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. 11-0526/AF
Senior Airman (E-4) KODY T. WEEKS, USAF, *Appellant.*	)	Crim. App. No. 37535

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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14 October 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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Senior Airman (E-4) KODY T. WEEKS, USAF, *Appellant.*	)	Crim. App. No. 37535

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

ISSUE PRESENTED

WHETHER APPELLANT'S GUILTY PLEA TO CHARGE II AND ITS SPECIFICATION IS IMPROVIDENT BECAUSE APPELLANT DID NOT FALSELY MAKE OR ALTER A SIGNATURE OR WRITING.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ. This Honorable Court has jurisdiction to review AFCCA's decision under Article 67, UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted.[1] AFCCA affirmed Appellant's guilty plea as being provident: "Appellant caused the checks to be falsely made and he uttered them." (Jt. App. at 3.)

[1] Appellant incorrectly identifies the amount for each check Appellant falsely uttered. Appellant asserts that 30 of the 31 checks were forged in the amount of $500. (*See* App. Br. at 1.) The charge sheet, the Care inquiry, and the stipulation of fact (Pros. Ex. 1) make clear that the check amounts were in many instances greater than $500. (*See* Jt. App. at 4, 25-26, 50.)

STATEMENT OF FACTS

Appellant pled guilty to Charge II, a single specification of forgery by uttering. (Jt. App. at 4, 6, 15.) Charge II identified 31 separate instances in which Appellant falsely uttered checks, with an aggregate value of the uttered checks being approximately $19,000. (Jt. App. at 4, 5, 50.) Appellant falsely uttered 31 checks to pay off his debt at Best Buy, a consumer electronics store. (Jt. App. at 49-50.) Each electronically created check contained Appellant's name and address written on the check. (Id.)

Appellant signed a stipulation of fact with the government admitting his forgery by uttering. (*See* Jt. App. at 49-51.) The stipulation of fact explained the means and methods of how Appellant was able to falsely create and utter checks, ultimately resulting in Appellant's Best Buy debt being paid by the Barbers' (hereinafter "victims'") without their knowledge or permission. (Id.)

Appellant admitted he had access to his victims' bank account information because they had previously given him a check containing their bank account and routing information. (Jt. App. at 49.) Relevant to Charge II, Appellant admitted that:

> Between 22 January 2008 and 16 June 2008, SrA Weeks falsely made 31 checks (listed under Charge II on the Charge Sheet (DD Form

> 458), dated 26 May 09), by using the account information (account number and routing number) from [victims'] Bank of America joint bank account to pay for debt he owed to Best Buy. On each of the 31 occasions SrA Weeks would cause the checks to be made by using the account information to create electronic checks by calling a phone number to Best Buy and using their automatic payment system to create checks from the [victims'] bank account that would be credited to his balance. On each occasion SrA Weeks selected an option to pay by check, provided the [victims'] account number, routing number, a specific check number, and an amount to create the electronic check. The check would automatically be generated from this information and would be credited to SrA Weeks' balance. The check was then processed through the [victims'] bank whereby the [victims'] account was debited for the amount of each check. Each check, if genuine, would apparently impose a legal liability on the [victims'] to their detriment and did in fact impose a legal liability on them by acting as a genuine check from their account and therefore drawing money from their account to pay for the debt. SrA Weeks uttered the checks by making the electronic checks over the phone and representing to Best Buy and the [victims'] bank that the checks were genuine. On each of the 31 occasions SrA Weeks knew the checks were falsely made and made each check with the intent to defraud.

(Jt. App. at 50.)

The military judge explained the elements for Charge II to Appellant at trial, and he defined the terms "falsely made," "intent to defraud," and "utter" for Appellant.[2] (Jt. App. at

[2] The military judge's instructions on "falsely made" and "uttering" mirrored

26-27.) The military judge defined the term "falsely made" as being "an unauthorized signing of a document or an unauthorized making of the writing which causes it to seem to be different from what it really is." (Jt. App. at 27.) For the legal term "utter," the military judged said it meant:

> to use a writing with the representation, by words or actions, that it is genuine. A writing would, if genuine, apparently impose a legal duty on another or change his or her legal right or duty to his or her harm if the writing is capable of paying an obligation or transferring a legal right.

(Id.)

Appellant told the military judge that he understood the elements and definitions the military judge read to him. (Id.)

