**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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**UNITED STATES**,
Appellee,

v.

**STEVEN S. MORITA,**
Lieutenant Colonel (O-5), USAF
Appellant.

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

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**BRIEF OF BEHALF OF APPELLANT**

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| | ) | USCA Dkt. No. 14-5007/AF |
| Lieutenant Colonel (O-5) **STEVEN S. MORITA,** USAF, *Appellant.* | ) | Crim. App. No. 37838 |

**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 ERRED BY FINDING THAT A RESERVIST CAN CREATE COURT-MARTIAL JURISDICTION BY FORGING ACTIVE DUTY ORDERS AND/OR INACTIVE-DUTY TRAINING ORDERS AND BY FINDING THAT COURT-MARTIAL JURISDICTION EXISTED FOR EACH 120-DAY PERIOD LISTED ON THE THREE APPLICATIONS FOR MPA MAN-DAY TOURS.

## 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 Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

## Statement of the Case

On 14, 27, 28, 30 September and 1-3 October 2010, Appellant was tried at a general court-martial by a panel of officer members at Travis AFB, CA. Contrary to his pleas, Appellant

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). Appellant was sentenced to dismissal, confinement for twelve months, and a $75,000 fine. R. 1517. 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.

**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 36-2619, 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 reasons, covering different periods 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.

**Summary of the Argument**

AFCCA erred when it found a reservist can create court-martial jurisdiction over themselves by forging active duty or inactive duty training orders, in violation of Article 2(a), UCMJ and *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003). The court created a new test, unsupported by either Article 2(a) or case law, that finds jurisdiction based on whether an accused is in some ill-defined military status.

The court erred in finding that allegedly fraudulent documents purporting to record inactive duty training performed were sufficient to prove that appellant had in fact been ordered to inactive duty training.

Further, court-martial jurisdiction did not exist for each 120-day period listed on the three applications for MPA man-day tours, because no evidence was produced at trial that the MPA days were actually approved.

## Argument

**AFCCA ERRED BY FINDING THAT A RESERVIST CAN CREATE COURT-MARTIAL JURISDICTION BY FORGING ACTIVE DUTY ORDERS AND/OR INACTIVE-DUTY TRAINING ORDERS AND BY FINDING THAT COURT-MARTIAL JURISDICTION EXISTED FOR EACH 120-DAY PERIOD LISTED ON THE THREE APPLICATIONS FOR MPA MAN-DAY TOURS.**

*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*

### A. Forged orders cannot lawfully call a reservist to active duty or training.

AFCCA considered two possible bases for establishing jurisdiction over Appellant, Article 2(a) and Article 2(c), UCMJ. Article 2(a) provides for jurisdiction over "persons lawfully called or ordered into, or to duty in or for training in, the armed forces," as well as "Members of a reserve component while on inactive-duty training . . ." UCMJ, Art. 2(a)(1), (3). In order for court martial jurisdiction to attach where it is not conferred by Article 2(a), the person must be "serving with an armed force" at the time of the offense, and also must meet the four-part test set forth in Article 2(c). *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F. 2003). AFCCA's opinion conflates the analysis under these two different statutory provisions.

AFCCA held "Article 2(a), UCMJ, conditions subject matter jurisdiction on the member's official status at the time of the offenses. It does not concern itself with how the member got into that status or whether he was doing official Government business pursuant to that status." *Morita*, 73 M.J. at 559. This is clearly against precedent and against the plain reading of Article 2(a). If Congress, in drafting Article 2(a) was unconcerned with how a person came to be in the military, it would not have specified that the law applies to persons "lawfully" called into duty. Rather, Article 2(a) applies to

> Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into 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.

10 U.S.C.A. § 802(a).

By concerning itself with a member's "status", AFCCA incorrectly imported a version of the analysis of jurisdiction under Article 2(c). As this Court is aware, Article 2(c) sets out a three-part analytical framework for finding jurisdiction. *United States v. Fry*, 70 M.J. 465, 469 (C.A.A.F. 2012); see also *United States v. Phillips*, 58 M.J. 217 (C.A.A.F. 2003). The threshold question is whether the person is "serving with the armed forces." Id. "Merely serving with the armed forces as a

reservist or civilian is not sufficient to establish jurisdiction under Article 2(c).” *Phillips*, 58 M.J. at 220. If this can be established, the analysis proceeds to the four-part test laid out in Article 2(c). *Fry*, 70 M.J. at 469. The four-part test requires findings that the accused: (1) voluntarily submitted to military authority; (2) met the mental and age requirement of 10 U.S.C. §§ 504 and 505; (3) received military pay or allowances; and (4) performed military duties. *Id*. The lower court held that neither *Phillips* nor Article 2(c) supported a finding of jurisdiction in this case. *Morita*, 73 M.J. at 560.

AFCCA’s opinion holds, in essence, that a reservist can simply create military jurisdiction by forging his or her own orders. AFCCA cites no authority for this proposition, nor is Appellant aware of any. AFCCA cites, in passing, a footnote in *United States v. Meadows*, 13 M.J. 165, 168 n.4 (C.M.A. 1982), but that citation does not support its holding. 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 Court of Military Appeals (CMA) cited as examples of such circumstances very different situations 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 CMA 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, at trial Meadows stipulated to jurisdiction and to having been voluntarily brought onto legitimate orders to stand trial. *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 CMA concluded that it could find court martial jurisdiction attached based on

> 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. 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*,[13 M.J. 132 (C.M.A. 1982)]. *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, 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. United States v. Self, supra; United States v. Pearson, 13 M.J. 132 (C.M.A.1982)(emphasis added).

