30 January 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 14-0754/AF
Captain (O-3), KIRKLAND C. NETTLES, USAF, *Appellant.*	)	Crim. App. No. 38336

FINAL BRIEF ON BEHALF OF THE UNITED STATES

MARY ELLEN PAYNE, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 34088

GERALD R. BRUCE
Associate Chief, Government Trial and Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 27428

KATHERINE E. OLER, Lt Col, USAF
Chief, Government Trial and Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4815
Court Bar No. 30753

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

ISSUE PRESENTED

WHETHER THE AIR FORCE HAD PERSONAL JURISDICTION OVER APPELLANT AT THE TIME OF HIS TRIAL.

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)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

STATEMENT OF FACTS

Appellant was on active duty in the United States Air Force from September 2001 until August 2007. (J.A. at 30.) Appellant is alleged to have committed the charged misconduct during this time frame, while he was on active duty. (J.A. at 35-38.) After Appellant's discharge from active duty in August 2007, he was transferred to the United States Air Force Reserve Command

and was "subject to recall to active duty and/or annual screening." (J.A. at 30.)

Reserve Order A-406, dated 28 March 2011 purported to assign Appellant to "NON OBLIGATED NON PARTICIPATING RESERVE SECTION, DENVER, CO 80290." (J.A. at 33.)

On 14 March 2012, Debra A. Young, Chief, Transition Programs Division at Headquarters Air Reserve Personnel Center (ARPC) signed a memorandum notifying Appellant that he had been deferred for promotion to major for a second time. (J.A. at 34.) The memorandum explained that in accordance with Title 10, United States Code, Section 14505, Appellant was required to be discharged and that his adjusted mandatory separation date was 1 October 2012. It also stated that Appellant's discharge and an honorable discharge certificate would be sent to him when the action was taken. (Id.)

In April 2012, Colonel Rogers, the Staff Judge Advocate for the 42d Air Base Wing (ABW) began to coordinate with ARPC on recalling Appellant to active duty and ensuring that he was properly coded so as to prevent the automatic discharge that was pending. (J.A. at 113, 119, 121.)

On 3 May 2012, the Commander of the 42 ABW signed Special Order AB-II 07512-059 recalling Appellant to active duty effective 8 May 20112, at the direction of the General Court-Martial Convening Authority (GCMCA), the Air University

Commander. (J.A. at 39.) The special order cited 10 U.S.C. 802(d), AFI 51-201 and AFI 33-328 as authority and listed the duration of active duty as "indefinite." (Id.)

On 8 May 2012, the charges in this case were preferred against Appellant. (J.A. at 35.)

On 12 June 2012, the Commander of the 42d Force Support Squadron signed Special Order AB-II 07512-060 at the direction of the GCMCA ordering Appellant "to involuntary extended active duty, as needed effective 18 June 2012." (J.A. at 40.) Again, the authorities cited were, 10 U.S.C. 802(d), AFI 51-201 and AFI 33-328. (Id.) The special order stated "the duration of this active duty is indefinite and member may be released from active duty and involuntarily recalled to active duty, until the termination of disciplinary proceedings." (Id.)

On 18 July 2012, the Secretary of the Air Force signed a memorandum for the Commander of Air University (AU/CC) approving any recall of Appellant ordered by the AU/CC. The Secretary's memorandum cited Article 2(d)(5), Uniform Code of Military Justice, which states "[a] member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not be sentenced to confinement. . ." The 42 ABW/JA provided the Secretary's memorandum to Air Reserve Personnel Center (ARPC). (J.A. at 113.)

