

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

U N I T E D   S T A T E S ,	)	BRIEF ON BEHALF OF APPELLANT
Appellee	)	ON SPECIFIED ISSUES
	)	
v.	)	Crim. App. No. 20110337
	)	
Private First Class (E-3)	)	USCA Dkt. No. 13-0348/AR
<b>AMANDA N. MOSS,</b>	)	
United States Army,	)	
Appellant	)	

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<b>AMANDA N. MOSS,</b>	)	USCA Dkt. No. 13-0348/AR
United States Army,	)	
Appellant	)	

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

**Specified Issues**

I.

WHETHER THE DECISION TO APPEAL TO THIS COURT  
IS A PERSONAL DECISION OF THE APPELLANT, AND  
IF SO, IN WHAT MANNER MAY SUCH A DECISION BE  
MADE?

II.

WHETHER THERE IS ANY EVIDENCE IN THE RECORD  
THAT APPELLANT HAS AUTHORIZED AN APPEAL TO  
THIS COURT, AND IF THERE IS NO SUCH  
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THE STATUTORY TIME LIMIT IN ARTICLE 67,  
UCMJ, TO FILE AN APPEAL?

#### IV.

**SHOULD THIS CASE BE DISMISSED WITH PREJUDICE  
UNDER THE HOLDING IN UNITED STATES V.  
SCHRECK, 10 M.J. 226 (C.M.A. 1981)?**

#### **Statement of the Case**

On March 7, April 29, and May 4-5, 2011, an officer panel sitting as a special court-martial tried Private First Class (PFC) Amanda N. Moss in absentia at Fort Stewart, Georgia. Contrary to the plea the military judge entered on PFC Moss' behalf, the panel convicted PFC Moss of one specification of desertion, in violation of Article 85, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 885 (2006). The panel sentenced PFC Moss to reduction to E-1, forfeiture of \$978.00 pay per month for twelve months, confinement for six months, and a bad-conduct discharge. (JA 16). The military judge credited PFC Moss with eighteen days of confinement against the sentence to confinement. (JA 87).

The convening authority approved the adjudged sentence. The convening authority credited PFC Moss with eighteen days of confinement against the sentence to confinement. (JA 17).

On January 17, 2013, the Army Court of Criminal Appeals [hereinafter Army Court] affirmed the findings and sentence. (JA 1). The Army Court mailed notice of its decision to PFC Moss. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel petitioned

this Court for review on March 18, 2013. On June 20, 2013, this Honorable Court granted PFC Moss' petition for review.

On July 22, 2013, the Final Brief on Behalf of Appellant was filed. On August 15, 2013, the government filed its response. On August 26, 2013, appellant's Reply Brief was filed. This Court held oral argument on the granted issues on September 18, 2013. On September 20, 2013, this Court specified the four issues.

### **Summary of Argument**

The decision to petition this Court belongs to the appellant. In this case, PFC Moss manifested her desire to seek review of her case at this Court when she elected to have counsel appointed to represent her at the Army Court. Under applicable rules of professional conduct and service regulations, appellate defense counsel had a continuing duty to represent PFC Moss at this Court. Finally, this case is distinct from *United States v. Schreck* since PFC Moss was not an escapee from confinement. Thus, this Court should not dismiss the petition with prejudice.

### **Statement of Facts**

On April 14, 2011, during pretrial preparation, trial defense counsel advised PFC Moss of her Post-Trial and Appellate Rights. (JA 176-80). This advisement was documented on a Post-Trial and Appellate Rights Form. (JA 176-80). The form



included a description of all her post-trial and appellate rights. Specifically, PFC Moss was advised that her case would be reviewed by the Army Court if she received a punitive discharge or confinement for more than a year at trial. (JA 177). She was further advised that she may petition this Court to review her case after the Army Court reviewed her case. (JA 177). Finally, PFC Moss was advised that she may waive or withdraw from appellate review. (JA 177).

