IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant and Cross-Appellee,

v.

STEVEN S. MORITA,
Lieutenant Colonel (O-5), USAF
Appellee and Cross-Appellant.

Crim. App. No. 37838
USCA Dkt. No. 14-5007/AF

ANSWER TO CERTIFIED ISSUE

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USAF,	)	
Appellee and Cross-Appellant.	)	

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

Certified Issue

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

Statement of Statutory Jurisdiction

AFCCA reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2006). This Honorable Court would normally have jurisdiction to review this case under Article 67(a)(3),UCMJ if this case was certified by The Judge Advocate General (TJAG) of the Air Force. However, it is not clear whether it was signed by TJAG.

The certification document was signed by Major General (Maj Gen) Robert G. Kenny. On the document, Maj Gen Kenny signs the document as Performing Duties of The Judge Advocate General (PDOT); however, according to Maj Gen Kenny’s biography (attached), he is the Mobilization Assistant to TJAG and not the

head of a major division. *See* Motion to Attach.

Maj Gen Steven Lepper was PDOT until 28 February 2014. Maj Gen Lepper issued his retirement farewell remarks to the JAG Corps on his last day performing the duties of TJAG, 28 February 2014, and announced: "[E]ffective 1 March 2013, Major General Robert Kenny, the Mobilization Assistant to TJAG, will be on Title 10 orders and Performing the Duties of the Judge Advocate General (PDOT)." *See* Motion to Attach.

The appointment and duties of the Judge Advocate General of the Air Force are prescribed in 10 U.S.C. § 8037, which provides, in relevant part:

> (d)(2) When there is a vacancy in the office of the Judge Advocate General, or during the absence or disability of the Judge Advocate General, the Deputy Judge Advocate General shall perform the duties of the Judge Advocate General until a successor is appointed or the absence or disability ceases.
>
> (3) When paragraph (2) cannot be complied with because of the absence or disability of the Deputy Judge Advocate General, the heads of the major divisions of the Office of the Judge Advocate General, in the order directed by the Secretary of the Air Force, shall perform the duties of the Judge Advocate General, unless otherwise directed by the President.

Maj Gen Kenny, as the Mobilization Assistant to TJAG, is not "the head[] of [a] major division[] of the Office of the Judge Advocate General," in accordance with 10 U.S.C. § 8037(d)(3), and not qualified under the statute to perform the duties of TJAG. In addition, on 23 May 2014, the Air Force Jag Corps sent

a message to the Corps announcing the Senate confirmation of Lieutenant General Burne to The Judge Advocate General of the Air Force. *See* Motion to Attach. The message also stated Maj Gen Kenny would return to his position as the Mobilization Assistant to TJAG, not to the head of a major division.

Therefore, it is Appellee's contention that this Honorable Court does not have jurisdiction and should deny the government's attempt to have Maj Gen Kenny certify an issue.

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). 10 U.S.C. §§ 923, 921, 932. Appellee was sentenced to a dismissal, confinement for twelve months, and a $75,000 fine. J.A. at 129. On 26 January 2011, the convening authority approved the sentence as adjudged.

On 10 January 2014, the AFCCA reversed some findings and specifications and modified the sentence. *United States v. Morita*, 73 M.J. 548, 558 (A.F. Ct. Crim. App. 2014).

Statement of Facts

Appellee was a Reservist assigned to the Health Facilities Office – Western Division (HFO-WD), in San Francisco, California. J.A. at 7. During his time at the HFO-WD, Appellee would regularly travel to various temporary duty locations as part of his duties as a project officer providing oversight of various Air Force health facilities construction projects. *Id*. During the charged time frame, the government alleged that Appellee filed numerous travel vouchers for expenses Appellee was not entitled to, in conjunction with authorized travel and filed false travel vouchers for unauthorized travel. App. Ex. XXXVIII, ¶ 12, J.A. at 1691.

In order to effectuate the filing of fraudulent travel vouchers, Appellee is alleged to have forged the signatures of various HFO-WD personnel. *Id*.

