20-14. A "person eligible to receive effects" [hereinafter PERE] is defined by AR 638-2 as "the person to whom the Army will deliver or ship the deceased or missing person's PE." *Id.* at para. 19-1. Army Regulation 638-2, Chapter 17, Personal Effects, expressly states that "[t]he provisions of this chapter do not apply to . . . the PE of soldiers who are patients in medical treatment facilities and not deceased (see AR 40-400)." *Id.* at para. 17-1b. Nothing

in AR 638-2 indicates the search of the deceased or missing person's computer is an inspection.

Argument as to Inspections

The government's search of SSG Kelly's personal computer did not amount to a lawful inspection within the meaning of Mil. R. Evid. 313(b). Military inspections are the tool of a commander to ensure the military fitness and readiness of a unit. *Middleton*, 10 M.J. at 128. The search conducted on SSG Kelly's personal computer was not ordered by his commander or any other commander. Nor was the search aimed at ensuring the military fitness or readiness of a unit. As the search was not conducted pursuant to a search authorization based on probable cause, the search of SSG Kelly's personal computer was unreasonable and cannot be classified as an inspection under Mil. R. Evid. 313(b). Therefore, the evidence obtained by the unlawful search must be excluded.

A. The search of SSG Kelly's computer does not qualify as an inspection because the search was not pursuant to an order by a commander.

Military Rule of Evidence 313(b) states that an inspection is "conducted as an *incident to command*." (Emphasis added). As this Court clearly stated in *United States v. Miller*, "[t]he authority to order an inspection under M.R.E. 313 is directly tied to a commander's inherent authority; it is the connection with command authority, and the commander's responsibility to

ensure fitness of a unit, that keeps a valid inspection scheme within constitutional parameters." 66 M.J. 306, 308 (C.A.A.F. 2008) (suppressing evidence from a urinalysis not clearly ordered by a commander) (citing *United States v. Bickel*, 30 M.J. 277, 280, 282 (C.M.A. 1990)) (emphasis added).

There is no evidence that SSG Kelly's commander, presumably in Iraq, ordered an inspection of the computer. There is also no evidence that he possessed the authority to order such an inspection after the property, and in effect SSG Kelly, left his command. In addition, there is no evidence that any other commander ordered the search as an inspection, to include the commanders of the Joint Personal Effects Depot [hereinafter JPED] and Aberdeen Proving Grounds. Rather, the government asserted that it conducted the search pursuant to AR 638-2, a blatant misapplication of that regulation. (JA 42-43). As in *Miller*, the JPED's inventory "program [was] on 'auto-pilot,' without command input, . . . [which] neither constitutes a legitimate order to [search] nor satisfies the requirements of M.R.E. 313." 66 M.J. at 308.

Thus, on this deficiency alone, the search of SSG Kelly's computer cannot qualify as a valid inspection under Mil. R. Evid. 313(b).

B. The search of SSG Kelly's computer does not qualify as an inspection because it was not with the purpose of ensuring the military fitness of a unit.

A traditional military inspection is used to ensure "the overall fitness of a unit to perform its military mission." *Roberts*, 2 M.J. at 36; see also *Middleton*, 10 M.J. at 127. The government search of SSG Kelly's computer for pornography did not seek to ensure the military fitness, security, or good order and discipline of the unit.¹ The government's only purported objective in searching for pornography was to prevent the release of material that would supposedly cause further sorrow to family members of soldiers, even though the wounded soldier was still alive and should receive his property. (JA 44).

The JPED's mission is to process the personal property of deceased and missing soldiers. (See JA 229). There is no evidence that it is a traditional unit. There is also no evidence of how the presence of pornography on a personally-owned computer located in the United States impacted the security, military fitness, or good order and discipline of SSG Kelly's unit in Iraq, the JPED, or of any other unit. Further, at the time of the search SSG Kelly was a wounded soldier

¹ While Staff Sergeant Kelly does not concede the government's search for classified material was lawful, that search did not yield evidence of pornography or child pornography. (JA 29). It was only discovered during a second search for pornography and "gore," which was unlawful to possess in Iraq. (JA 29, 261).

receiving treatment at Fort Bragg, North Carolina. (JA 126). There is no conceivable way that the presence of pornography of any kind on his personally-owned computer—that is not even within close proximity of SSG Kelly—can impact or threaten mission readiness. This is especially true considering SSG Kelly was hospitalized, and not likely to perform any traditional duties of a soldier requiring military readiness.

The purpose of military inspections is to minimize contraband that presents clear dangers to the military mission. For example, courts have long “acknowledged that drug use in the armed services harms the military missions.” *Bickel*, 30 M.J. at 280. The reasons for this harm are apparent. Drug use “diminishes the military effectiveness of the servicemembers who are using drugs; and, when such persons are entrusted with important responsibilities . . . it may endanger other persons, their property, and government property.” *Id.* A similar analysis applies to the possession of unauthorized weapons in certain places. See Mil. R. Evid. 313(b).

