16 December 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED
v.	)	USCA Dkt. No. 17-0079/AF
Master Sergeant (E-7), PATRICK CARTER, USAF, *Appellee*.	)	Crim. App. No. 38708

APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED
v.	)	
	)	USCA Dkt. No. 17-0079/AF
Master Sergeant (E-7), PATRICK CARTER, USAF, *Appellee.*	)	Crim. App. No. 38708

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED BY FINDING THAT THE CONVENING AUTHORITY EXCEEDED THE SCOPE OF AFCCA'S REMAND WHEN HE REFERRED APPELLANT'S CASE TO AN "OTHER" TRIAL UNDER R.C.M. 1107(e)(2) FOLLOWING AFCCA'S ORIGINAL REMAND DECISION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE & STATEMENT OF FACTS

Appellee was convicted, contrary to his pleas, at a general court-martial composed of officer members on 16-26 February 2010 of one specification of

taking indecent liberties with a child under the age of 16, one specification of child endangerment, and one specification of committing indecent acts with a child under the age of 16, in violation of Articles 120 and 134, UCMJ. The convening authority disapproved the finding of guilty with respect to taking indecent liberties with a child under the age of 16, and approved the remaining findings. The approved sentence consisted of a dishonorable discharge, 3 years of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On 4 January 2013, the Air Force Court of Criminal Appeals (AFCCA) issued an opinion setting aside and dismissing Appellee's remaining convictions for failure to state an offense. United States v. Carter, ACM 37715 (A.F. Ct. Crim. App. 4 January 2013) (unpub. op.) (JA at 236-41). On 2 August 2013, this Court affirmed AFCCA's opinion, and on 29 August 2013, this Court denied reconsideration. The record was then returned to the convening authority.[1]

On 10 June 2014 and 21-24 July 2014, Appellee was tried at an "other" trial by a military judge sitting alone at a general court-martial. Appellee was convicted, contrary to his pleas, of one specification of child endangerment and

[1] There was some confusion about the status of Appellee's case upon the expiration of the time to file a petition for review with the United States Supreme Court, which Appellee will certainly try to use as a shield. The confusion was undoubtedly caused because "appellate courts have used varied language in describing what can happen after an appellant is found guilty of one or more specifications that are later found to have failed to state an offense." United States v. Carter, ACM 38708 at *11 (A.F. Ct. Crim. App. 21 July 2016) (unpub. op.) (JA at 1-18). What is controlling in Appellee's case, though, is that ultimately the convening authority, within the scope of AFCCA's general remand, appropriately used his authority under R.C.M. 1107(e)(2) to refer Appellee's crimes to an "other" trial.

one specification of indecent acts with a child under the age of 16, both in violation of Article 134, UCMJ. The approved sentence consisted of confinement for 40 months, total forfeiture of all pay and allowances, and reduction to the grade of E-1.[2]

On his second appeal to AFCCA, Appellee raised five issues, including whether the convening authority's referral of the Article 134 charge exceeded the scope of AFCCA's remand.[3] On 21 July 2016, AFCCA, in a 2 to 1 decision, determined that the convening authority had exceeded the scope of what was permitted by the original decision. Specifically, one judge opined that the "other" trial was a type of rehearing and not authorized. United States v. Carter, ACM 38708 at *16 (A.F. Ct. Crim. App. 21 July 2016) (unpub. op.) (JA at 1-18). The other two judges disagreed and found that there was a distinction between a "rehearing" and an "other" trial, and that what the convening authority ordered was an "other" trial. Carter, ACM 38708, unpub. op. at 13 and 16. However, one of those judges determined that although the convening authority ordered an "other" trial under R.C.M. 1107(e)(2), the convening authority did not have the power to

[2] R.C.M. 810(d) provides "offenses on which a[n]…other trial has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial." Appellee has referenced throughout his previous pleadings in this case Article 63, UCMJ, which provides for the same principle in relation to rehearings. This case was not a rehearing.