Appellant's verbal providency inquiry was substantially similar to his signed stipulation of fact: he admitted to using Best Buy's automated bill pay system to create and utter electronic checks to pay his debt, using the victims' bank account information.[3] (Jt. App. at 27-36.) Appellant provided Best Buy his name and address for each check; sometimes Appellant gave the information to a Best Buy employee and sometimes the information was provided through Best Buy's automated system. (Id.) Best Buy credited Appellant's account with the fraudulently created and uttered check, and the

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the military judge's benchbook. *See* Department of Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 3-48-2(d) (1 January 2010).

[3] The electronic check created was actually paid to HSBC Bank, a consumer credit firm associated with Best Buy's credit card. (Jt. App. at 28.)

victims' bank honored the fraudulently uttered checks with a corresponding legal liability to Appellant's victims. (Id.)

After the extensive colloquy with Appellant, both the trial counsel and Appellant's trial defense counsel stated on the record that they did not believe any additional inquiry was necessary for a provident guilty plea. (Jt. App. at 36.) Appellant orally informed the military judge that he wanted to plead guilty, and the military judge found that Appellant's guilty plea was provident and was knowing and voluntary. (Jt. App. at 48.)

SUMMARY OF ARGUMENT

Appellant's guilty plea to forgery by uttering was provident. The 31 electronic checks Appellant caused to be falsely made were "writings" within the definition of Article 123, UCMJ. Appellant's false statements and actions caused his victims to suffer financial loss when Appellant paid for his consumer debt from his victims' bank account without their knowledge or consent.

ARGUMENT

APPELLANT'S GUILTY PLEA TO CHARGE II, FORGERY BY UTTERING, WAS PROVIDENT. MORE THAN SUFFICIENT EVIDENCE EXISTS IN THE RECORD OF TRIAL -- BOTH IN THE STIPULATION OF FACT SIGNED BY APPELLANT AND APPELLANT'S OWN ORAL STATEMENTS TO THE MILTIARY JUDGE DURING HIS CARE INQUIRY -- TO SATISFY ALL FIVE ELEMENTS OF ARTICLE 123(2), UCMJ.

Standard of Review

The military judge is charged with determining whether the guilty plea is supported by is an adequate basis in law and fact. United States v. Inabinette, 66 M.J. 320, 321-22 (C.A.A.F. 2008). A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion.[4] Id. at 322. The abuse of discretion standard is a strict one. It involves more than a difference of opinion. The challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be invalidated on appeal. United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987).

"A military judge abuses his discretion if he accepts a guilty plea without an adequate factual basis to support the plea – an area we afford significant deference." Inabinette, 66 M.J. at 322 (*citing* United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)). When a guilty plea is first attacked on appeal, the evidence of guilt is construed in the light most favorable to the government. United States v. Hubbard, 28 M.J. 203, 209 (C.M.A. 1989) (Cox, C.J., concurring) (reversed on other grounds). To overturn a guilty plea on providency grounds, a reviewing court must find that there was a

[4] To the extent that this honorable Court considers the issue of whether the electronic check under the circumstances of the case constitutes a "writing" under Article 123(2) is a legal question, legal questions are reviewed de novo. *See* Inabinette, 66 M.J. at 322. A military judge's acceptance of a guilty plea based upon an erroneous view of the law is reviewed for an abuse of discretion. Id.

"substantial basis" in "law or fact" in the record of trial as a whole to question the guilty plea.[5] Inabinette, 66 M.J. at 322.

Law and Analysis

Before accepting a guilty plea, a military judge must explain the elements of the offense to the accused and ensure that a factual basis for each element exists. United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996). *See also*, Jordan, 57 M.J. at 238; United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969); R.C.M. 910(e). The military judge properly explained the elements and relevant legal terms to Appellant, and Appellant fully explained his criminal actions in light of the elements and definitions provided by the military judge. (Jt. App. at 25-36.) Ultimately, trial counsel, trial defense counsel, and the military judge were satisfied that Appellant's guilty plea was provident. (Jt. App. at 36, 48.)

A military judge may not accept a guilty plea if it is "irregular," if the accused "sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . ." Article 45(a), UCMJ.

