19 May 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED
v.	)	Crim. App. No. ACM 37838
Lieutenant Colonel (O-5) STEVEN S. MORITA, USAF *Appellee.*	)	USCA Dkt. No. 14-5007/AF

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,* v. Lieutenant Colonel (O-5) STEVEN S. MORITA, USAF, *Appellee.*	))))))))	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUE CERTIFIED USCA Dkt. No. 14-5007/AF Crim. App. No. ACM 37838

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

ISSUE CERTIFIED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT FOUND THE COURT-MARTIAL LACKED SUBJECT MATTER JURISDICTION AND WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT THE GOVERNMENT'S MOTION TO SUBMIT DOCUMENTS.

STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

On 14, 27, 28, 30 September and 1-3 October 2010, Appellee was tried at a general court-martial by a panel of officer members at Travis AFB, CA. Contrary to his pleas, Appellee was found guilty of seven specifications alleging violations of Article 123 (Forgery), one specification alleging a violation of Article 121 (Larceny), and one specification alleging a

violation of Article 132 (Frauds against the United States). Appellee was sentenced to dismissal, confinement for twelve months, and a $75,000 fine. (R. at 1517.) On 26 January 2011, the convening authority approved the sentence as adjudged.

This case was docketed with the Air Force Court of Criminal Appeals (AFCCA) on or about 10 February 2011. On 7 May 2012, Appellee filed his Assignments of Error. On 11 July 2012, the Government filed its Answer to the Assignments of Error. On 23 July 2012, Appellee filed a Reply. On 1 August 2013, AFCCA ordered oral argument, scheduled for 11 September 2013. Oral argument was continued until 15 November 2013 and the Government filed a supplemental brief on 26 September 2013. Appellee filed a reply to the supplemental brief on 17 October 2013. The Government responded to the reply brief on 24 October 2013.

On 10 January 2014, AFCCA issued its published decision in this case. *See* United States v. Morita, 73 M.J. 548 (A.F. Ct. Crim. App. 2014). In its decision, AFCCA found that the trial court lacked subject matter jurisdiction over some of Appellee's crimes and refused to consider a Government motion to attach Air Force Forms 938 and Air Force Repository Printouts (pay records). Id. at 557. This issue was certified to this Honorable Court on 22 April 2014.

STATEMENT OF FACTS

The facts necessary for disposition of this case are set

forth in the argument below.

SUMMARY OF ARGUMENT

Appellee triggered the Article 2(c), UCMJ, jurisdiction test as a person "serving with the armed forces" during the charged timeframe for all offenses not falling under Article 2(a), UCMJ. This is established by the following facts: (1) on the dates of the charged offenses, Appellee was a member of the Air Force Reserve component; (2) he performed active tours and reserve training pursuant to military travel orders, albeit a portion of the military travel orders were forged by Appellee; (3) the military travel orders were issued for the purpose of performing active duty or IDTs; (4) he engaged in official military travel to purportedly perform military duties at various TDY locations despite Appellee claiming expenses for unofficial, non-reimbursable travel; (5) he received military pay and allowances pursuant to military orders, and he was reimbursed for his travel expenses by the armed forces; (6) and he received military service credit in the form of retirement points for his military service dates.

AFCCA incorrectly reasoned that "[t]he mere fact the [Appellee's] offenses were aimed at the military does not confer jurisdiction. . . ." Morita, 73 M.J. at 561. Appellee was able to commit his crimes **because** of his status as a reserve military officer. Without his reserve officer military status and

assignment to the Health Services Office, Appellee would not have had the access or opportunity to commit these crimes against the Air Force. Furthermore, this Court can be assured that such a ruling would not open the floodgates of jurisdiction over reservists. This case represents a fact pattern where the reserve military officer used his military status and, specifically, his unit assignment and responsibilities as criminal tools. Furthermore, a rule where reservists can be prosecuted by the military for forgeries on official Air Force documents filled out as a necessary part of reserve duties is not confusing or onerous.