[3] This was the first time Appellee raised this issue.

authorize an "other" trial since an "other" trial was not specifically authorized in AFCCA's remand. Carter, ACM 38708, unpub. op. at 14.

On 20 August 2016, the United States filed a motion for reconsideration and reconsideration en banc. On 19 September 2016, AFCCA denied the government's motion for reconsideration by a vote of 3 to 0, and separately denied the government's motion for reconsideration en banc by a vote of four to four.[4]

SUMMARY OF THE ARGUMENT

R.C.M. 1107(e)(2) unambiguously provides that "[t]he convening or higher authority may order an 'other' trial if the original proceedings were invalid because of lack or jurisdiction or failure of a specification to state an offense." Appellee was originally tried and convicted under Article 134 of one specification of child endangerment, and one specification of committing indecent acts with a child under the age of 16. However, his conviction was set aside and dismissed because the terminal element of Article 134 did not appear on the charge sheet in accordance with United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011) and United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012). There is no question that

[4] The denial of the motion for reconsideration appeared to be based on a concern over the composition of the panel and not necessarily because of the merits of the issue. However, the United States does not challenge this on appeal as the true issue is whether the convening authority exceeded the scope of the remand authority by authorizing an "other" trial as provided in R.C.M. 1107(e)(2).

Appellee's first conviction was dismissed because the charge sheet failed to state an offense.

In its 4 January 2013 opinion, AFCCA was silent in its decretal paragraph regarding a rehearing, re-prosecution, or any subsequent proceedings, although in the body of its opinion it clearly suggested and anticipated possible later proceedings. AFCCA simply returned the record of trial "to the Judge Advocate General for remand to an appropriate convening authority." This was a remand order with a general mandate. *See* United States v. Campbell, 168 F.3d 263, 268 (6th Cir. 1999), *cited by* United States v. McMurrin, 72 M.J. 697, 703 (N.M. Ct. Crim. App. 2013), *review denied*, 73 M.J. 243 (C.A.A.F. 2014), *cert. denied* 135 S.Ct. 382 (2014). Therefore, the convening authority was not limited by AFCCA to "issue a final court-martial order reflecting that the charges and specifications were dismissed." Carter, ACM 38708, unpub. op. at 14. Indeed, a lower authority on remand is "required to examine the appellate court's decision and determine what further proceedings would be proper and consistent with the opinion." American Jurisprudence, 2nd Edition, 5 Am Jur 2d Appellate Review § 737, *quoted in* McMurrin, 72 M.J. at 703.

"[T]he parties and military judge at the second trial agreed that [AFCCA] had dismissed the specifications and that this second proceeding constituted an "other" trial." Carter, ACM 38708, unpub. op. at 12. As noted by the majority

opinion, "the convening authority cited to R.C.M. 1107(e)(2)" in authorizing the second trial. Id., at 13.[5] Appellee's second trial was not subject to, or expressly prohibited by, the terms of the remand. "The second court-martial was an independent *de novo* proceeding, not a continuation of his initial trial." Carter, ACM 38708, unpub. op. at 17, Brown, J., dissenting, *citing* Chapman v. United States, 75 M.J. 598 (A.F. Ct. Crim. App. 2016).

Therefore, the convening authority did not exceed the scope of the general remand and was authorized to convene an "other" trial. AFCCA wrongly overturned the second conviction and incorrectly dismissed the charge and specifications with prejudice.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED BY FINDING THAT THE CONVENING AUTHORITY EXCEEDED THE SCOPE OF AFCCA'S GENERAL REMAND. THIS WAS AN "OTHER" TRIAL CONVENED UNDER R.C.M. 1107(e)(2) INVOLVING SPECIFICATIONS THAT ORIGINALLY FAILED TO STATE OFFENSES.