The government's theory of jurisdiction – which the military judge adopted – was based on Appellee ordering himself on to active duty through forged travel orders. App. Ex. XXXVIII, ¶ 21, J.A. at 1693.

The military judge held that "the accused's actions in forging the various travel orders, authorizations, and vouchers were committed with the intent to place himself under military control, which ultimately resulted in his being actually under military control during the same timeframe." *Id.* The military

judge did not find that Appellee was subject to the UCMJ on the grounds that Appellee was on Military Personnel Appropriation (MPA) orders.

The government presented evidence and testimony regarding Appellee being on MPA orders, although these orders are not completed. App. Ex. X, Attachment 14, J.A. at 1634-42. The HFO-WD would request MPA days for Appellee in 120-day increments for each fiscal year; however, the 120-day period was "arbitrarily selected." *Id.*, Attachment 12, page 1, J.A. at 1617. Dates were arbitrarily selected to secure funding without the intention that they be used consecutively. However, MPA orders must be for a set period of time. *See* AFI 36-2619, *Military Personnel Appropriation (MPA) Man-Day Program*, dated 22 July 1994 paragraph 8.1, J.A. 143. In contravention of AFI 36-2919, HFO-WD would use Appellee's 120-day MPA man days throughout the entire fiscal year. *Id.*, Attachment 12, page 8; J.A. at 237, 1624. The government offered the MPA requests during the motions hearing, but the orders do not appear to contain approval from a MAJCOM representative. App. Ex. X, Attachment 14, J.A. at 1634-42. At trial, the government did not provide proof of inactive duty for training (IDT) orders or Annual Tours (AT) orders despite jurisdiction being challenged by the defense. *Id*. *See also* J.A. at 240.

Mr. Kevin Purvis testified at the motions hearing regarding the "arrangement" between HFO-WD and Appellee as to his work schedule. J.A. at 231. Mr. Purvis stated that the office would request 120 days to be used during the fiscal year in various small, non-continuous periods of time. J.A. at 232.

The government's theory of jurisdiction was that Appellee subjected himself to UCMJ jurisdiction when he forged travel orders, regardless of MPA orders. J.A. at 194-95. The government provided the following analogy in support of its theory of jurisdiction:

> If a person of reserve command calls up the reserve units and they issue orders and everyone shows up for the training weekend, on orders, what they believe are orders; they do military duties. But what if the orders weren't right; what if the commander's secretary forged the orders and sent them out without the commander's knowledge? Now ultimately, one of those people commits a bunch of crimes that weekend, the training weekend. Would they be able to step back and say, oh, the orders were forged, we weren't under real orders, so we were in our civilian capacity, therefore jurisdiction doesn't attach? And ultimately, that doesn't make sense and the analysis goes well beyond simply just the paperwork because if we looked at just the paperwork then any error in paperwork would be a nice way for people to just kind of dodge jurisdiction, but what we have here is a purely – it's an offense that's purely related to his duties as a reserve officer in the first place and as he is taking affirmative actions to forged documents in that capacity and sending them into the chain and then pulling them back out when [he] is doing the voucher on the backend of it all, that's subject matter jurisdiction.

J.A. at 197.

The government later argued a person can put themselves on Title 10 orders through their actions. J.A. at 213. The government also argued that Appellee tricked the government into putting him on orders. J.A. at 206-07. The defense asserted that it appeared the government never discussed Appellee's case with the U.S. Attorney's office to consider civilian criminal prosecution; the government responded that in a prosecution by the U.S. Attorney, the Air Force "would lose all of the military offenses under that." J.A. at 206.

The AFCCA agreed with Appellee that jurisdiction was not shown for a large number of the offenses. However, AFCCA held Appellee was subject to court-martial jurisdiction pursuant to Article 2(a), UCMJ, for two distinct blocks of time. First, AFCCA found jurisdiction during 14 November 2005-14 March 2006, 1 December 2006-30 March 2007, and 1 October 2007-28 January 2008, citing evidence of MPA orders calling Appellee to active duty. *United States v. Morita*, 73 M.J. 548, 558 (A.F. Ct. Crim. App. 2014). Second, the court identified a second block of time for which there was evidence he was performing inactive duty training, including 11-15 February 2008; 18-22 February 2008; 25-26 February 2008; 8-12 September 2008; 15-19 September 2008; and 22-26 September 2008. *Id*. at 559.