Appellee also meets the four part test of Article 2(c), UCMJ. It is uncontroverted that Appellee meets the first and second element.[1]

Regarding the third prong, i.e. receiving military pay, even when not on active duty or IDT orders, Appellee received base pay, basic allowance for subsistence (BAS), and basic allowance for housing (BAH) overlapping with acts of forgery of documents, larceny, or forged signatures. Appellee was

[1] Appellee voluntarily submitted to military authority. The evidence at trial established that Appellee was criminally responsible for forging his supervisors' signatures and initials on official documents to procure military orders; authorization for "official" travel; military pay and allowances; and travel expenses. These acts are conclusive evidence of Appellee's subjective intent to voluntarily submit to military authority. The evidence also clearly demonstrated Appellee met the mental and minimum age qualifications. Finally, Appellee's record of military service did not reflect an issue with the requisite mental qualifications.

receiving military pay on the date of nine documented forgery and forged signature occurrences, and the Government introduced voluminous records proving that Appellee received pay and allowances resulting from his fraudulent scheme. In total, the fraudulent vouchers paid out to Appellee amounted to approximately $160,000, covering the dates of his active service or IDTs, containing 300 plus forged signatures, and 180 forged initials. Moreover, Appellee's duties are inseparably intertwined with his criminal acts. This complicated long-term fraudulent scheme is a far cry from "an act merely related to his reserve duties." Morita, 73 M.J. at 562. Notably, Appellee did not sign these documents in a civilian status, i.e., "Mister," but as a military officer. As such, his forgery charge and specifications, the larceny charge and specification, and Appellee's well-earned sentence should be affirmed in its entirety.[2]

ARGUMENT

BECAUSE THE APPELLEE RELIED ON HIS RANK AND POSITION IN COMMITTING HIS CRIMES, THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING A LACK OF SUBJECT MATTER JURISDICTION. ADDITIONALLY, THE AIR FORCE COURT ERRED WHEN IT REFUSED TO CONSIDER DOCUMENTS IT REQUESTED THE GOVERNMENT PROVIDE.

Standard of Review

[2] As the military judge merged Charge I and the additional Charge for sentencing, the dismissal of the additional Charge has no effect on Appellee's sentencing. (R. at 1452.)

Whether a court-martial had subject matter and personal jurisdiction over an accused is a question of law reviewed de novo. United States v. Melandson, 53 M.J. 1, 2 (C.A.A.F. 2000). The burden is placed on the government to establish jurisdiction by a preponderance of the evidence. United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002).

Law and Analysis

A. The Air Force had subject matter jurisdiction over Appellee.

R.C.M. 201(b) specifies the following criteria to be subject to court-martial jurisdiction:

> (4) The accused must be a person subject to court-martial jurisdiction; and
>
> (5) The offense must be subject to court-martial jurisdiction.

"Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the [UCMJ]." United States v. Phillips, 58 M.J. 217, 219 (C.A.A.F. 2003) (citations omitted). "Status in the armed forces for purposes of court-martial jurisdiction is generally governed by Article 2 [of the UCMJ]." Id. (citations omitted). Article 2(a)(1) states:

> (a) The following persons are subject to this chapter:
>
> (1) Members of a regular component of the armed forces, . . . and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces,

> from the dates when they are required by the terms of the call or order to obey it.
>
> . . .
>
> (3) Members of a reserve component while on inactive-duty training. . .

As evidenced by the numerous AF IMTs 938 "Request and Authorization for Active Duty Training/Active Duty Tour" and AF Forms 40A, Record of Individual Inactive Duty Training, introduced at trial and by motion to AFCCA, Appellee was on orders on active duty or inactive duty training during a significant portion of his misconduct.