On 25 September 2012, Ms. Darcy Blair a senior human resources assistant at ARPC created Reserve Order CB-001669 (hereinafter "Reserve Discharge Order") for Appellant which stated, "By direction of the President the above named officer is relieved from assignment HQ ARPC (NARS) this station and honorably discharged from all appointments in the United States Air Force. Effective: 1 Oct 2012. Authority: AFI 36-3209. DD Form 256 AF will be furnished." (J.A. at 60, 145.) Despite generating the Reserve Discharge Order, it was never sent to Appellant. (J.A. at 71.) Appellant was also never sent a DD Form 256 discharge certificate because the paper for such certificates was on backorder from ARPC's supplier. (J.A. at 76.) At trial, Ms. Blair testified that the Reserve Discharge Order was not sent to Appellant because she intended to send discharge orders at the same time as she sent the DD Form 256 discharge certificates. (Id.) Ms. Blair further clarified that she had not received notice that Appellant was to be placed on hold before she generated the 25 September 2015 Reserve Discharge Order. (J.A. at 72.)

On 7 or 8 November 2012, 42 ABW/JA learned that ARPC had not properly coded Appellant and that discharge paperwork had been generated but not sent to Appellant. (R. at 119.) The 42 ABW/JA then worked with ARPC to have Appellant's Reserve Discharge Order rescinded. (J.A. at 120.) On 8 November 2012,

Ms. Blair generated an AF IMT 973 totally rescinding Appellant's 25 September 2012 Reserve Discharge Order by authority of Special Order AB-II 07512-060, dated 12 June 2012. (J.A. at 42.) At trial, Ms. Blair testified that she had rescinded the Reserve Discharge Order, and Appellant's current status was in the "IRR," but she did not explain what that acronym meant. (J.A. at 73.)

On 19 November 2012, trial counsel sent an email to trial defense counsel providing them for the first time with copies of the Reserve Discharge Order and the 8 November 2012 AF IMT 973. (J.A. at 25, 56-61.)

On 21 November 2012, trial defense counsel filed a motion to dismiss for lack of jurisdiction. (J.A. at 24-43.) On 26 November 2012, trial counsel responded, opposing the motion. (J.A. at 44-55.) On 30 January 2013, the military judge issued his ruling, denying Appellant's motion to dismiss for lack of jurisdiction. (J.A. at 62 – 66.)

SUMMARY OF THE ARGUMENT

Appellant was a member of the Individual Ready Reserve (IRR) and was properly recalled to active duty for his court-martial. Jurisdiction over Appellant's crimes attached when charges were preferred on 8 May 2012 and continued because Appellant was never validly discharged. Current case law requires delivery of a valid discharge certificate in order to

effect a discharge from the Armed Forces, including the Air Force Reserve. Although ARPC generated a discharge order for Appellant on 25 September 2015, this discharge order was not a valid substitute for a discharge certificate, nor was it "self-executing." In any event, the discharge order lacked validity because it was issued contrary to the lawful, 12 June 2012 special order recalling Appellant to active duty for disciplinary proceedings. Appellant has made no persuasive argument for ignoring existing case law; therefore, because Appellant was not delivered a valid discharge certificate, he was never discharged and the Air Force maintained jurisdiction over him at the time of his trial.

ARGUMENT

THE AIR FORCE HAD PERSONAL JURISDICTION OVER APPELLANT AT THE TIME OF HIS TRIAL.

Standard of Review

Questions of law are reviewed de novo. United States v. Conliffe, 67 M.J. 127, 131 (C.A.A.F. 2009). "When an accused contests personal jurisdiction on appeal, we review that question of law de novo, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." United States v. Melanson, 53 M.J. 1, 2 (C.A.A.F. 2000) (citing United States v. Owens, 51 M.J. 204, 209 (C.A.A.F. 1999)).

Law and Analysis

a. Appellant was a member of the *Individual* Ready Reserve at the time he was recalled for trial.

Before delving into the heart of the United States' argument, an important issue must be clarified. The parties at trial, the military judge, and Appellant on appeal continually refer to IRR as the "inactive ready reserve." This is incorrect. IRR, in fact, stands for "Individual Ready Reserve." *See* Air Force Instruction (AFI) 36-2633, *The Air Force Reserve Pretrained Individual Manpower Programs – Management and Utilization*, (30 August 2004); Department of Defense Instructions (DoDI) 1235.13 and 1235.14; and United States v. Watson, 69 M.J. 415 (C.A.A.F. 2011).