Additional facts are included in the argument below.

Argument

AFCCA DID NOT ERR WHEN IT FOUND THE COURT-MARTIAL LACKED SUBJECT MATTER JURISDICTION AND DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO GRANT THE GOVERNMENT'S MOTION TO SUBMIT DOCUMENTS.

Standard of Review

Jurisdictional questions are reviewed de novo. *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005).

Law and Analysis

I. AFCCA correctly determined there was insufficient evidence of subject-matter jurisdiction under Article 2(c), UCMJ.

In order for court-martial jurisdiction to attach where it is not otherwise conferred by Article 2(a), the accused must be "serving with an armed force" at the time of the offense, and also the government must meet a four-part test set forth in Article 2(c). *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003)("*Phillips*"). What constitutes "serving with" is factually intensive and specific. *Id.* Here, the government failed to prove both that Appellee was "serving with" the armed forces and that all four prongs of the Article 2(c) test were satisfied. Specifically, the government failed to show Appellee voluntarily submitted to military authority and that he was engaged in military duty. Article 2(c)(1),(4), UCMJ.

A. Appellee Was Not "Serving With" the Armed Forces

The government relies on six "theories" to argue Appellee was "serving with" the armed forces, which can be restated as three: (1) Appellee was a member of the reserve; (2) he ostensibly engaged in military duty and travel pursuant to orders, regardless of the authenticity of such orders; and (3) he received military compensation, reimbursement, and service credit for such duty and travel. Gov. Br. 13-14.

The first theory fails because case law is clear – simply being a member of the Reserves is insufficient to confer jurisdiction. *See Phillips* at 220. Indeed, the analysis of whether a person is "serving with" the armed forces is designed, in part, to deal with circumstances where the person is not on active duty.

The second theory in the Government's analysis shows that it is the Government that is seeking to "have its cake and eat it to." Gov. Br. 17. The Government's theory of the case all along has been that Appellee was not actually doing the work while traveling – hence the fraudulent travel and the theft. Further, the government argued that even if Appellee engaged in any legitimate military work, any pay or reimbursement Appellee received for such work was nonetheless larcenous because it was obtained via a scheme of forgery and fraud. J.A. at 275 (trial counsel arguing "You may be entitled to this money, but if you forge a document, if you commit fraud to get it then ultimately

you're not entitled to the money"). Indeed, if, as the Government now argues, Appellee engaged in legitimate military duty and travel, then exactly what did he steal, since while traveling he was completing the work that he was required to do? At trial the Government sought to avoid having to articulate exactly what was stolen by simply arguing that, by virtue of the false vouchers, Lt Col Morita had the intent to steal and that none of his actions were really legitimate; thus all his pay and compensation were theft. Now, the Government seeks to avoid having to prove when he was on orders, and when he was serving with the armed forces for purposes of jurisdiction, by arguing he *was* actually performing legitimate military duties the whole time, even if the orders were fake. The Government should be judicially estopped from arguing these inconsistent theories. *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005)(Judicial estoppel precludes a party from successfully asserting a position in a proceeding and then asserting an inconsistent position later).

The third theory in the Government's analysis, the fact that Appellee received pay and credits, also tells us little. It means simply that, on the government's theory, this was a successful fraud and theft. If the fact of payment was so significant, however, it would mean that an *attempted* theft under the same circumstances would not be subject to UCMJ

jurisdiction. Such an absurd result undermines this aspect of the government's analysis. Similarly, on the government's theory, if a reservist fills out false paperwork and collects pay and allowances for work he never performed, but was in fact at home, he is not subject to UCMJ jurisdiction.