[5] The majority opinion made a finding that the "order states the new trial is 'pursuant to R.C.M. 1107(f)(2).' This appears to be a typographical error as that provision pertains to modifying initial actions following a court-martial. We conclude the convening authority meant to reference…R.C.M. 1107(e)(2) which is the provision relating to ordering an 'other' trial." Carter, ACM 38708, unpub. op. at 5, fn. 11. *See also* General Court Martial Order No. 19, 21 March 2015. (JA at 223.)

Standard of Review

"Jurisdiction is the power of a court to try and determine a case and to render a valid judgment. Jurisdiction is a legal question which [this court] review[s] *de novo*." United States v. Nealy, 71 M.J. 73, 75 (C.A.A.F. 2012).

Law and Analysis

Following a trial, a convening authority "loses jurisdiction of the case once he has published his action or has officially notified the accused thereof." United States v. Montesinos, 28 M.J. 38, 42 (C.A.A.F. 1989). After action, "a [convening authority]…can only take further action through remand." McMurrin, 72 M.J. at 701-02, *citing* United States v. Hernandez, 33 M.J. 145, 148 (C.M.A. 1981). And, that further action is only authorized "to the extent permitted by the terms of [the remand's] mandate." McMurrin, 72 M.J. at 702, *citing* United States v. Riley, 55 M.J. 185, 188 (C.A.A.F. 2001.)

> While not articulated in military jurisprudence, federal appellate courts have long recognized two types of mandates: general and limited. *See, e.g.*, Campbell, 168 F.3d 263 at 265 (limited remands "explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate. . . . [whereas] [g]eneral remands, in contrast, give district courts authority to address all matters so long as remaining consistent with the remand.") (citation omitted).
>
> In the absence of any express prohibition, "the remand order is presumptively a general one." United States v. Moore, 131 F.3d 595, 598 (6th Cir. 1997); *see also* 5

> AM. JUR. 2d Appellate Review § 737 (2013) (In the absence of specific instructions, "[a] mandate does not generally preclude further proceedings not inconsistent with the mandate"). By contrast, a limited mandate "must convey clearly the intent to limit the scope of the [lower court or convening authority's] review. . . . [t]he language used to limit the remand should be, in effect, unmistakable." Campbell, 168 F.3d at 268.

McMurrin, 72 M.J. at 703. Moreover, federal appellate courts presume a dismissal is without prejudice unless there is a specific indication that dismissal is with prejudice. *See* United States v. Stoker, 522 F.2d 576, 580 (10th Cir. 1975.) In considering this principle, a dismissal with prejudice is typically reserved for situations where the government has engaged in misconduct. For example, in federal cases, noncompliance with the Speedy Trial Act, 18 U.S.C.S. § 3162(a)(2), may, but not necessarily will, result in dismissal with prejudice. United States v. Taylor, 487 U.S. 326 (1988). In this Court's jurisprudence, dismissal with prejudice is a "drastic remedy" and requires judges to consider alternative remedies. United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004). Dismissal with prejudice has been reserved for blatant discovery violations (United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015); unlawful command influence (United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013); Gore, 60 M.J. at 178); and prosecutorial misconduct (United States v. Frey, 73 M.J. 245, 249 (C.A.A.F. 2014).

This case was originally dismissed not because of any misfeasance by the government, but because of a pleading error which was unforeseen until a 3-2

majority of this Court reversed precedent in interpreting a new requirement that the terminal element needed to be included on the charge sheet for Article 134 specifications. Fosler, 70 M.J. at 226. This was not a case in which the drastic remedy of dismissal with prejudice was required to address an error that could not be rendered harmless. *Cf.* United States v. Lewis, 63 M.J. 405, 416 (C.A.A.F. 2006).

In this case, AFCCA's decretal paragraph in ACM 37715 stated:

> Having considered the record in light of Humphries, the findings of guilty to Charge III and its specification and the sentence are set aside and dismissed. The record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority.