AFI 36-2633, Attachment 1 defines "Individual Ready Reserve" as:

> Officer and enlisted members who may or may not have a remaining military service obligation or a commitment to remain in the Ready Reserve for benefits or training received. This section consists of both participating and non-participating members. Some of these members are those who completed their 4 years of AD and serve the remainder of their 8 year obligation in the IRR. These members are subject to involuntary recall by the President and Congress, and are also required to participate in Muster or Push-Pull screenings.

Paragraph 3 further describes, "[t]he IRR members are assigned to either the Obligated Reserve Sections (ORS/RA or ORS/RC) or

the Non-obligated Non-participating Ready Personnel Section (NNRPS/RD)." Id.

The only mention of "inactive" status in AFI 36-2633 is in paragraph 4, which describes the "Standby Reserve." Paragraph 4 explains the "Standby Reserve is comprised of the active Non-Affiliated Reserve Sections (NARS) and the Inactive Status List Reserve Section (ISLRS) who are managed by ARPC/DPAF (AFI 36-2115, Chapter 5)." Id.

As will be described in more detail below, there is no evidence on the record that Appellant was ever in an "inactive" reserve status.

b. In this case, court-martial jurisdiction attached to Appellant.

The Manual for Courts Martial (MCM) provides:

> A member of a reserve component at the time disciplinary action is initiated, who is alleged to have committed an offense while on active duty or inactive-duty training is subject to court-martial jurisdiction without regard to any change between active and reserve service or within different categories of reserve service subsequent to the commission of the offense. This subsection does not apply to a person whose military status was completely terminated after commission of an offense.

R.C.M. 204(d).

The discussion to R.C.M. 204(d) further explains:

> [a] member of a regular or reserve component remains subject to court-martial jurisdiction after leaving active duty if

> the member retains military status in a reserve component without having been discharged from all obligations of military service. A 'complete termination' of military status refers to a discharge relieving the servicemember of any further military service. It does not include a discharge conditioned upon acceptance of further military service.

In discussing *when* court-martial jurisdiction attaches, the MCM provides:

> Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial.

R.C.M. 202(c)(1).

If jurisdiction has attached before the effective terminal date of self-executing orders, the person may be held for trial by court-martial beyond the effective terminal date. R.C.M. 202(c)(1), Discussion. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges. R.C.M. 202(c)(2)

Once attached, personal jurisdiction over a member continues until it is terminated through a valid discharge.

United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006)(citing Smith v. Vanderbush, 47 M.J. 56, 58 (C.A.A.F. 1997)).

In this case, Appellant was subject to court-martial jurisdiction because he committed the alleged offenses while he was on active duty in the Air Force. Article 2(d), UCMJ and R.C.M. 204(d) confirm that a reservist may be ordered to active duty to face trial by court-martial for either current-service or prior-service offenses, including offenses committed while the reservist was a member of a regular component. Willenbring v. Neurauter, 28 M.J. 152, 175 (C.A.A.F. 1998.) In this case, jurisdiction attached at the very latest on 8 May 2012 when charges were preferred on Appellant. After jurisdiction attached, it could only be severed by a valid discharge from all obligations of military service.

c. A valid, jurisdiction-terminating discharge requires actual delivery of a discharge certificate.

"For purposes of ascertaining the impact of an administrative discharge on court-martial proceedings," this Court has identified three generally applicable elements of a valid discharge: (1) a delivery of a valid discharge certificate; (2) a final accounting of pay made; and (3) undergoing the clearing process under the appropriate service regulation for separation. Watson, 69 M.J. at 417 (citing United States v. Hart, 66 M.J. 273, 276 (C.A.A.F. 2008); United

States v. King, 27 M.J. 327, 329 (C.M.A. 1989)). In Watson, a case involving the automatic administrative discharge of a Reserve officer, this Court made clear that the requirements of King apply to officer discharges from the Reserve as well as to discharges from active duty. Thus, in order for Appellant to be validly discharged from the Air Force Reserve, he must have been delivered a discharge certificate.[1]