Private First Class Moss exercised her right to post-trial review to the maximum extent permitted by the form. She elected to have her defense counsel submit clemency matters on her behalf, even if counsel could not contact her. (JA 177). Private First Class Moss also elected to have appellate defense counsel appointed to represent her before the Army Court of Criminal Appeals. (JA 179). The Post-Trial and Appellate Rights Form was silent as to a specific request for representation at this Court, however, the form does state, "I have the same rights to counsel before . . . [the Court of Appeals for the Armed Forces] as I have before the ACCA." (JA 177). Private First Class Moss signed and dated the form. (JA 180). Her defense counsel also signed and dated the form certifying that he had, "advised the accused . . . regarding . . . her post trial and appellate rights as forth above, that . . .

she received a copy . . . and that . . . she has personally made all the elections herein." (JA 180).

Private First Class Moss was arraigned on The Charge and its Specification on March 7, 2011. (JA 21). The military judge informed the parties that the case was docketed for April 29, 2011. (JA 21). Private First Class Moss was reported absent without leave by her unit on April 20, 2011. (JA 24). On April 29, 2011, the military judge held an Article 39(a), UCMJ, hearing and found that PFC Moss was voluntarily absent from the proceeding. (JA 24). The military judge entered a plea of not guilty and selected a forum of officer panel for PFC Moss. (JA 24). Trial was held on May 4-5, 2011, PFC Moss was absent from trial.

On August 22, 2011, trial defense counsel submitted clemency matters on behalf of PFC Moss pursuant to R.C.M. 1105 and 1106. (JA 125-26). On September 15, 2011, the convening authority took Action on PFC Moss' case approving the findings and sentence.

On October 27, 2011, the Clerk of the Court for Army Court issued a "Referral and Designation of Counsel" memorandum on behalf of the Judge Advocate General. (Supp. JA 1). The memorandum directed:

Pursuant to Article 70(c)(1), Uniform Code of Military Justice, the Chief, Defense Appellate Division, and such additional or other appellate counsel as he may assign,

shall represent that accused in these proceedings and in any further or related proceedings in the United States Court of Appeals for the Armed Forces.

Subsequently, the Chief of the Army Defense Appellate Division detailed first undersigned counsel to represent PFC Moss before the Army Court "and in any further or related proceedings in the United States Court of Appeals for the Armed Forces." (Supp. JA 1).

#### **Law**

"Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court-(1) when requested by the accused." Article 70(c), UCMJ.

"The attorney-client relationship exists between the accused and counsel designated to represent the accused as authorized by UCMJ, Art. 70." Army Reg. 27-10, Legal Services: Military Justice [hereinafter AR 27-10], Appendix C, para. C-3(a)(1)(3 October 2011)(Supp. JA 15-16). The regulation further states:

The duty of representation is established at the time of the appointment for the purpose of the appointment and the relationship remains in effect until-

(a) The accused terminates it.

(b) The counsel is relieved from active duty or duly assigned to other duties, or

(c) The representation ceases upon termination of the appellate processes under the UCMJ.

AR 27-10, Appendix C, para. C-3(a)(1)(a)-(c)(Supp. JA 15-16).

An accused "has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (quotations and citations omitted). Whether a petition is filed at this Court is the decision of the appellant. *United States v. Larnear*, 3 M.J. 76, 82 (C.M.A. 1977).

The Court of Appeals for the Armed Forces shall review the record in . . . all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review." UCMJ art. 67(a)(3). "The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals." Article 67(b), UCMJ.

Either the appellant or counsel for appellant may file a Petition for Grant of Review with this Court. Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces, Rule 20.

Article 67(b)(2) permits constructive service of a decision from a Court of Criminal Appeals, stating that the sixty-day period to petition this Court begins on,

the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused . . . , is deposited in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record. The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

Article 67(b)(2).

Army Regulation 27-26, Legal Services: Rules of Professional Conduct for Lawyers [hereinafter AR 27-26], Rule 1.2 (1 May 1992) states, "A lawyer shall abide by a client's decisions concerning the objectives of representation."