However, not all contraband poses a risk to military fitness. In this case, there is no evidence that pornography on a personally-owned computer going to a soldier in a hospital diminishes military effectiveness in any way. The inquiry this Court must conduct focuses “on whether the ‘primary purpose’ of the inspection was ‘to determine and ensure the security,

military fitness, or good order and discipline of the unit.”² *Jackson*, 48 M.J. at 294. The factfinder should take into account the nature of the contraband in determining that maintaining unit readiness was the primary purpose for an inspection and not criminal prosecution. *Id.* at 296. In this case, the government’s only purported objective was to prevent the release of material that may cause embarrassment or sorrow to the wounded soldier’s family. The government asserted no purpose meant to ensure military fitness and unit readiness. Thus, this search falls outside the scope of Mil. R. Evid. 313(b), and cannot be classified an inspection.

C. The government’s search was unreasonable because the conduct in this case falls outside the realm of accepted inspection practices.

In the civilian arena, searches based on less than probable cause have been upheld as lawful inspections as long as they are reasonable. In *Camara v. Municipal Court*, the Supreme Court held that city building-code inspectors could inspect private residences, but a warrant based on less than probable cause was required. 387 U.S. 523, 538-40 (1967). The warrant ensures the reasonableness of the goals of the inspection. See *id.* at 535. Military inspections do not require a warrant, but the warrant

²² The government bears the burden of proving by a preponderance that the contraband sought would “adversely affect the command.” 1 Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* § 13.03[2] (7th ed. 2011).

requirement is automatically met because inspections are ordered by a commander authorized to grant such an intrusion. The reasonableness of the inspection is then determined by military necessity. See *Roberts*, 2 M.J. at 36. The reasonableness of an inspection is determined by analyzing the commander's objective and limitations as to the area to be searched. *Ellis*, 24 M.J. at 372. Thus, like the city building-code inspectors, there must be limits in a military inspection based on reasonableness. When those limitations are not set by a commander for the purpose of ensuring unit fitness and readiness, the search cannot be deemed a reasonable act pursuant to Mil. R. Evid. 313(b).

In *Colonnade Catering Corp. v. United States*, the Supreme Court held that a long history of regulation in the liquor industry did not give inspectors the authority to enter premises by force without a warrant. 397 U.S. 72, 75-77 (1970). Likewise, the bounds of military inspections are not limitless or unfettered. The search of a secured wall locker may not be covered by the scope of a barracks health and welfare inspection because of the bounds of the reasonable expectation of privacy. See *Ellis*, 24 M.J. at 372 n.3.

In SSG Kelly's case, the government used personnel trained in fighting cyber-crime to search SSG Kelly's computer. (JA 69). Additionally, the government used forensic software to

break SSG Kelly's password. (JA 72). This conduct is similar to the forceful entry that was condemned in *Colonnade Catering Corp.* "[T]his Nation's traditions [] are strongly opposed to using force without definite authority to break down doors"—that is to violate that place where a person has a reasonable expectation of privacy. *Colonnade Catering Corp.*, 397 U.S. at 77.

While the military has a long tradition of inspections, the familiar image conjured is one "of a soldier standing rigidly at attention at the foot of his bunk while his commander sternly inspects him, his uniform, his locker, and all his personal and professional belongings." *Middleton*, 10 M.J. at 127. What is different in this case is that SSG Kelly's computer files were searched without his consent away from his unit; this is vastly different from an inspection of his bunk or his uniform. Despite the pronouncement in *Middleton*, that "no serviceperson whose area is subject to [an] inspection may reasonably expect any privacy," SSG Kelly maintained a reasonable expectation of privacy in his effects—the files located in his personal computer. *Id.* at 128 (emphasis added); *cf. Conklin*, 63 M.J. at 337. Singling out wounded soldiers for a search without their

knowledge or consent does not strip these soldiers of their reasonable expectation of privacy.³

Staff Sergeant Kelly's expectation of privacy should be even greater than that in *Conklin*. 63 M.J. at 336-37. First, someone else took SSG Kelly's computer to the JPED. (See JA 45-46). Second, he had no reason to expect that his computer would be searched at the JPED or even transported to the JPED. See *Unrue*, 22 U.S.C.M.A. at 470, 47 C.M.R. at 560 (upholding a search because soldiers were warned that proceeding further would subject them to a search); *Bickel*, 3 M.J. at 285-84 (upholding a urinalysis inspection because of the "extensive notice" of the drug-testing program, which limited arbitrariness and abuse by inspectors). Even if he, as a soldier, "must expect" traditional inspections to ensure the overall fitness of a unit, this was not such an inspection. *Roberts*, 2 M.J. at 36. This search was not aimed at ensuring the military fitness of his unit. It was conducted at a warehouse that processed the personal effects of deceased soldiers. (JA 62). The search was not pursuant to any regulation that applied to SSG Kelly; and, as the search related to SSG Kelly's circumstances, the only objective was to search for evidence of a crime.