In United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985), this Court squarely addressed the issue of when a servicemember is discharged, saying it intended "to identify the *moment* of discharge." (emphasis in original.) The Court held that "[d]ischarge is effective upon ***delivery*** of the discharge certificate. Id. *citing* United States v. Scott, 29 C.M.R. 462 (1960)(emphasis added.) This Court elaborated that "'[d]elivery' in this context has significant legal meaning. It shows that the transaction is complete, that full rights have been transferred, and that the consideration for the transfer has been fulfilled." *See also* United States v. Noble, 32 C.M.R. 413, 416 (C.M.A. 1962) (mere preparation of the instrument of discharge, without delivery thereof, does not terminate military status.)

Applying the reasoning of Howard, Scott, and Noble, the evidence needed to show some sort of transfer and receipt of

[1] The second and third requirements of King are not at issue in this case.

Appellant's discharge certificate in order to confirm his discharge was completed. The mere fact that the Reserve Discharge Order had been prepared on 25 September 2012 was not sufficient to discharge Appellant.

Appellant contends that a DD Form 256 is not a discharge certificate, but merely a ceremonial certificate suitable for framing. (App. Br. at 8-9.) This claim is not supported in law and completely ignores the fact that AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, paragraphs 1.4.4. and 1.4.4.2 (14 April 2005) specifically refer to a DD Form 256 as a "discharge certificate" issued for "individuals who are in reserve status at the time of discharge." Thus, given that King specifically requires delivery of a discharge certificate to effect discharge, the only reasonable interpretation based on AFI 36-3209 is that a DD Form 256 must be received. In this case, Appellant never received a DD Form 256, and therefore was not validly discharged and remained subject to court-martial jurisdiction.

d. The generation of a discharge order is not a substitute for delivery of a valid discharge certificate.

Appellant asserts that the delivery of a discharge certificate is unnecessary in this case because the Discussion to R.C.M. 202(a) states "[o]rders transferring a person to the inactive reserves are the equivalent of a discharge certificate

for purposes of jurisdiction." This interpretation of the facts and law is incorrect for several reasons.

First, there is no evidence on the record that Appellant was ever transferred to an "inactive" status in the Reserve. "IRR" stands for "Individual Ready Reserve," not inactive reserve. Appellant's Reserve Order A-406 dated 28 March 2011 assigned him to "non obligated non participating reserve section, Denver CO 80280." According to AFI 36-2633, the Non-obligated Non-participating Ready Personnel Section is part of the Individual Ready Reserve.

Furthermore, both 10 U.S.C § 14505 and 10 U.S.C. § 14513, direct the separation of captains who are on the "reserve active-status list" of the Air Force. Thus, Appellant would have never been separated in accordance with 10 U.S.C. § 14505 and § 14513 if he had not been in an "active" status in the Reserve.

Also, the purported Reserve Discharge Order date 25 September 12, indicates that Appellant is being relieved from "Assignment HQ ARPC (NARS)." AFI 36-2633 explains that "NARS" means "Non-Affiliated Reserve Section." Paragraph 4 further clarifies that "NARS" is an active component of the Standby Reserve, as opposed to the other inactive component, the Inactive Status List Reserve Section. Therefore, even as Appellant was supposedly being discharged, he was to be

discharged from an "active", rather than "inactive" status in the Reserve. Since there is no indication Appellant was ever transferred to the "inactive" reserve, the cited part of R.C.M. 202(a), Discussion has no application to this case.

Appellant's interpretation of the Discussion to R.C.M. 202(a) is also incorrect because that section must not be read to contradict R.C.M. 204. In 1986, Congress enacted legislation to expand military jurisdiction over reservists. *See* Willenbring, 48 M.J. at 169. As this Court explained:

> The primary effect of the 1986 legislation was that a reservist would no longer be relieved of amenability to court-martial jurisdiction for offenses committed on active duty or during inactive-duty training by virtue of return to civilian life. In other words, even though a return to civilian life would mean that a reservist could not be tried by court-martial for offenses committed while a civilian, that break in the status of being subject to military law would not constitute a break in service so long as the person continued his or her military status as a member of the reserve component.