Army Regulation 27-26, Rule 1.16(b) states, "[A] lawyer may seek to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client."

### **Argument**

#### **I.**

**WHETHER THE DECISION TO APPEAL TO THIS COURT IS A PERSONAL DECISION OF THE APPELLANT, AND IF SO, IN WHAT MANNER MAY SUCH A DECISION BE MADE?**

#### **II.**

**WHETHER THERE IS ANY EVIDENCE IN THE RECORD THAT APPELLANT HAS AUTHORIZED AN APPEAL TO THIS COURT, AND IF THERE IS NO SUCH AUTHORIZATION, IS THERE NONETHELESS A**

**CONTINUING DUTY TO REPRESENT THE APPELLANT,  
AND IF SO, FROM WHERE DOES THIS DUTY DERIVE?<sup>1</sup>**

**1. The decision to appeal to this Court is a personal decision belonging to an appellant.**

The law is clear that the decision to take an appeal belongs to an appellant. *Nixon*, 543 U.S. at 187. Further, "it is the appellant's decision whether to take an appeal to this Court." *Larneard*, 3 M.J. at 82; see also *United States v. Rodriguez*, 67 M.J. 110, 115 (C.A.A.F. 2009) ("the option of whether to petition or not petition the court rests with the appellant"). Article 67(b), UCMJ, indicates that the appellant may petition this Court to review a decision from a Court of Criminal Appeals. Article 67(b)(2) permits service on *appellate counsel of record*, in this case, first undersigned counsel. The rules of Court authorize counsel of record to file a petition on an appellant's behalf. Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces, Rule 20.

An appellant's decision may be manifested in two ways. First, under Rule 20 of this Court's Rules of Practice and Procedure, an appellant may personally file a Petition for Grant of Review. Second, Rule 20 allows counsel for the appellant to petition this Court. By indicating on an appellate rights form, prior to the close of trial, that they wish to appeal their case, an appellant manifests their decision to seek appellate

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<sup>1</sup> Appellate Defense Counsel has consolidated their analysis of Specified Issues I and II as they are interrelated.

relief, including at this Court. See *Larneard*, 3 M.J. 76, 82 (C.M.A. 1977). Further an appellant may indicate their desire to petition this Court during initial contact with the Defense Appellate Division. Thus, in those situations, "the attorney is acting as the agent for the appellant pursuant to his client's instruction and authorization to pursue the appeal." *Id.*

**2. The record contains evidence that PFC Moss authorized an appeal to this Court**

In this case, PFC Moss requested the assignment of appellate defense counsel to represent her at the Army Court indicating that she wanted appellate review of her case. (JA 179). Private First Class Moss was advised that after the Army Court reviewed her case she could petition this Court to review her case. (JA 177). Private First Class Moss was also advised that she had the "same rights to counsel before . . . [this Court]" as she had before the Army Court. (JA 177). The form used to advise PFC Moss of her appellate rights was inartfully drafted, however, it is clear from her elections that she wished (1) to seek appellate relief and (2) she desired appointed counsel to assisted in that effort. (JA 175-80).

Despite the inartfully drafted advisement form, it must be inferred that PFC Moss intended for representation at this Court. Because she authorized her defense counsel to file clemency matters in her absence and then requested representation at the Army Court, it logically follows that she

wanted review by this Court. Her previous elections signal that she intended for her assigned counsel to seek relief on her case in all possible forums. After the Army Court, the next forum to seek relief is this Court.

The appellate rights form instructed PFC Moss that her case will automatically be reviewed by the Army Court if the punishment meets the jurisdictional threshold. (JA 177). Private First Class Moss was also advised that counsel would be appointed to represent her at the Army Court "if [she] so request[ed]." (JA 177). She was also advised that review by this Court may be possible and that she had "the same rights to counsel" as she had at the Army Court. (JA 177).