B. The Government did not meet the four-part test for jurisdiction.

To the extent the government relies on *Phillips* to argue that Appellee meets the "Serving with" test, *Phillips* is of no avail. In *Phillips*, this Court considered whether court-martial jurisdiction existed to try a reservist for using marijuana on a travel day authorized by her lawful orders for annual duty. The Court noted it was "uncontested" that:

> (1) on [the] day [of the offense], she was a member of a reserve component of the armed forces; (2) she traveled to a military base on that day pursuant to military orders, and she was reimbursed for her travel expenses by the armed forces; (3) the orders were issued for the purpose of performing active duty; (4) she was assigned to military officers' quarters, she occupied those quarters, and she committed the pertinent offense in those quarters; (5) she received military service credit in the form of a retirement point for her service on that date; and (6) she received military base pay and allowances for that date.

Id. at 220. Thus, critically important was that **the offense was committed while the accused was on orders**. Just as important was the fact the offense was committed in **military quarters**. Finally, there was no question as to the legitimacy of the

orders or the accused's performance of military duty. In essence, the only real question in *Phillips* was the timing of the accused's act relative to her active duty status. It is these critical distinctions that make *Phillips* inapplicable to Appellee's case.

The government has not adduced adequate evidence to show when the offenses occurred. Moreover, there is a serious question as to the legitimacy of the orders the government would seek to use to confer court-martial jurisdiction – orders that the government itself contends were fraudulent. Finally, the government's theory at trial and on appeal was that Appellee was not engaged in legitimate military service, but rather an extensive scheme to defraud.

In its brief, the Government finally comes out and says what it has been skirting around – "Appellee placed himself under court-martial jurisdiction" by forging travel authorizations, travel vouchers, training records, and orders. Gov. Br 11. The Government does not explain how, if everything Appellee did was fraudulent, he could have manufactured jurisdiction where it otherwise did not exist.

The government also argues that "the facts are uncontroverted that Appellee voluntarily submitted to military authority." Gov. Br. 13. The Government reaches this conclusion by engaging in tortured logic – according to the

Government, Appellee's acts of forgery and fraud demonstrate "his desire to voluntarily submit to military authority." *Id*. On the contrary, as the Government argued at trial, the "purpose of the forgeries . . . is freedom to pretty much do whatever you want." J.A. at 664. In other words, according to the Government, Appellee went to great pains to **avoid** going through official channels, seeking proper authorization, etc. J.A. at 661 ("He wanted free reign. . .Colonel Morita wanted to bypass all of that [authorization requirements]").[1] According to the government, "the purpose of the forgeries…is freedom to pretty much do whatever you want." J.A. at 664. This is the quintessential **opposite** of voluntarily submitting to military authority. The Government fails to explain how this complex scheme of fraud **in any way** demonstrates the intent to submit to military authority. It also ignores this Court's common sense and knowledge of ways of the world – why would you voluntarily subject yourself to the jurisdiction of the organization you are stealing from?

Similarly perplexing is the Government's insistence that the fraudulent records Appellee created "unequivocally establish that he performed military duties during the requisite time periods." Gov. Br. 15. The Government is saying Appellee was

[1] Trial Counsel's closing argument is instructive in this regard. He highlights voucher after voucher and argues to the members that what the documents demonstrate is "intent to steal, intent to defraud." See, e.g., J.A. at 664-677.

not entitled to pay because he was engaged in fraud by not working, but at the same time that his fraudulent records show that he engaged in legitimate work. The Government begrudgingly concedes that "the amount of legitimate work performed during these periods was in dispute." *Id*. But this throwaway comment reveals the problem with the Government's approach, a problem they were made aware of as early as the Article 32 investigation, and which AFCCA's opinion reinforced.[2] It is not sufficient for the Government to make vague accusations; the Government must prove what the accused did, when he did it, and whether and how jurisdiction attaches for each offense. It did not do so, and apparently cannot do so now. Appellee was not on orders, was not on active duty, and there was a very real question about what military duties he was performing. If the government wants to prosecute him under the UCMJ, it has to specify exactly when and under what conditions jurisdiction can attach. It continues to refuse to do so, even before this Court.