Carter, ACM 37715, unpub. op. at 5-6. Within the body of its original opinion, AFCCA clearly suggested and anticipated possible subsequent proceedings when it declined to grant relief for any post-trial delay.

> Considering the totality of the circumstances, including the serious nature of the alleged offenses, we find that any relief we might afford to the appellant at this time would not be reasonable and would be disproportionate to any harm the appellant experienced as a result of the delay. Prospectively limiting the characterization of a potential punitive discharge, restricting the amount of confinement, or otherwise limiting the possible sentence **[Appellee] might receive at a possible rehearing** would amount to an underserved windfall and is neither reasonable nor warranted under the circumstances of this case.

Id., unpub. op. at 5 (emphasis added). Even the majority opinion in the current phase of this case recognized that its original opinion "was not a model of clarity" because it found the specifications failed to state an offense, did not find the original proceedings to be invalid, and did reference a possible rehearing. Carter, ACM 38708, unpub. op. at 6, n. 16.

All three AFCCA judges on the panel in this case, ACM 38708, agreed that, of the options available to it under Article 66(d), this Court in its decision in ACM 37715 chose dismissal rather than rehearing and, having done so, no rehearing was authorized. Carter, ACM 38708, unpub. op. at 12. Frankly, the United States and the convening authority reached the same conclusion, which is precisely why the convening exercised his authority to convene an "other" trial permitted by the MCM. (JA at 223.)

The authorities cited in footnote 40 of the majority opinion, as well as other cases have long distinguished between a rehearing as a continuation of the original proceeding and an "other" trial as a trial *de novo*. *See e.g.* United States v. Padilla, 5 C.M.R. 31, 36-38 (C.M.A. 1952) (distinguishing among a "new trial," a "rehearing," and "another trial" and concluding that the proceeding under review was "another trial"). *See also* United States v. Reid, 46 M.J. 236, 240 (C.A.A.F. 1997) (recognizing the distinction between a rehearing and an "other trial" in its holding that "[t]he decision of the United States Army Court of Criminal Appeals

authorizing an 'other trial' and a rehearing on sentence is affirmed"); United States v. Ellison, 40 C.M.R. 726, 729-30 (A.B.R. 1969) (discussing at length "the complete conceptual distinction" between a rehearing and an "other trial" and noting the provision for an "other" trial as a necessary supplement to Article 66(d), UCMJ).

Furthermore, since 1951 the provisions in the Manual for Courts-Martial have treated new trials, other trials, and rehearings as separate and distinct types of proceedings. *See* Padilla, 5 C.M.R. at 36-37 (discussing authorities applicable to new trials, rehearings, and other trials in the Manual as it existed at that time). See also the current Rules for Courts-Martial and corresponding discussion and the Military Rule of Evidence cited in footnote 40 which reference as separate proceedings a new trial, an other trial, and a rehearing, to wit: R.C.M. 810(a)(1); R.C.M. 810(b)(3); R.C.M. 810(c); R.C.M. 810(d)(1); R.C.M. 103(2); R.C.M. 304(g), Discussion; R.C.M. 502(e)(2)(E); R.C.M. 503(a), Discussion; R.C.M. 912(f)(1)(J); R.C.M. 1103(b); R.C.M. 1104(e); R.C.M. 1208(b); and Mil. R. Evid. 301(d).

The idea that AFCCA's election under Article 66(d) to dismiss the charges prohibited the convening authority from ordering an "other" trial is inconsistent with the treatment of such proceedings by other service Courts of Criminal Appeals. *Compare* Carter, ACM 38708, unpub. op. at 15, *with* Ellison, 40 C.M.R.

at 729-30 (lengthy discussion distinguishing rehearing from other trial and characterizing the "other trial" as a necessary supplement to Article 66(d)), *and* McMurrin, 72 M.J. at 702 (Article 66(d), UCMJ provides two options, dismissal or order rehearing, when setting aside guilty findings and sentence, and R.C.M. 1107(e)(2) provides convening authority with third option, ordering an "other trial," when the original proceedings are invalid due to lack of jurisdiction or failure to state an offense).