"By pleading guilty, an accused does more than admit that he did the various acts alleged in a specification; he is

[5] In Inabinette, this honorable Court noted that while the substantial basis test has traditionally been conjunctive (substantial basis in law and fact), the deferential test was better viewed in light of a disjunctive test (substantial basis in law or fact). Inabinette, 66 M.J. at 322.

admitting guilt of a substantive crime." United States v. Campbell, 68 M.J. 217, 219 (C.A.A.F. 2009) (internal citation and quotation omitted). On appeal, a guilty plea is reviewed for providency and not sufficiency of the evidence.[6] Faircloth, 45 M.J. at 174. No requirement exists that a witness testify or other independent evidence be admitted to establish a factual predicate for a guilty plea; the factual predicate "is sufficiently established if the factual circumstances as revealed by the accused himself objectively support that plea." Id. (internal citation and quotation omitted). Accordingly, this Court will not overturn a guilty plea based on a "mere possibility of a defense." Id. (internal citation and quotation omitted). Something in the record of trial itself must exist that raises substantial questions related to the accused's guilty plea. United States v. Riddle, 67 M.J. 335, 338 (C.A.A.F. 2009). This Court also will not "speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas." Faircloth, 45 M.J. at 174 (internal citation and quotation omitted).

Moreover, this Court grants "broad discretion" to military

[6] This Court in Faircloth approved of the CCA analysis that explained the need for appellate military courts to only review a guilty plea for providency and not sufficiency of the evidence. Faircloth, 45 M.J. at 174. The CCA judge wrote: "[t]his is a guilty plea, folks. Whether someone is an 'owner' or 'any other person' is a matter of proof which an accused may contest at trial. By pleading guilty, appellant knowingly waived a trial of the facts as to that issue." Id.

judges in accepting guilty pleas, in part because "facts are by definition undeveloped in such cases." Inabinette, 66 M.J. at 322 (*citing* Jordan, 57 M.J. at 238). Further, this Court has noted that an accused's decision to plead guilty may often "include a conscious choice by an accused to limit the nature of the information that would otherwise be disclosed in an adversarial contest." Jordan, 57 M.J. at 238-39.

Finally, in light of the well-known tendency of human beings to rationalize their behavior, the military judge can give weight to the defense evaluation of the evidence in a borderline case. United States v. Clark, 28 M.J. 401, 406-07 (C.M.A. 1989). Appellant's forgery conviction is not a borderline case.

A. Appellant misunderstands the type of forgery charge for which he was convicted: personally creating a false writing is not an element of forgery by uttering. This Court holds that Article 123, UCMJ, contains two separate crimes: forgery by making and forgery by uttering. United States v. Albrecht, 43 M.J. 65, 68 (C.A.A.F. 1995). Appellant was charged with and convicted of violating Article 123(2), UCMJ, forgery by uttering and not Article 123(1), UCMJ, forgery by making or altering. (*See* Jt. App. at 4.) Unlike forgery by making or altering, forgery by uttering does not require the government to prove that the accused falsely made or altered a

writing. *See* Article 123(2), UCMJ. Under forgery by uttering, a writing must have been falsely made and the accused must "utter" it. See id.

The military judge tailored the statutory elements according to the charge sheet, and the elements explained to Appellant mirrored the five elements for forgery by uttering under Article 123(2):

> (a) That a certain signature or writing was falsely made or altered;
>
> (b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's rights or liabilities to that person's prejudice;
>
> (c) That the accused uttered, offered, issued, or transferred the signature or writing;
>
> (d) That at such time the accused knew that the signature or writing had been falsely made or altered; and
>
> (e) That the uttering, offering, issuing or transferring was with the intent to defraud.

Manual for Courts-Martial, United States part IV, para. 48b(2) (2008 ed.) (MCM).

The MCM defines "utter" as both "transfer" and "offering to transfer." MCM, pt. IV, para. 48c(7) (adopting the definition for "uttering" provided in para. 49c(4)). The MCM further provides:

> A person need not personally be the maker or

> drawer of an instrument in order to violate this article if that person utters or delivers it. For example, if a person holds a check which that person knows is worthless, and utters or delivers the check to another, that person may be guilty of an offense under this article despite the fact that the person did not personally draw the check.

Id.

Nevertheless, Appellant fully admitted at trial that he did in fact falsely make and/or caused to be made 31 electronic checks resulting in corresponding legal liability to his victims'. (*See* Jt. App. at 28, 32, 50.) Appellant's additional admission related to his creation of the electronic checks does not call into question his guilty plea. If anything, it is an aggravating fact that the members could have used to properly sentence Appellant for the entirety of his criminal endeavors.