Consistent with this casual approach to applying UCMJ jurisdiction to civilians, the Government simply brushes aside

[2] The Government improperly analogizes this case to *United States v. Humphries* 71 M.J. 209 (C.A.A.F. 2012) to suggest that the Article 32 investigation has no bearing on whether the Government had notice of the jurisdictional flaws in its case. *Humphries* involved the question of whether the Defense had adequate notice of a terminal element in the offense, so that it could prepare an adequate defense. This is far different than the government's ever present burden to prove jurisdiction.

the question of whether there were lawful orders and whether Appellee was lawfully called to duty. Gov. Br. 13-14. It must dismiss this question, because the Government's position requires that it ignore this issue. What about the reservist who forges orders at home, goes to Hawaii on fake orders, submits fake vouchers and gets paid? How is he "serving with the armed forces"? The obvious answer is that he is not; the Government's position fails.

The Government's argument also reveals other inconsistencies. According to the Government, it is significant that "during the periods in question Appellee was not released pursuant to law or regulation." Gov. Br. 15. In other words, since there was no official (i.e. lawful) release from duty, jurisdiction attaches. Yet at the same time, the Government argues it is immaterial whether Appellee was lawfully called to duty in the first place!

Furthermore, as AFCCA correctly noted, the test of whether the member is lawfully released could be easily applied in *Phillips*, "which involved one distinct period of active duty service." *Morita*, at 15, n. 13. By contrast in this case,

> there is no evidence the Appellant was ever on active duty outside of the periods discussed above. Therefore, it would be illogical to hold that the Appellee was subject to jurisdiction under Article 2(c), UCMJ, for individual fraudulent actions, where the appellant was not on active service during the periods in question and we would have no way of

> determining when that distinct period of jurisdiction would end.

Morita, slip op. at 15, n. 13.

The Government also relies on dictum from the unpublished AFCCA opinion in *United States v. Morse*, ACM 33566 (A.F. Ct. Crim. App. 2000) to argue that jurisdiction is proper because Appellee's criminal acts were performed "in his capacity as an officer in the Air Force Reserves." Gov. Br. 16. Notably, *Morse* relied on no authority for this curious statement. Indeed, the Government fails to appreciate the irony in its position. The Government argues: "[i]t was part of his duty incident to these reserve tours or training to complete these forms with truthful information." Gov. Br. 16. Yet the Government's position is that these forms were **illegitimate and so, then, were the reserve tours**. Accordingly, nothing about his capacity as an officer permitted him to submit false documentation.

The government also seeks to rest its argument on the slender reed of a footnote in *United States v. Meadows*, 13 M.J. 165, 169 n.4 (C.M.A. 1982), claiming it supports the proposition that "[a]lthough 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." Gov. Br. 16.[3] *Meadows* does not support this broad proposition. The footnote stated, "Although an accused cannot create court-martial jurisdiction by consent, under some circumstances his actions may have the effect of establishing or confirming court-martial jurisdiction." *Id*. In that same footnote, the *Meadows* court cited as examples very different circumstances than the case at bar: a request for trial by a dismissed officer; consent of a reservist to being ordered back to active duty) and reenlistment in an Armed Service. *Id*. The court further noted that "the actions of Meadows and his counsel at trial eliminated the need for the Government to offer certain evidence that might otherwise have been necessary to establish that the court-martial had jurisdiction to try appellant." *Id*. Specifically, **Meadows stipulated to jurisdiction**. *Id.*

Thus the question of jurisdiction in *Meadows* was far different than in this case. There was no dispute Meadows **committed the offenses while on active duty**, the only question was whether he had been validly subject to court-martial jurisdiction, as his enlistment expired prior to the convening of the court-martial. The court concluded that it could find court martial jurisdiction attached based on the following:

[3] Again, the Government fails to appreciate the irony in its citation to *Meadows*. While *Meadows* holds "an accused cannot create court-martial jurisdiction by consent," that is exactly what the Government is arguing here. See Gov. Br. 11.