Accordingly, the convening authority's referral of a charge and specifications to an "other" trial pursuant to the authority granted to him in R.C.M. 1107(e)(2) was proper and consistent with AFCCA's general mandate and the MCM. "[T]he parties and military judge at the second trial agreed that [AFCCA] had dismissed the specifications and that this second proceeding constituted an "other" trial." Carter, ACM 38708, unpub. op. at 12. Indeed, the civilian paralegal from the military justice division testified that this was an "other" trial during a Motion to Dismiss for a violation of speedy trial under R.C.M. 707. (JA at 120; *see also* App. Ex. VII, JA at 218.) The trial counsel asserted this was an "other" trial and not a rehearing during the same motion. (JA at 129.) The trial defense counsel stated:

> The definition of an "other" trial means "another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense." That is exactly why we're

> here today, Sir. AFCCA has stated per Humphries and Fosler that the Article 134 charges failed to state an offense, therefore the charges were dismissed for failure to state an offense and you can see that in their actual ruling…Therefore, that makes this case in and of itself an "other" trial…

(JA at 131.) There is simply no question that this was an "other" trial. Appellant clearly conceded at trial that his case was an "other" trial and should not be heard to complain that it was anything else.

In the absence of specific instructions, a remand order is presumptively a general mandate.[6] *See* United States v. Moore, 131 F.3d 595, 597-98 (6th Cir. 1997) (citing United States v. Jennings, 83 F.3d 145 (6th Cir. 1996); United States v. Moored, 38 F.3d 1419, 1422 (6th Cir. 1994); United States v. Young, 66 F.3d 830, 835-36 (7th Cir. 1995); United States v. Caterino, 29 F.3d 1390, 1394-95 (9th Cir. 1994); United States v. Cornelius, 968 F.2d 703, 705-06 (8th Cir. 1992)), *quoted in* McMurrin, 72 M.J. at 703[7]. As summarized in American Jurisprudence, 2nd Edition:

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[6] "[T]o impose a limited remand, an appellate court must sufficiently outline the procedure [to be followed below] . . . . The language used to limit the remand should be, in effect, unmistakable." Campbell, 168 F.3d at 268, *quoted and applied in* McMurrin, 72 M.J. at 703.

[7] Both this case and the McMurrin case involve the question of under what circumstances a convening authority may re-prosecute a charge that was previously dismissed by an appellate court. In McMurrin, the convening authority re-prosecuted the charge pursuant to R.C.M. 1107(e)(1)(D), under which a convening authority can refer additional charges for trial together with charges as to which a rehearing has been directed. McMurrin, 72 M.J. at 700. In this case, the convening authority re-prosecuted the charge pursuant to R.C.M. 1107(e)(2). The pertinent issues in both cases are the scope of the appellate court's mandate and the mandate's impact on

> A mandate does not generally preclude further proceedings not inconsistent with the mandate; thus, the lower court's actions after the mandate is issued need not be specifically mentioned in the opinion of the appellate court, but only need be consistent with it.
>
> Where the remanding court does not give specific instructions, the trial court on remand is required to examine the appellate court's decision and determine what further proceedings would be proper and consistent with the opinion.

5 Am Jur 2d Appellate Review § 737, *quoted in part in* McMurrin, 72 M.J. at 703.

The principles summarized in the above section of American Jurisprudence have been articulated and applied in our courts. In United States v. Kepperling, this Court's predecessor held that, on remand, the trial forum is bound to comply with the mandate of the appellate authority. United States v. Kepperling, 29 C.M.R. 96 (C.M.A. 1960). The same principle applies when a service Court of Criminal Appeals remands a case to a convening authority. United States v. Montesinos, 28 M.J. 38, 44 (C.A.A.F. 1989).