*Meadows*, *Id.* at 168-69.

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

Unless on orders, a Reservist is a civilian, which makes AFCCA's opinion troubling. AFCCA seeks to vastly expand court-martial jurisdiction over civilian reservists. Under this rationale, if a reservist who forges orders at home, placing himself on active duty and commits a crime in his home (whether smoking marijuana, engaging in insider trading, or committing domestic violence), she or he is subject to court martial – rather than civilian - jurisdiction. This expands jurisdiction over civilian reservists far beyond its intended reach. Moreover, it creates difficult questions of liability and responsibility. For example, if reservist who forges his own orders is still considered "lawfully" called to duty, is the military then responsible for actions he takes while performing that duty? Such questions demonstrate that AFCCA has created an unwarranted expansion of jurisdiction over reservists.

### B. AFCCA's opinion relies on a faulty construction of Article 2(a).

AFCCA's opinion below speaks of whether appellant "was in a military status under Article 2(a)," but the test of jurisdiction under Article 2(a)(1) is not whether the person is in some ill-defined "military status." Instead, the test is whether a reservist is "lawfully called or ordered into, or to duty in or for training in, the armed forces." Article 2(a)(3) also provides for court-martial jurisdiction over "[m]embers of a reserve component while on inactive-duty training . . . " Thus, AFCCA's opinion attempts to create a new test for jurisdiction not supported by the plain language of Article 2, UCMJ, nor any case authority. In doing so, the opinion is able to side-step the critical question of whether the member has been "lawfully" called into duty by looking at whether a proper "military status" exists.

The court continued that it was unwilling to adopt the position that Article 2(a), UCMJ did not confer jurisdiction "to prosecute a member who fraudulently obtains military orders through forgery, is compensated for those orders, and receives military credit under those orders, simply because of the fraudulent nature of the member's own actions." *Morita*, at 559. This is an unwarranted expansion of Article 2(a), however. The court then held that "even if some of these documents contained

forgeries," the government had jurisdiction because it had presented evidence "showing the appellant was in active military status or performing IDTs." *Id*. Thus, AFCCA explicitly determined that an accused can create jurisdiction by forging orders.

The flawed nature of this approach is clear in Appellant's case. The court determined that there was evidence appellant was performing IDTs and therefore jurisdiction attached. Yet, as the court acknowledged, the evidence it was relying on were forged and fraudulent AF Form 40As. Nonetheless, the court concluded that these forged AF Form 40As "demonstrate the appellant was in military status and thus subject to military jurisdiction." *Id.* at 558.

Even if AFCCA could reasonably rely on these documents as evidence of dates that Appellant performed training, there was no evidence he was *lawfully called* to inactive duty training under Article 2(a). AFCCA has dispensed with this statutory requirement in its construction of Article 2(a).

### C. Even if AFCCA could rely on forged orders to find Appellant was subject to court-martial jurisdiction, it erred in relying on records of inactive duty training.

In AFCCA's opinion, the court identified specific periods of time it found appellant subject to jurisdiction pursuant to Article 2(a). All but one of these periods (10-12 September 2007), were based on inactive duty training orders, (Form 40A):

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. *See Morita*, 73 M.J. at 558.

These forged documents, even if they were real, do not purport to place appellant on active duty, or call him to inactive duty training. Rather, they are simply records of training allegedly performed.[1] Yet, at the heart of the case was whether Appellant had performed legitimate work during the time he claimed compensation.

**D. The AFCCA Erred When it Found Jurisdiction based on the three 120 day MPA periods, because no evidence was presented that the orders were authorized.**

Evidence was presented that Appellant's supervisor, Mr. Purvis signed the three MPA justifications. However, Purvis testified that in order for the MPA days to be approved, they would have to submit it to the Surgeon General's Office, which would send back an email authorizing the days. J.A. at 232. Those emails were not produced at trial, nor did anyone from the Surgeon General's Office testify that the orders had been approved.

Thus the government failed to prove there were lawful MPA orders, and AFCCA erred in relying on insufficient evidence to determine jurisdiction attached. This is no different than, for

[1] It should be noted that the government's theory of larceny at trial was that Appellant did not actually perform the training. Indeed, the government's theory that Appellant engaged in a vast scheme to defraud undermines any reliability such records of training might otherwise possess.

example, if in attempting to prove personal jurisdiction, the government failed to produce authorization from the Secretary of the Air Force ordering appellant to active duty to stand for trial by court martial. The government did provide such proof in its opposition to the motion to dismiss. *See* J.A. at 1602-04, 1615-16.

AFCCA was conceptually correct in looking to the MPA days as an anchor for jurisdiction. Those days, assuming sufficient proof of the actual lawful orders, were the only days the court could reasonably rely on in determining jurisdiction attached. However, the government simply failed to adequately prove there were lawful orders for those MPA days.

**WHEREFORE**, appellant respectfully requests the ruling of the lower court finding subject matter jurisdiction be reversed.

Respectfully submitted,

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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 25 August 2014.

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