> Appellate Exhibit III the document dated June 30, 1978, wherein the officer then exercising general court-martial jurisdiction over appellant authorized his retention for trial by court-martial.[3] Typically, a document executed after the scheduled expiration date of a term of service will not suffice to show that the term was validly extended. *United States v. Self, supra.* **However, in light of appellant's pleas of guilty, the refusal of trial defense counsel to accept the military judge's invitation to contest the court-martial's *in personam* jurisdiction,[4] and the evidence that the CID investigation was almost complete on June 2, we conclude** that Appellate Exhibit III—fortified by the presumption of regularity—**is adequate here to establish that appellant's original term of service had been validly extended before it expired**. Thus, since appellant was properly retained in the Army until completion of his trial, as authorized by AR 635–200, he was subject to military jurisdiction at all times.

Meadows, 13 M.J. at 168-69 (citing *United States v. Self,*13 M.J. 132 (C.M.A. 1982)*; United States v. Pearson*, 13 M.J. 132 (C.M.A.1982))(emphasis added).

It was in **this context** that the *Meadows* court remarked that an accused can in some circumstances *confirm* court-martial jurisdiction. No such circumstances apply here.

Thus, this Court should affirm AFCCA’s opinion as to its finding of a lack of jurisdiction under Article 2(c), UCMJ.

II. The AFCCA correctly declined to accept additional government documents and in electing not to hold a Dubay hearing.

A. The court did not err in denying the motion to submit documents.

The Government cites to *United States v. Heimer*, 34 M.J. 541 (A.F.C.M.R. 1991) to argue it is proper to admit documents

post-trial to prove jurisdiction. Gov. Br. 20. Setting aside the obvious lack of precedential value of the case, the first distinction is that in *Heimer*, the issue of jurisdiction was not challenged at trial. Accordingly, the government had not been provided the opportunity to present the information. Second, even in that circumstance, the lower court ordered the government to show cause why the case should not be set aside for lack of jurisdiction. *Id.* at 548. Third, *Heimer* involved a situation where the government could easily provide documents that would prove jurisdiction. The *Heimer* court noted "[t]here was no documentation in the record of trial or allied papers to support a determination of whether the appellant reenlisted on 15 May 1987 with or without a break in service." *Id*. "The government has now provided us with appropriate documentation showing that the appellant was discharged from his prior enlistment early solely for purposes of reenlisting on 15 May 1987, and that his military status remained uninterrupted." *Id*. at 548-549. In other words, determining jurisdiction for that enlisted member was a simple matter. Here, as AFCCA correctly noted, jurisdiction was inextricably bound up with the question of the commission of the offenses in the first place. Thus, allowing the government to submit its proposed documents would not have resolved the question, and would have allowed them to prove a material fact to conviction on appeal, thereby avoiding

the need for a trial. *See, e.g.*, *Garner v. Louisiana*, 368 U.S. 157 (1961).

The Government complains incorrectly that AFCCA has created some impossible standard for the Government to meet. Gov. Br. 13-14. This Court should disregard this straw man. First, the government's argument is essentially one of "trying." If the government tries and does all that it can to prove jurisdiction, this Court should condone whatever shortcomings in proof remain. Indeed, the Government argues trial counsel did all that could reasonably be expected to prove jurisdiction at the trial court level, and to prevent the Government from proving jurisdiction now would be unfair and unreasonable.[4]

The point, however, is that the Government still cannot prove jurisdiction and the fact that it tried and failed to do so at trial only demonstrates the correctness of AFCCA's decision. Again, this is not like *Heimer*, where the Government needed only to produce a few self-explanatory documents that were inadvertently left out of the trial. The Government is essentially seeking a new trial, because to prove jurisdiction under Article 2(c), the Government must make a fact-intensive detailed showing that is woven completely together with the questions of what offenses, if any, Appellee committed, and when

[4] It should also be noted this is not true. If the government had done all it could then, at a minimum, the documents they seek to admit on appeal would have been attempted at trial. While the evidence would have still been insufficient, it is clear the government could have done more at trial.

and how he committed them. Thus, AFCCA has not created some new standard, and it acted well within its discretion in denying the Government's motion. This is particularly true when the AFCCA found that these documents were not self-explanatory.