Id.

In 1987, the President also promulgated R.C.M. 204, which, as explained above, stated in relevant part that court-martial jurisdiction continued over a reservist "without regard to any change between active and reserve service or within different categories of reserve service subsequent to the commission of the offense." Id.

Notably, the portion of the R.C.M. 202(a) Discussion quoted by Appellant regarding orders "transferring a person to the inactive reserve" predated the 1986 reforms and creation of R.C.M. 204. *See* R.C.M. 202(a), Discussion, MCM (1984 ed.)

Knowing the legislative history of R.C.M. 204, it would make no sense to believe that R.C.M. 202(a), Discussion still allows for termination of jurisdiction when a member is transferred to an inactive reserve component. Such a reading would completely contradict R.C.M. 204(d)'s clear intent to hold a reservist accountable despite a transfer to *any* reserve component. As such, the cited portion of R.C.M. 202(a), Discussion should be viewed only as a relic of the law that existed prior to the 1986 reforms and as having no bearing on Appellant's case.

Based on Appellant "active" reserve status and R.C.M. 204, this Court should not countenance Appellant's assertion that R.C.M. 202(a), Discussion allows his undelivered Reserve Discharge Orders to terminate court-martial jurisdiction over him.

e. Appellant's discharge order was not self-executing, and even if it was, it could not sever jurisdiction over him.

Without citing to any precedent, Appellant also argues that AFI 36-3209 obviates the need for a reservist to physically receive his discharge order because paragraph 1.5.2. renders his

discharge order self-executing. He bases that contention on the language in AFI 36-3209 that states such orders will "become effective at 2400 on the date specified if the member receives actual or constructive notice on or before the effective date specified in the orders," and that "if the delivery cannot be made through normal postal channels, the effective date specified in the orders will be considered to be the date official notification was received." (App. Br. at 8.)

In Howard, 20 M.J. at 353, this Court specifically rejected the argument that a service regulation could establish the moment of discharge. This Court firmly asserted that the moment of discharge occurred when a discharge certificate was delivered to a servicemember. Id. Similarly, here, any language in AFI 36-3209 cannot override well-established case law on the legal requirements for discharge, which necessitate delivery of a valid discharge certificate. Even supposing the Reserve Discharge Order was an equivalent to or a valid substitute for a discharge certificate,[2] it could not discharge Appellant without first being delivered to him. Delivery unequivocally did not occur in this case before the Reserve Discharge Order was rescinded on 8 November 2012.

Further, a self-executing order "does not free the individual from military jurisdiction, if before the prescribed

[2] The United States still does not concede this point.

time, action on a court-martial charge against him has been taken with a view to trial." United States v. Hudson, 5 M.J. 413, 419 (C.M.A. 1978). *See also* R.C.M. 202(c)(1), Discussion. In this case, the 8 May 2012 preferral of charges against Appellant – an undeniable action with view to a trial – occurred well before the supposed date when Appellant's Reserve Discharge Order became effective. Thus, even if the Reserve Discharge Order could be considered to be "self-executing", it could not and did not sever the Air Force's jurisdiction over Appellant.

f. Even if the law permitted discharge from the Air Force pursuant to self-executing discharge orders, the Reserve Discharge Order in this case was not valid.

The Reserve Discharge Order created on 25 September 2012 was not valid because it was generated in contradiction to valid orders recalling Appellant to active duty for disciplinary proceedings. 10 U.S.C. § 14513 provides that if a captain has been passed over twice for promotion, he will be discharged "unless the officer's separation is deferred or the officer is continued in an active status under another provision of law."