Specifically, Appellee was on orders during the time frames listed in the following table:

Order Number	Type	Dates	Number of Days
D-01567	Active duty tour (ADT)	10/30/2005 - 11/03/2005	5
D-03934	Manpower Authorization (MPA)	11/14/2005 - 03/13/2006	120
D-14112	ADT	04/10/2006 - 04/21/2006	12
D-06507	MPA	12/01/2006 - 04/11/2007	132
D-04795	ADT	4/23/2007 - 05/04/2007	12
D-16936	MPA	5/5/2007 - 06/03/2007	30
D-20166	MPA	06/04/2007 - 08/03/2007	61
D-28796	ADT	9/10/2007 - 09/12/2007	3
D-05114	ADT	01/28/2008 - 02/08/2008	12
D-12114	MPA	03/10/2008 - 03/14/2008	5
D-12111	MPA	03/17/2008 - 03/21/2008	5
D-26325	ADT	10/20/2008 - 10/31/2008	12

Article 2(c), UCMJ, provides that:

> Notwithstanding any other provision of law, a person serving with an armed force who:
>
> (1) submitted voluntarily to military

> authority;
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

United States v. Fry, 70 M.J. 465, 468-69 (C.A.A.F. 2012) (citing Article 2(c), UCMJ) (emphasis added).

Courts have generally recognized that the "notwithstanding" language is a clear statement of law indicating the obvious intent of the drafters to supersede all other laws. Id. (citation omitted). The practical effect of the "notwithstanding" clause is that courts-martial need not concern themselves with the legal effect of other "clause[s] in . . . statute[s], contract[s], or other legal instrument[s]," when deciding whether jurisdiction exists. Id.

Article 2(c) was added to the UCMJ in 1979 in the Department of Defense Authorization Act. Phillips, 58 M.J. at 219. The legislative history indicates that the amendment was primarily enacted to ensure that court-martial jurisdiction would not be defeated by assertions that military status was tainted by recruiter misconduct, and also makes clear that the

four-part test for active service applies to circumstances not involving defective enlistments. Id. (emphasis added). In describing the scope of the legislation, the legislative history observed:

> The new subsection is not intended to affect reservists not performing active service or civilians. It is intended only to reach those persons whose intent it is to perform as members of the active armed forces and who met the four statutory requirements . . . . An individual comes within new Subsection (c) whenever he meets the requisite four-part test regardless of other of other regulatory or statutory disqualification.

Id. at 219-20 (citing S. Rep. No. 96-197, at 122-23, U.S. Code Cong. & Admin. News 1979, at 1828)(emphasis added).

The statute, by its express terms, establishes a specific analytical framework. First, the person must be "serving with an armed force" at the pertinent point in time. Id. The phrase "serving with" an armed force has been used to describe persons who have a close relationship to the armed forces without the formalities of a military enlistment or commission. Id. The concept is dependent upon a case-specific analysis of the facts and circumstances of the individual's particular relationship with the military, and means a relationship that is more direct than simply accompanying the armed forces in the field. Id. (citations omitted).

Second, the statute provides that a person serving with the

armed forces also must meet the four-part test of Article 2(c), UCMJ.

Finally, if the four-part test is satisfied, the individual retains status as a person in the "active service" until released under applicable laws and regulations. Id.

1. Personal jurisdiction existed over Appellee during the disciplinary proceedings.

Personal jurisdiction was conclusively established by the substantial documentation attached to the government's response to the defense's motion to dismiss for lack of jurisdiction. (App. Ex. X.) On 29 May 2009, the Secretary of the Air Force (SECAF) approved Appellee's recall to active duty for disciplinary action. (App. Ex. X at Atch. 2.) On 14 July 2009, the general court-martial convening authority ordered Appellee on to active duty via Special Order AE-0011 for the purpose of preferring charges. (Id. at Atch. 5.) On 24 September 2009, the general court-martial convening authority again recalled Appellee to active duty via Special Order AE-0013 for the purpose of conducting the Article 32 hearing. (Id. at Atch. 6.) On 13 November 2009, Appellee was recalled to active duty via Special Order AE-0002 for the purpose of preferring an additional charge. (Id. at Atch. 7.) On 10 December 2009, Appellee was recalled to active duty via Special Order AE-0003 for the purpose of receipting for the referral of charges. (Id.

at Atch 8.) On 14 September 2010, Appellee was recalled to active duty via Special Order AB-0027 for the purpose of conducting an Article 39(a), UCMJ, hearing. Finally, Appellee was recalled to active duty from 25 September until 4 October 2010 to prosecute him by general court-martial. (Id. at Atch 11.)