Indeed, the irony is that even had the Court accepted the documents, the outcome would have been the same. The documents the Government sought to introduce did not clarify the burning questions in this case. On the contrary, they demonstrate why an appellate court should not be making substantive factual determinations outside the trial record.

1. AFCCA did not err in denying submission of the orders.

The purported orders the Government sought to introduce did not clarify the question of jurisdiction. Those orders were never shown to any witness at trial who could authenticate them, or even determine their significance. The fact that information was entered into Arrows (the Reserve order writing system) proves nothing, as there was testimony that Appellee himself entered the information into that system. Indeed, the government's theory was that Appellee was bypassing the normal authorization channels and taking advantage of his supervisor's lack of familiarity with the reserve system. Moreover, the documents are incomplete as they do not show that Appellee reported for duty or was released from duty.

2. The pay records were properly excluded.

The government also proposed to submit pay records; AFCCA correctly declined to permit those as well. The records lacked foundation as well as relevance. The person authenticating the records is not the custodian of records. She did not certify that she knows how to use OLRV or that the records are accurate or that her search of the system was complete. So merely at an initial foundational level, the records were faulty.

Moreover, most of the records show Appellee received pay at times **other** than when he is alleged to have engaged in misconduct. As discussed above, the fact that Appellee was paid at some later date for work he may or may not have performed at some earlier date when he may or may not have been on orders, or valid orders, is irrelevant. Even those portions of the records that show Appellee receiving pay at or close to the time of the alleged frauds is not conclusive. Especially in as obtuse and weak an evidentiary showing in support of jurisdiction as the Government made here, these documents could not have made a difference.

B. AFCCA Did Not Abuse Its Discretion In Declining to Grant a *DuBay* Hearing.

A *Dubay*[5] hearing was not appropriate because (1) it would have amounted effectively to a trial de novo on the merits, (2)

[5] *United States v. DuBay*, 17 U.S.C.M.A. 147, 149, 37 C.M.R. 411,

the government has not demonstrated that a *DuBay* hearing would serve any effective purpose, and (3) such proceedings would have resulted in undue post-trial delay. As this Court's predecessor has pointed out, the *DuBay* process is designed for *limited* hearings, it "has never been used to retry the merits of a case; its purpose is merely to clarify collateral or predicate matters." *United States v. Parker*, 36 M.J. 269, 272 (C.M.A. 1993). The Government is seeking a *DuBay* hearing that would require the appellate court to evaluate evidence combined with the record of trial "arriving [again] at a determination of sufficiency of the evidence on the merits. That, however, would be an abuse of the DuBay process." *United States v. Parker*, 36 M.J. 269, 272 (C.M.A. 1993)

The Government's consistent failure, including to this Court, to present definitive evidence establishing jurisdiction shows that a *DuBay* hearing would be inappropriate. Unlike *Heimer*, where a few simple documents could establish the member's active duty status, here the question of whether Appellee was on legitimate orders and whether he was performing military service, are all issues that go to the heart of the case. The idea (implicit in the government's argument) that the government could simply submit a few pay records and be done with it again demonstrates the government's folly.

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Furthermore, considerations of post-trial delay are significant here. *United States v. Harvey*, 64 M.J. 13, 22 (C.A.A.F. 2006). It is now been over three years (approximately 40 months) since the case was docketed at AFCCA. If necessary, Appellee is prepared to present evidence that further hearings and delay in this matter would be prejudicial. He has suffered anxiety and uncertainty as he awaits the outcome of these proceedings. Additional hearings which could affect the outcome of his sentence will heighten those impacts. Furthermore, his ability to find civilian employment has been impacted by the unresolved nature of this case. AFCCA properly determined there has been prejudice to Appellee from the length of these proceedings. A *DuBay* hearing and the inevitable post-hearing proceedings would work a hardship to Appellee.

WHEREFORE, This Court should find no abuse of discretion and affirm AFCCA's decision denying the Government's motion to submit documents.

Respectfully submitted,

For

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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 Director, Air Force Government Trial and Appellate Counsel Division, on 18 June 2014.

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