A soldier being advised of their appellate rights cannot be expected to differentiate between the Army Court and this Court. Nor is it reasonable for a soldier to understand that their election for representation is limited to the Army Court. On the contrary, the regulatory scheme established by the Secretary of the Army in AR 27-10 directs that once counsel is appointed, representation begins at the Army Court, and will continue until "termination of the appellate processes under the UCMJ." (Supp. JA 16). The appellate rights form specifically advised PFC Moss that she had the same rights to counsel at this Court as she did at the Army Court. Absent any indication that she did not want representation at this Court, the appellate rights form leaves



no conclusion but that she wanted representation at this Court and her appointed counsel to petition this Court. This conclusion is consistent with both Article 67(b)(2) and AR 27-10.

**3. Even if there is no evidence that PFC Moss authorized an appeal to this Court, detailed appellate defense counsel has a continuing duty to represent PFC Moss.**

Under Article 70, UCMJ, appellate defense counsel was assigned to represent PFC Moss on appeal at the Army Court. This is consistent with her election on her appellate rights form. (JA 179). Under AR 27-10, this appointment created an attorney-client relationship between appellate defense counsel and PFC Moss. AR 27-10, Appendix C, para. C-3(a). Once appointed as appellate defense counsel, the appellate counsel's duty to represent PFC Moss on appeal remains in effect until (1) PFC Moss terminates the attorney-client relationship; (2) counsel leaves active duty or is reassigned to other duties; or (3) when "[t]he representation ceases upon termination of the appellate processes under the UCMJ." *Id.* (emphasis added).

Appellate defense counsel represented PFC Moss at the Army Court by filing several assignments of error seeking relief for PFC Moss. The Army Court granted no relief in affirming the findings and sentence. (JA 1-9). Under AR 27-10, Appendix C, appellate defense counsel had a continuing duty to represent PFC Moss since PFC Moss did not terminate the relationship, counsel

was not reassigned to other duties, and the appellate processes under the UCMJ had not terminated.

The Judge Advocate General's Attorney-Client Guidelines in AR 27-10, Appendix C, direct that the duty of representation under Article 70, UCMJ, extends to all appellate processes under the UCMJ. Until PFC Moss indicates that she wants to terminate her appellate processes under the UCMJ, appellate defense counsel has a duty to continue representing her interests in furtherance of the attorney-client relationship.

This conclusion is consistent with the Army Rules of Professional Conduct for Lawyers. The comment to AR 27-26, Rule 1.16 states, "a lawyer appointed to represent a client shall continue such representation until relieved by competent authority." The comment to Rule 1.16 further states, "The lawyer has the option of seeking to withdraw if it can be accomplished without material adverse effect on the client."

Here, once appointed under Article 70, UCMJ, appellate defense counsel had a duty to continue with the appellate representation of PFC Moss until the relationship was terminated in accordance with AR 27-10, Appendix C-3, para. C-3. After the Army Court issued its decision, appellate counsel could not seek withdrawal since doing so could not "be accomplished without material adverse effect on the client's interests." AR 27-26, Comment to Rule 1.16. Withdrawal from representation would

terminate PFC Moss' appeals and would not be in furtherance of her intent to have appellate counsel seek relief for her, as indicated by her on the appellate rights form. In accordance with the Judge Advocate General's guidelines in AR 27-10, the rules of professional conduct, and advice from the Standards of Conduct Office, appellate defense counsel had an obligation to continue representation of PFC Moss at this Court and fulfill her desire to have counsel seek appellate relief on her behalf.

### III.

**IN CIRCUMSTANCES WHERE THE APPELLANT CANNOT BE LOCATED DURING THE TIME PERIOD AVAILABLE TO FILE A PETITION FOR GRANT OF REVIEW AT THIS COURT, WHAT IS THE RESPONSIBILITY OF APPELLATE DEFENSE COUNSEL IN THE CONTEXT OF THE STATUTORY TIME LIMIT IN ARTICLE 67, UCMJ, TO FILE AN APPEAL?**

An appellate defense counsel has an obligation to follow their client's wishes with regard to petitioning this Court. See *Larneard*, 3 M.J. at 81. If the appellant has made known their desire to petition this Court, then the appellate defense counsel "must accede to his wishes." *Id.* In cases where appellate defense counsel is unable to locate an appellant within the sixty-day statutory time limit to petition this Court, the appellate defense counsel has an obligation to file a petition on behalf of the appellant if that is the appellant's desire.