Article 2(d), UCMJ, provides for the recall of reserve personnel for purposes of disciplinary action. Here, the general court-martial convening authority lawfully ordered Appellee to active duty consistent with approval by SECAF. The attachments to App. Ex. X clearly demonstrate that each step of the process was properly followed for personal jurisdiction over the accused at all stages of the disciplinary proceedings.

2. Personal and subject matter jurisdiction existed over Appellee at the time of the commission of the offenses.

Appellee placed himself under court-martial jurisdiction through his own conniving scheme where he used hundreds of pages of forged documents, such as military orders, travel authorizations, travel vouchers, and training records to place himself in an active military status or IDTs to steal money from the Air Force. Personal and subject matter jurisdiction over Appellee at the time of the offenses was established by a preponderance of the evidence through sworn witness testimony, (App. Exs. XXXI-XXXIII), the attachments to the government's

motion response, (App. Ex. X at Atchs. 1-14), the sworn witness testimony received at trial, (R. at 662-1266), and Prosecution Exhibits 1-64. Through this evidence, the government established that Appellee forged and fraudulently submitted numerous official documents in his capacity as an officer in the United States Air Force Reserves. These documents were used to authorize and perfect Appellee's military duty status, official travel, military pay and allowances, and other benefits from the Air Force. Consequently, there is no question that Appellee subjected himself to court-martial jurisdiction.

a. Appellee was "serving with an armed force" at the time of the charged offenses.

Applying the first step of the analysis, Appellee's status as a person serving with the armed forces during the charged timeframe is established by the following facts: (1) on the dates of the charged offenses, Appellee was a member of the Air Force Reserve component; (2) he performed active tours and reserve training pursuant to military orders, albeit military orders forged by Appellee; (3) the military orders were issued for the purpose of performing active duty or IDTs; (4) he engaged in official military travel to purportedly perform military duties at various TDY locations despite Appellee claiming expenses for unofficial, non-reimbursable travel; (5) he received military pay and allowances pursuant to military

orders, and he was reimbursed for his travel expenses by the armed forces; (6) and he received military service credit in the form of retirement points for his military service dates. (*See* Pros. Ex. 64, AF IMTs 40A.) Therefore, the facts of this case demonstrate by a preponderance of the evidence that Appellee was "serving with an armed force" at the time of the commission of the offenses.

b. The facts demonstrate that Appellee's status during the charged offenses as a person in active service under the four-part test in Article 2(c), UCMJ, was satisfied by a preponderance of the evidence.

First, the facts are uncontroverted that Appellee voluntarily submitted to military authority. The evidence at trial established that Appellee was criminally responsible for forging his supervisors' signatures and initials on official documents to procure military orders, induce "official" travel, initiate military pay and allowances, and reimburse travel expenses. These acts are conclusive evidence of Appellee's subjective intent regarding his desire to voluntarily submit to military authority. It is also inconsequential whether Appellee was called to active duty under "valid" military orders. The correct legal standard to be applied by this Court is whether the evidence satisfied the four-part test for jurisdiction under Article 2(c), UCMJ. If "valid" military orders were the correct standard, the primary purpose of enacting Article 2(c), UCMJ,

would be defeated because the statute was intended to cover situations where persons intended to and, in fact, did submit to military authority notwithstanding technical jurisdictional defects.