³ There is no evidence that the government searched non-wounded soldier's computer files upon their departure from Iraq.

There is no evidence the government gave SSG Kelly "extensive notice" that the JPED was going to search his computer for any purpose. The regulations in place at the time only pertained to missing and deceased soldiers. See AR 638-2, para. 17-1. As such, there was no protection for SSG Kelly from arbitrariness or abuse. Further, SSG Kelly did not have the opportunity to prevent his computer from entering the JPED and being subjected to a search, as the soldiers in *Unrue* did. The collection of SSG Kelly's computer from his quarters in Iraq may have been pursuant to regulations that applied to him, but there is no evidence that they provide notice or authorized a search of the files on his password-protected computer.

Finally, the government argues that the test enunciated in *New York v. Burger* should apply to this case only in a Mil. R. Evid. 314(k) context. (Appellee Br. at 28, 30-31). The three-part test regarding regulatory inspections of businesses is as follows:

First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . .

Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . .

Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a

constitutionally adequate substitute for a warrant.”

482 U.S. 691, 702 (1987) (citations omitted).

Even if this Court were to find that the *Burger* test applies to this case,⁴ it is clear that the search of SSG Kelly's computer is unreasonable even in a situation where there is a reduced expectation of privacy. First, there is not a “substantial” government interest at play in this case. The presence of pornography on a wounded soldier's computer does not raise a substantial interest for the government. The government purportedly wanted to prevent the release of contraband to the persons eligible to receive effects. According to AR 638-2, since SSG Kelly was alive, he was the only person that was eligible to receive his personal effects. (See JA 179). The government did not have a substantial interest as it pertained to protecting SSG Kelly from his pornography.

Under the second *Burger* prong, the inspection must further a regulatory scheme. *Id.* at 702. Since the government's reliance on AR 638-2 was misplaced, the search of SSG Kelly's computer was not pursuant to a regulatory scheme. Under the third prong, the regulatory scheme must properly advise the owner of the premises that an inspection will take place and it must limit the discretion of the inspectors. *Id.* at 703. As

⁴ Appellant has not found any majority opinion by this Court, or any military court, citing this test.

stated above, there is no evidence that SSG Kelly was on notice that the files on his personal computer would be searched in the event he was wounded on the battlefield. Army Regulation 638-2 did not provide any notice to SSG Kelly because it did not apply to him, and ALARACT message 139/2006 was not intended to provide this type of notice. (See JA 3 n.5).

D. The evidence should be excluded pursuant to Military Rule of Evidence 311(a).

The government should not be allowed to continue to search the personal property of soldiers for evidence of crimes simply because they had the misfortune of being wounded on the fields of combat. The JPED made no distinction between the property of wounded soldiers and the property of deceased soldiers. (JA 72). In making no distinction between the two groups, the JPED disregarded the fact that wounded soldiers retain their Fourth Amendment protections. At the time of SSG Kelly's trial, the JPED still made no distinction between deceased and wounded soldiers. (JA 72). In fact, the JPED personnel knew that living soldiers receive their personal effects. (JA 73). Specifically, in this case, the government knew that SSG Kelly wanted his property, and was available to receive his property. (JA 29).

Military Rule of Evidence 311(a) states that evidence obtained unlawfully is inadmissible against the accused if the

accused objected at trial and the accused had a reasonable expectation of privacy in the property searched. As the government searched SSG Kelly's personal computer files without a search authorization for contraband, and not pursuant to any other recognized exception under the military rules of evidence, the evidence obtained must be suppressed.

Conclusion

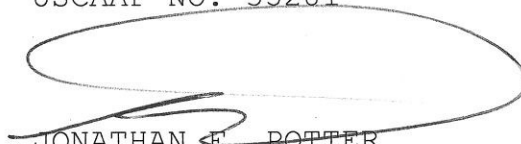
WHEREFORE, SSG Bruce L. Kelly respectfully requests this Honorable Court set aside and dismiss the findings of guilty as to the Specification of Charge I and Charge I and the Specification of Charge II and Charge II, and return his case to The Judge Advocate General for a sentence rehearing.



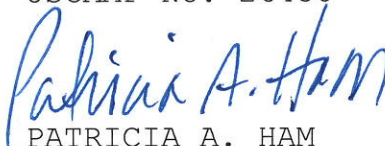
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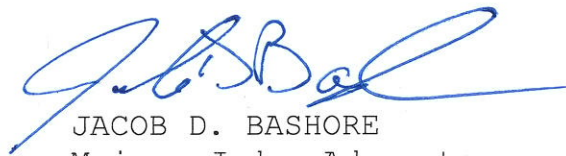


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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because this brief contains 4,420 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007 with Courier New, using 12-point type with no more than ten and ½ characters per inch.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Kelly, Crim. App. Dkt. No. 20090809, Dkt. No. 12-0524/AR, was delivered to the Court and Government Appellate Division on February 14, 2013.



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