In *Larneard*, the Court recognized that it is not unusual for an appellant to serve their confinement and be released on appellate leave prior to their case reaching this Court. *Id.* at 82. When appellants are placed on appellate leave they may move and fail to update the military or their attorneys with current contact information. See *id.* at 78. Article 67, UCMJ, allows for constructive service of the decision of the Court of Criminal Appeals on the appointed appellate defense counsel. UCMJ, art. 67(b). In *Larneard*, the Court stated that if the appellant "cannot be located within the time provided in Article 67(c) of the Code, the attorney can and should proceed in accordance with the authority previously given by the accused and file such proceedings as may be necessary to protect the interests of his client." *Id.* at 82.

Once a Court of Criminal Appeals issues its decision on a case, the detailed appellate defense counsel is wise to exercise reasonable measures to contact the appellant using the last known address, phone number, and email address. However, failure to make contact with the appellant in the sixty-day period does not terminate the appellate process. In accordance with Army policy expressed in Appendix C of AR 27-10, if the client has previously indicated a desire to petition this Court, an appellate defense counsel must comply with that desire even if they cannot communicate with the appellant during the sixty-

day statutory period. See also *Larneard*, 3 M.J. at 82 ("If the accused evidences a desire to seek further relief, he can at that time authorize his attorney and all who may be associated with or substituted for him to take such action as may be necessary to protect his interests and his desire for further review if the decision of the Court of [Criminal Appeals] is adverse to him."). When the attorney files a petition on behalf of the appellant, "the attorney is acting as the agent for the appellant pursuant to his client's instruction and authorization to pursue the appeal." *Id.*

Under Article 67(b), UCMJ, the sixty-day limit to petition this Court after a decision by a Criminal Court of Appeals is a strict jurisdictional limit. See generally *Rodriguez*, 67 M.J. 110. Since the failure to file a petition with this Court within the sixty-day time period is fatal to an appellant's appeal, it is essential for an appellate defense counsel to make efforts to communicate with the appellant. However, if efforts at communication are unsuccessful, it is reasonable for the appellate defense counsel to follow the desires of an appellant and file a petition in order to pursue the goals of the representation. Once an appellant "instructs his counsel to pursue the appeal, that attorney can and should do all that he may ethically do in furtherance of his client's cause." *Larneard*, 3 M.J. at 82.

If appellate counsel is not able to communicate with an appellant within sixty days of a decision by a Court of Criminal Appeals and then is unable to reasonably rely on an appellant's previous indication that they want to petition this Court, it will operate to the detriment of the appellant and the military justice system. It is conceivable that, under these circumstances, many meritorious issues will never reach this Court. If these issues are not considered by this Court, then it not only deprives the appellant, whose case is terminated, but the military justice system is harmed as well. In enacting the UCMJ, Congress specifically chose to create a civilian Court of Appeals for the Armed Forces to review the decisions of the Courts of Criminal Appeal. UCMJ, Art. 67, 142. This Court should seek to exercise maximum oversight, as provided by law, over the military justice system.

The Court's prior granting of the petition in this case indicates the appeal has merit and that the Army Court's decision requires review. Dismissing PFC Moss' case at this late time would not only deprive PFC Moss of relief, but would also run afoul of the statutory scheme of review enacted by Congress. The entire system is advanced by appellate review of meritorious issues.