Second, the evidence adduced at trial clearly demonstrated that Appellee met the mental and minimum age qualifications at the time of voluntary submission to military authority. Appellee's date of birth, 14 May 1966, and his total active federal military service date (TAFMSD), 20 May 1989, clearly shows that he met the statutory age requirements delineated in 10 U.S.C. §§ 504-05. (Pros. Ex. 73.) Furthermore, Appellee's record of military service did not reflect an issue with the requisite mental qualifications.

Third, Appellee undoubtedly received military pay and allowances as a result of his military service during the charged timeframe. The Government introduced voluminous records proving that Appellee received pay and allowances resulting from his fraudulent scheme. (Pros. Exs. 1-62; R. at 383-415; App. Exs. X at Atchs. 1-14, XXXI-XXXIII, XXXV-XXXVI.) In total, the fraudulent vouchers paid out to Appellee amounted to approximately $160,000, covering the dates of his active service or IDTs, containing 300-plus forged signatures, and 180 forged initials. These vouchers do not include Appellee's military pay for these timeframes.

Fourth, Appellee voluntarily performed military duties. The numerous travel vouchers, DD Forms 1352-2, submitted by Appellee describe the exact dates he engaged in military service, and claimed travel expenses and lodging costs. (Pros. Exs. 1-62.) Appellee's records of IDTs, AF IMTs 40A, claim the number of hours he worked and points earned towards retirement during particular periods of military service. (Pros. Ex. 64.) Furthermore, Appellee also self-reported the dates he performed military service over a two-year period throughout fiscal years 2006 and 2007 in an email to his supervisor, Lt Col Kevin Purvis. (Pros. Ex. 63.) These documents, together with the testimony of Appellee's supervisors at trial, unequivocally establish that he performed military duties during the requisite time periods, even though the amount of legitimate work performed during these periods was in dispute.

Finally, it is uncontroverted that during the periods in question Appellee was not released pursuant to law or regulation. In fact, Appellee was not released from active duty or IDTs until he completed his fraudulent scheme by filing all necessary documentation to collect his purported reimbursable expenses or seek credit for the amount of work completed. Therefore, the evidence shows that Appellee was subject to court-martial jurisdiction pursuant to Article 2(c), UCMJ.

When Appellee forged the travel authorizations, vouchers,

and other various official documents, he did so in his capacity as an officer in the Air Force Reserves. *See* United States v. Morse, ACM 33566 at 6 (A.F. Ct. Crim. App. 2000) (unpub. op.). The paperwork was necessary to authorize periods of active duty and IDTs, to track the days he was supposed to be working, and to document the entitlements he would receive resulting from his travel and military duties. It was part of his duty incident to these reserve tours or training to complete these forms with truthful information, regardless of whether or not his supervisors actually authorized these period of active service or training. Id. It is immaterial that Appellee's supervisors did not, in fact, sign these forms. Appellee committed these crimes incident to his duty status. Although an accused cannot create court-martial jurisdiction by consent, under some circumstances his actions can have the effect of establishing or confirming court-martial jurisdiction. United States v. Meadows, 13 M.J. 165, n.4 (C.M.A. 1982). Overwhelming evidence was presented demonstrating Appellee was subject to military authority.

Article 2(c), UCMJ, was intended to reach those persons, such as Appellee, whose intent is to perform as members of the active force and who meet the four statutory requirements notwithstanding other legal provisions which may normally operate to bar jurisdiction. Fry, 58 M.J. at 219-20. It is

nearly impossible to envision a better fact pattern to establish an individual's intent to voluntarily submit to military authority, considering the hundreds of documents under Appellee's own penmanship, written pursuant to his authority as a Lieutenant Colonel in the Air Force, which were created to perfect his desired military status.

This case is the quintessential example of the idiom "trying to have one's cake and eat it too." Appellee strived to enter into active status to reap the bountiful benefits of military service without the burden of being subject to military jurisdiction for criminal offenses committed within such status. This would lead to an absurd result and directly contradict Congress' intent in enacting Article 2(c), UCMJ. The legislative history discussed in Phillips demonstrates Congress enacted Article 2(c), UCMJ, to cover situations exactly like this case. Id. at 219. Appellee's devious scheme to exploit the statutory peculiarities of temporary reserve duty does not obscure the reality of his status as a paid Air Force reservist. Morse, unpub. op. at 5. This Court should not permit Appellee to claim a lack of jurisdiction based on his own fraudulent efforts to subject himself to jurisdiction.