B. Electronically created checks are "writings" within the definition of Article 123, UCMJ, because they had the ability to, and in fact did, affect a legal right of another. Appellant asserts on appeal that: he "did not utter any such writing or signature. Instead he took the money by electronic or telephonic means." (App. Br. at 6.) Appellant's assertion ignores the evidence he admitted in the stipulation of fact and under oath during the Care inquiry. At trial, Appellant unequivocally stated that electronic checks were created, had individual numbers, contained bank information, and identified Appellant's name and address. (*See* Jt. App. at 28, 32, 49-50.)

If a stipulation of fact is accepted by the military judge, the facts stipulated to are binding on the court-martial, and may not contradicted by the parties. *See* R.C.M. 811(e).

Appellant is apparently hung up on the fact that the checks Appellant created were "electronic checks," from which Appellant asserts that the electronic checks were not "signatures" or "writings" because Congress has not specifically amended Article 123, UCMJ, to reference "electronic" signatures or writings.[7] (*See* App. Br. at 6.) Appellant's complaint on appeal ignores the fact that Article 123, UCMJ, uses the inclusive term "signature" and "writing," legal terms which necessarily includes signatures and/or writings using every medium imaginable (i.e., fingers in wet cement, crayons, pencils, and electronic checks.)[8] "A writing falsely made includes an

[7] Appellant's unsubstantiated assertion that Best Buy has a business model that permits fraud is wholly irrelevant to the question of whether Appellant's guilty plea was provident. (*See* App. Br. at 7.) Article 123, UCMJ, is rightly focused on Appellant's criminal actions and not what Best Buy's business practices are or should be.

[8] This Court has approved forgery convictions using many different means/mediums when the writing imposed legal liability on another person. *See* United States v. Driggers, 45 C.M.R. 147 (C.M.A. 1972) (falsely made PCS orders), United States v. Noel, 29 C.M.R. 324 (C.M.A. 1960) (falsely changed payment authorization by a relief organization that under the circumstances conferred additional rights to the accused at the prejudice of the relief society); United States v. Taylor, 26 C.M.R. 376 (C.M.A. 1958) (forging of ration books); United States v. Erby, 49 M.J. 134 (A.F. Ct. Crim. App. 1997) (affirmed on other grounds, remanded on other grounds) (upholding conviction of forgery and uttering convictions in which the appellant created and loaded fictitious names, social security numbers, and travel documents into Air Force computer programs to embezzle nearly $24,000 in government money). This Court has also overturned forgery convictions when the writing did not create legal liability on another person. *See* United States v. Hopwood, 30 M.J. 146, 147 (C.M.A. 1990) (forged loan application with no signature, the necessary provision to create liability on another); United States v. Thomas, 25 M.J. 396, 402 (C.M.A. 1988) (commanding officer's letter lacked sufficient

instrument that may be partially or entirely printed, engraved, written with a pencil, or made by photography or other device." MCM, pt. IV, para. 48c(4).

The only relevant question under forgery by uttering is whether the writing, whatever it might be, has "apparent [legal] efficacy to create, increase, diminish, discharge, transfer, or otherwise affect a legal right." United States v. Thomas, 25 M.J. 396, 400 (C.M.A. 1988). *See also*, MCM, pt. IV, para. 48c(4) ("With respect to the apparent legal efficacy of the writing falsely made or altered, the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability the prejudice of another.").

This Court's holding in Thomas makes clear that the term "electronic check" and "paper check" are terms without legal distinction: the legal effect of the signature or writing depends upon the relevant law for contracts or torts. Thomas, 25 M.J. at 402 n.5. In fact, if a change in contract law and/or tort law occurs, the scope of liability changes for forgery.[9] Id.

Notwithstanding the contrary case precedent discussed

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legal efficacy).

[9] *See generally*, United States v. Pauling, 60 M.J. 91, 93 n.3 (C.A.A.F. 2004) (holding that "[a]t one time "arcane distinctions existed between a 'share draft' drawn at a credit union and a 'check.' However, the law of negotiable instruments now includes share drafts within the definition of checks.") (internal citation and quotation omitted).

above, Appellant asserts that United States v. Nimmons, 59 M.J. 550 (N.M. Ct. Crim. App. 2003), is relevant to the guilty plea providency issue before this Court. (*See* App. Br. at 6, 8.) The facts of Nimmons are entirely different than the case *sub judice*. More importantly, Appellant misunderstands the holding of Nimmons related to "electronic checks" and the requirement in Article 123, UCMJ, of proof of a "writing" or "signature." The Navy-Marine Corps Court of Criminal Appeals' (NMCCA) holding in Nimmons is very narrow and ultimately is not binding on this Court's analysis.