R.C.M. 204(a) allows the service Secretaries to prescribe regulations for procedures for recalling reservists to active duty for disciplinary proceedings. In AFI 51-201, *Administration of Military Justice,* (21 December 2007), paragraph 2.9.4 the Secretary of the Air Force gives authority to various GCMCAs to recall reservists to active duty. In this

case, as of 12 June 2012, Special Order AB-II 07512-060 had continued Appellant in an active status indefinitely, and he could be released and involuntarily recalled to active duty until the termination of disciplinary proceedings. Therefore, since Appellant had been "continued in an active status under another provision of law," there was no requirement that Appellant be automatically discharged in accordance with 10 U.S.C. § 14513. It was an administrative error for Ms. Blair to create the Reserve Discharge Order when Special Order AB-II 07512-060 was already in existence.

The administrative error on the part of ARPC rendered the Reserve Discharge Order invalid and without effect. In a writ appeal in a case later affirmed by this Court, the Air Force Court of Criminal Appeals cautioned, "[t]here is nothing talismanic about a [discharge certificate]. The discharge it memorializes must be a ***valid*** discharge, that is, it must be issued by ***competent authority***, or if by delegation from that competent authority, according to the requirements and limitations of that delegation." Wilson v. Courter, 46 M.J. 745, 749 (A.F. Ct. Crim. App. 1997) (emphasis added), *aff'd*, United States v. Wilson, 53 M.J. 327 (C.A.A.F. 1999). *See also* United States v. Garvin, M.J. 194 (C.M.A. 1988) (Finding no valid discharge when a discharge certificate was issued and delivered contrary to revoked orders because the personnel

clerks were unaware of the revocation.) Following the above logic, the Reserve Discharge Order generated by Ms. Blair on 25 September 2012 was not issued in accordance with the requirements and limitations of 10 U.S.C. § 14513, and therefore was invalid and could not effect Appellant's discharge.

g. his Court should not deviate from current case law and equate the language "ready for delivery" with actual delivery of a valid discharge certificate.

As a last resort to escape jurisdiction, Appellant urges this Court to redefine the requirements for discharge based on the language of 10 U.S.C. § 1168(a), such that a discharge certificate must only be "ready for delivery" in order to effect discharge. This Court has specifically declined to do this in the past. This Court has articulated that even though 10 U.S.C. § 1168(a) states that "[a] member of an armed force may not be discharged or released from active duty until his discharge certificate . . . and his final pay or a substantial part of that pay, *are ready for delivery* to him," this does not change the fact that actual delivery is a requirement for a valid discharge. Howard, 20 M.J. at 354. "Congress . . . did not indicate that the language in this code provision was intended to change the long-standing historical precedent that a discharge is effective upon 'delivery' of the discharge certificate. Id. *See also* United States v. Palumbo, 27 M.J. 565, 566 (A.C.M.R. 1988.) in which ACMR pointed out that the

statutory language "may not be discharged . . . until" in 10 USC §1168(a) does not set out or establish the moment of discharge. Appellant suggests no compelling reason why this Court should suddenly reach a different conclusion.

In sum, Appellant's arguments contradict well-established case law and would require this Court to reverse course and hold for the first time (1) that a discharge order can be a substitute for a discharge certificate and (2) actual delivery of a discharge instrument is not required to effect discharge. Appellant offers no persuasive authority or reason for this Court to deviate from the precedent that delivery of a valid discharge certificate is required to effect discharge from the Armed Forces. Applying existing law to the facts of this case, a valid discharge certificate was never delivered to Appellant. Appellant was never discharged, and therefore, the Air Force had jurisdiction over Appellant at the time of his trial.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

MARY ELLEN PAYNE, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 34088

GERALD R. BRUCE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 27428

FOR KATHERINE E. OLER, Lt Col, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4815
Court Bar No. 30753

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 30 January 2015.

MARY ELLEN PAYNE, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar. No. 34088

COMPLIANCE WITH RULE 24(d)

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

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/s/
MARY ELLEN PAYNE, Maj, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 30 January 2015