Consequently, the military judge correctly determined the government demonstrated by a preponderance of the evidence that Appellee was subject to court-martial jurisdiction, and AFCCA

erred when it found otherwise. Therefore, this Court should reverse the decision of the lower court and find that Appellee was subject to court-martial jurisdiction.

B. The Air Force Court Erred By Refusing To Consider Documents It Requested Be Provided By The Government.

On 10 January 2014, AFCCA issued its decision in this case. *See* United States v. Morita, 73 M.J. 548 (A.F. Ct. Crim. App. 2014). In the pertinent parts of the instant appeal, AFCCA denied the Government's motion to reconsider its denial of the Government's motion to attach Air Force Forms 938 and Air Force Repository Printouts (pay records), holding that "[t]he documents the Government now seeks to attach pertain to a matter squarely at the heart of the trial, whereas our ability to accept additional evidence on appeal is normally limited to collateral claims." Id. at 557. While finding court-martial jurisdiction existed over Appellee for portions of time pursuant to Article 2(a), UCMJ, AFCCA held that Phillips "does not support extending jurisdiction pursuant to Article 2(c), UCMJ, to offenses committed when the [Appellee] was not in military status, particularly where the record does not reveal when the [Appellee] was performing military duties or making up earlier approved MPA days." Id. at 561. Furthermore, AFCCA declined to follow United States v. Morse, which held that when a reservist forged travel authorizations, vouchers, and other various

official documents, he did so in his capacity as an officer in the Air Force Reserves. *See* id. at 561-62; United States v. Morse, ACM 33566 at 6 (A.F. Ct. Crim. App. 2000)(unpub. op.). As such, AFCCA dismissed portions of Charge I and the entire larceny charge and its specification because the Court could not "determine whether the [Appellee] was properly convicted of two or more larcenies that occurred only when subject matter jurisdiction was present." Id. at 564. The United States asserts this holding is incorrect and that Appellee was subject to jurisdiction for all charged misconduct. As such, the findings and sentence were proper and should be upheld.

Facts outside the record may be considered by a court of criminal appeals to the "extent that they support or counter a claim that conviction was nullity for lack of jurisdiction over person." United States v McCarthy, 24 M.J. 841 (A.F.C.M.R. 1987)(citing United States v. Williams, 18 M.J. 533 (A.F.C.M.R. 1984). As such, this Court has stated that "[o]rdinarily appellate courts review alleged errors on the basis of the error as presented to the lower courts;" however, "material outside the record having to do with insanity and jurisdiction" will be permitted. United States v. Roberts, 22 C.M.R. 112, 115 (C.M.A. 1956) (internal citations omitted).

The case relied upon by AFCCA, United States v. Oliver, 57 M.J. 170 (C.A.A.F. 2002), involved a case where, unlike this

case, the jurisdictional issue was not raised until the appeal. Regardless, Oliver does not preclude a court of criminal appeals from using its fact-finding powers to resolve a question about jurisdiction.

In a more relevant case, United States v. Heimer, the Air Force Court of Military Review ordered the Government to show cause why the findings of guilty should not be set aside for lack of jurisdiction. 34 M.J. 541, 548 (A.F.C.M.R. 1991). The Government responded with documentation establishing military status, satisfying the Court that the court-martial had jurisdiction. Id. A service court may hear evidence, even when not introduced at trial, regarding questions about jurisdiction. This is logical – either Appellee was subject to court-martial jurisdiction or not. Appellee's orders and pay records do not grow cold with the passage of time and AFCCA's refusal to exercise its Article 66(c) authority and to consider those records was error that improperly determined the outcome of the case.