While a "mandate is controlling as to matters within its compass," however, the lower court or military authority is "free as to other issues" not addressed by the mandate. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168 (1939), *quoted and applied in* McMurrin, 72 M.J. at 702. *See also* Montesinos, 28 M.J. at 43 (convening authority had the power to take action authorized by Manual for

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the authority of the convening authority. *Compare* McMurrin, 72 M.J. at 702, *with* Carter, ACM 38708, unpub. op. at 4 and 13-14.

Courts-Martial unless specifically forbidden to do so by the express terms of the remand.)

To determine the scope of the mandate in the remand, it is appropriate to consider the body of the remanding court's opinion as well as the decretal paragraph. *See* In re Sanford Fork & Tool Co., 160 U.S. 247, 256 (1895). *See also*, McMurrin, 72 M.J. at 703 (quoting and applying In re Sanford Fork & Tool Co., *supra*) and the cases cited therein, to wit: United States v. Jordan, 35 M.J. 856, 861 (N.M.C.M.R. 1992), *aff'd*, 38 M.J. 346 (C.M.A. 1993); United States v. Barnes, 660 F.3d 1000, 1006 (7th Cir. 2011); United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir. 2001); and United States v. Kikumura, 947 F.2d 72, 76 (3d Cir. 1991).

As recited above, AFCCA's decretal paragraph in ACM 37715 was silent regarding re-prosecution or any subsequent trial proceedings. In considering the body of AFCCA's original opinion, however, it is quite clear that AFCCA actually anticipated possible re-prosecution, although it erroneously referred to such possible subsequent proceeding as a "rehearing" rather than an "other" trial since it had decided to dismiss the charge and its specifications rather than order a rehearing under Article 66(d), UCMJ. Carter, ACM 37715, unpub. op. at 5; Carter, ACM 38708, unpub. op. at 6 n.16.

Moreover, AFCCA and this Court routinely authorized rehearings in other similarly situated cases when applying Fosler and Humphries. *See* United States v. Hudson, 72 M.J. 464 (Summary Disposition Order C.A.A.F. 2013), which was another child sexual abuse case like Appellee's with a Fosler and Humphries pleading error in which this Court dismissed an Article 134 specification for failing to state an offense: "The decision of [AFCCA] is reversed. The findings of guilty to the Charge and Specification 2 thereunder and the sentence are set aside. The record is returned to the Judge Advocate General of the Air Force. A rehearing on the affected charge and specification is authorized." AFCCA should have done in Appellee's case exactly like this Court did in Hudson. But AFCCA's mistake in its original decision in Appellee's case in no way divested the convening authority of his clearly expressed power in the MCM to convene an "other" trial.

Based on the facts of this case, there was no prejudice to a re-prosecution of Appellee based solely on a simple failure to state an offense issue that was a result of a change in the law and that Appellee never complained about at trial. While Appellee would naturally desire a windfall benefit based upon a legal error in AFCCA's original decision, such a claim does not equate to cognizable prejudice, and it does not divest the convening authority of his power expressly provided in the MCM.

CONCLUSION

AFCCA dismissed the charge and specifications for failure to state an offense, and issued a nonspecific remand with a general mandate in its decretal paragraph of ACM 37715. As the charge was dismissed, a rehearing was not possible under Article 66(d). This is not a situation where the convening authority acted contrary to the Court of Criminal Appeals; the convening authority referred the charge and specifications to an "other" trial as permitted by R.C.M. 1107(e)(2). The conclusion by the majority at AFCCA misapplied the precedent from the United States Supreme Court, this Court, and the treatment of this issue by other service Courts of Criminal Appeals, and is inconsistent with those opinions as detailed above.

WHEREFORE the United States respectfully requests that this Honorable Court reverse the decision of the Air Force Court of Criminal Appeals, and remand the case to AFCCA for completion of its Article 66(c) review.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 16 December 2016.

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/s/_____

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