Nimmons involved a guilty plea to "falsely making and uttering" checks. Nimmons, 59 M.J. at 551. The accused in Nimmons stated in his Care inquiry that he called Sprint PCS to make a payment by phone. Id. He provided Sprint PCS with his personal information and the check number he wished to use, and Sprint PCS checked with the bank and the check was processed. Id. The appellant argued on appeal that the mere act of calling Sprint PCS and giving stolen check information and account information did not constitute an act of forgery because no writing or signature was used. Id. at 550. The CCA agreed with the appellant in Nimmons under the evidence presented at trial. Id.

Of crucial importance to both Nimmons and the case *sub judice*, the NMCCA wrote that, "[n]othing in the record indicates

that the paper check numbered 0115 or any other writing was ever forwarded to Sprint or used in any other way by the appellant for this particular transaction." Id. at 551. Essentially, there was an electronic to electronic transaction with no evidence admitted that a writing was created.

The government argued that Appellant's telephone call to Sprint PCS and his using the word "check 0115" was a "forgery by telephone" (e.g., "electronic signature") satisfying the requirement of a signature under Article 123, UCMJ. Id. The NMCCA held that "[i]nasmuch as neither a writing nor a signature was used in this telephone transaction, we conclude that there is a substantial basis to question the providency of this part of the guilty plea to forgery." Id. For the other checks which the appellant physically signed, the forgery specifications were upheld by the NMCCA. Id. Accordingly, Nimmons is a narrow holding, as it considered only the evidence in the case to determine if a writing/signature actually occurred. Relevant to Appellant's assertions, Nimmons did not say that "electronic checks" cannot qualify as a writing or signature. Unlike Nimmons, where there was just a telephone conversation and no evidence was admitted that a tangible/physical paper check was created/uttered, *see* id., actual checks in the case *sub judice* were created and uttered by Appellant. The checks Appellant created/caused to be created and then uttered were tangible:

> In addition to the unauthorized transactions, SrA Weeks' name and address appeared on 31 checks that were drawn on the account between 22 January 2088 and 16 June 2008.
>
> ****
>
> On each of the 31 occasions SrA Weeks would cause the checks to be made by using the account information to create electronic checks by calling a phone number to Best Buy and using their automatic payment system to create checks from the [victims'] bank account that would be credited to his balance. On each occasion SrA Weeks selected an option to pay by check, provided the [victims'] account number, routing number, a specific check number, and an amount to create the electronic check. The check would automatically be generated from this information and would be credited to SrA Weeks' balance. The check was then processed through the [victims'] bank whereby the [victims'] account was debited for the amount of each check.

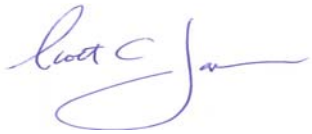
(Jt. App. at 49-50) (emphasis added).

C. The electronic checks created and uttered by Appellant were falsely made. Appellant's assertion on appeal that the electronic checks "were not falsely made" again contradicts his signed stipulation of fact and oral assertions made under oath during his Care inquiry. (*See* Jt. App. at 28, 32, 50.) Likewise, Appellant misunderstands what the legal term "false" means. The MCM defines "false" as relating to the "making or altering" of the writing and not the writing itself or the contents of the writing. *See* MCM, pt. IV, para. 48c(4). The fact that Appellant did not lie to Best Buy about his identity

has no bearing on the question of whether electronic checks were falsely made. (*See* App. Br. at 8.) Appellant admitted to falsely making 31 checks by calling Best Buy and asserting that the victims' bank account information was his own when he had no authority to use his victims' bank account as his own. (*See* Pros. Ex. 1, para. 6, Jt. App. at 50.) Accordingly, this Court has no reason to question whether the electronic checks were falsely made.

CONCLUSION

WHEREFORE, this honorable Court should find Appellant's guilty plea provident and affirm his guilty plea to Charge II.



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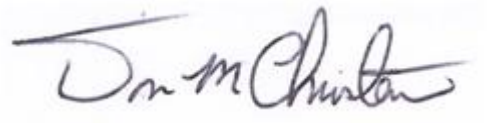

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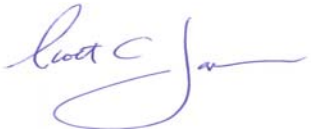
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Appellate Defense Division, on 14 October 2011.



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