This is not an instance where trial counsel presented no evidence on the question of jurisdiction. Rather, trial counsel argued that the court-martial had jurisdiction over all the instances of misconduct under Article 2(c), UCMJ, under United States v. Phillips, and United States v. Morse. (App. Ex. X, p. 4-6.) This argument and evidence was accepted by the military

judge who ruled that the government proved by a preponderance of the evidence that the court-martial had jurisdiction.[3] (App. Ex. XXXVIII, p. 5.) It is illogical to now bind the Government's hands on an issue that can never be waived, especially where the military judge at trial was satisfied with the evidence presented by the Government. There is no allegation of bad faith on the Government's part, and the trial counsel cannot be faulted for failing to seek an advance advisory opinion from AFCCA to ensure that not only was the military judge convinced of jurisdiction but also that the appellate court would be satisfied. Rather, trial counsel moved on to the merits of his case after prevailing following a lengthy motions hearing about jurisdiction. Furthermore, AFCCA's reliance on the Article 32 Investigating Officer's report as sacrosanct is not persuasive in light of this Court's recent precedent in United States v. Humphries, which completely disregarded the Article 32 report as providing notice of the terminal element. *See* 71 M.J. 209 (C.A.A.F. 2012). At trial, the Government needed to prove jurisdiction to the judge's satisfaction, not the Article 32

[3] The reasoning in AFCCA's opinion holds the Government to an illogical standard, by requiring evidence to be presented above and beyond that necessary to convince the military judge. Essentially, AFCCA demands that the Government ignore considerations of relevance, time, and expense, and simply put on all evidence it has in its possession, even if that evidence is presented to an already convinced military judge or does not necessarily support the Government's theory, solely on the chance that an appellate court may come to a conclusion contrary to the military judge. AFCCA also presumes that a military judge would be willing to sit idly and allow for the needless presentation of evidence and that a defendant would not object to the introduction of evidence not necessary or relevant on the motion.

Investigating Officer, and did so. AFCCA's refusal to exercise its Article 66(c) authority as apparent punishment of the trial counsel for satisfying the military judge but not the Article 32 IO makes no sense and cannot stand.

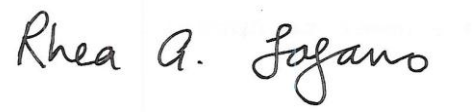
Moreover, it was AFCCA's order that directed evidence of court-martial jurisdiction under Article 2(a), UCMJ – an order well within the fact-finding power of the lower Court under Article 66(c). If, as AFCCA found, "the documents are not self-explanatory, and the parties differ as to their interpretation," a DuBay hearing should be ordered whereby the government can introduce evidence and present witnesses, while allowing Appellee to cross-examine or rebut. Morita, 73 M.J. at 557. This Court's predecessor has not only endorsed the DuBay process for collateral matters but also for predicate matters. United States v. Parker, 36 M.J. 269 (C.M.A. 1993).

AFCCA's opinion in the instant appeal not only needlessly limits its Article 66(c) fact-finding powers, but also violates concepts of fair play. As Appellee can always raise jurisdictional issues under R.C.M. 905(e), the United States should be availed the consideration of responding to the issue in the interests of justice. Appellee should not be shielded from responsibility for his crimes because AFCCA ignores prior precedent and limits, without justifiable reasons, its own jurisdiction to the detriment of the Government. Appellee never

filed a timely objection to admission of the documents, and AFCCA had no valid reason to reject them.[4]

CONCLUSION

WHEREFORE, this Court should reverse the decision of the Air Force Court of Criminal Appeals and reinstate Appellee's conviction and sentence.



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[4] In fact, appellants are often allowed to supplement the appellate record before courts of criminal appeals, particularly in the case of alleged ineffective assistance of counsel, and even when the appellant is presenting evidence that was available at trial. Unquestionably, AFCCA possesses the authority to supplement the record.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian defense counsel and to the Appellate Defense Division on 19 May 2014.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

☒ This brief contains 5,579 words.

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/s/

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