#### IV.

**SHOULD THIS CASE BE DISMISSED WITH PREJUDICE  
UNDER THE HOLDING IN UNITED STATES V.  
SCHRECK, 10 M.J. 226 (C.M.A. 1981)?**

In *United States v. Schreck*, appellate defense counsel filed a petition on behalf of Schreck who had escaped from confinement. 10 M.J. 226, 229 (C.M.A. 1981)[hereinafter *Schreck 2*]. The Court held that unless Schreck returned to military control within thirty days his petition would be dismissed with prejudice. *Id.* (citations omitted). The instant case raises a different situation than that in *Schreck 2*. Here, PFC Moss has not escaped from confinement. She was arraigned and then absented herself from the remainder of her trial without ever going into confinement.

The Court in *Schreck 2* relied upon *Estelle v. Dorrough*, which found, "dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American law." 420 U.S. 534, 537 (1970)(citations omitted). However, the Court in *Estelle* did not address the situation where an accused was tried in absentia.

The facts and law applicable in this case are distinct from those in *Estelle*. The Court in *Estelle* analyzed a Texas statute that required automatic dismissal of pending appeals of escaped felons unless they voluntarily surrendered within ten days of escape. *Estelle*, 420 U.S. at 535. There is no provision in the

UCMJ that allows for automatic dismissal of a pending appeal. Under Article 66, UCMJ, a Court of Criminal Appeals has a mandatory duty to review any trial resulting in a punitive discharge or confinement for more than one year. The Army Court automatically reviewed PFC Moss' case pursuant to its duties under Article 66, UCMJ, since she received a punitive discharge. Article 67(b)(2) allows for constructive service on appellants and for appellate counsel to petition on behalf of an appellant. At the time PFC Moss went absent, she did not have an appeal pending as she still had not been convicted or sentenced.

As the appeals process was initiated automatically pursuant to Article 66, UCMJ, the rule analyzed in *Estelle* is not dispositive to this case; neither is the Court's holding in *Schreck 2*. Since *Schreck 2* dealt with an escaped confinee, the holding is not applicable to PFC Moss' case. "If a defendant who has initially been present at trial later absents himself, he waives his right to be present during the rest of trial; but he does not forfeit his right to a fair trial. In the absence of any indication to the contrary, I conclude that similarly an accused who is absent without authority does not forfeit his right to petition for review." *United States v. Schreck*, 9 M.J. 217, 219 (C.M.A. 1980) (Everett, C.J., concurring) [hereinafter *Schreck 1*].



The facts of *Schreck 2* are not similar to the facts of PFC Moss' case. As Chief Judge Everett stated in *Schreck 1*, an accused who is absent at trial does not relinquish their ability to appeal to this Court when they go absent from trial. The application of *Schreck 2* should not be expanded to cases that do not involve escapees from confinement.

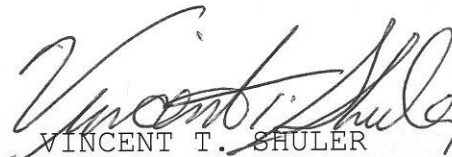
Dismissal of the petition in this case not only harms PFC Moss, it harms the entire military justice system. The meritorious issues raised in the granted issues are important to the military justice system. Because PFC Moss indicated her desire to have her appellate defense counsel seek appellate relief and the applicable Army regulations require appellate defense counsel to continue representation until the appellate processes are terminated under the UCMJ, dismissal under *Schreck 2* is not appropriate.

### Conclusion

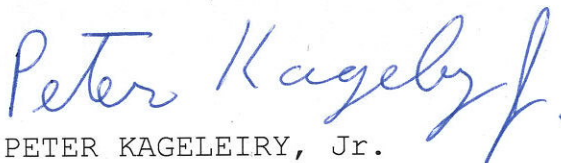
WHEREFORE, appellate defense counsel respectfully request that this Honorable Court not dismiss PFC Moss' case and instead address the granted issues.



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**CERTIFICATE OF COMPLIANCE WITH RULES 24(d)**

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 4,510 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 foregoing in the case of  
United States v. Moss, Crim. App. Dkt. No. 20110337, Dkt. No.  
13-0348/AR, was delivered to the Court and Government Appellate  
Division on October 4, 2013.



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