IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant	) BRIEF ON BEHALF OF APPELLANT)
v.	) Crim. App. Dkt. No. 20120024)
Sergeant (E-5) **SHAWN M. HINES** United States Army, Appellee	) USCA Dkt. No. 13-5010/AR)))

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

Certified Issues

I.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT APPELLANT'S PLEAS TO SPECIFICATIONS 1, 2, AND 3 OF CHARGE II WERE IMPROVIDENT BECAUSE THEFT OF BASIC ALLOWANCE FOR HOUSING OCCURRING OVER MULTIPLE MONTHS "AMOUNTS TO A SEPARATE LARCENY EACH MONTH THE MONEY IS RECEIVED."

II.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT APPELLANT'S PLEAS TO SPECIFICATIONS 1 AND 3 OF CHARGE II WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE "NEVER SATISFACTORILY RESOLVED THE INCONSISTENCY BETWEEN APPELLANT'S PLEAS TO THE ENTIRE AMOUNT [OF BASIC ALLOWANCE FOR HOUSING] IN LIGHT OF HIS APPARENT ENTITLEMENT TO A LESSER AMOUNT."

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is found in Article 67(a)(2), UCMJ, which allows review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."[2]

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[1] JA 1-4; 10 U.S.C. § 866(b) (2008).
[2] 10 U.S.C. §867(a)(2).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of false official statement, two specifications of larceny of military property of a value over $500.00, and one specification of wrongfully appropriating property of a value over $500.00, in violation of Articles 107 and 121, UCMJ.[3] The military judge sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for three months, and to be discharged from the service with a bad-conduct discharge.[4] The convening authority approved only so much of the sentence as provided for reduction to the grade of E-1, confinement for three months, and a bad-conduct discharge.[5]

On May 24, 2013, the Army Court held that "the military judge erred in accepting appellant's plea to larceny [and wrongful appropriation] of over $500.00 of military property when [appellant] providently pled only to larceny [and wrongful appropriation] of less than $500.00 of military property."[6] Further, with respect to the issue of aggregating the total sums stolen or wrongfully appropriated, the Army Court specifically "reject[ed] the approach of the Navy and Marine Corps Court of

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[3] JA 1, 16, 39.
[4] JA 40-41.
[5] JA 42.
[6] JA 1-2.

Criminal Appeals and [found] that theft of [basic allowance for housing], under these circumstances, amounts to a separate larceny each month the money is received."[7] However, the Army Court affirmed appellant's sentence.[8] The Army Court denied the Government's first motion for en banc reconsideration on June 13, 2013, and dismissed the Government's second motion for en banc reconsideration on July 1, 2013.[9]

The Judge Advocate General of the Army filed a certificate for review of the Army Court's decision with this Honorable Court on August 5, 2013.[10]

Statement of Facts

In May 2008, appellant was stationed at Fort Bragg, North Carolina.[11] He was married but had no children or other dependents.[12] Based on his status as a married active-duty servicemember, appellant was receiving Basic Allowance for Housing (BAH) at the with-dependents rate (BAH-WITH).[13] Appellant and his wife divorced on May 27, 2008, and appellant was aware that because he no longer had dependents, he was no

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[7] JA 3.
[8] JA 3-4.
[9] JA 5.
[10] JA 6.
[11] JA 7-10, 33-34, 41-42, 44.
[12] JA 41.
[13] JA 41.

longer entitled to receive BAH-WITH.[14] Furthermore, Fort Bragg policy required soldiers at the grade of E-5 without dependents to live in the barracks.[15] Such soldiers were not entitled to receive any amount of BAH, including BAH at the without-dependents rate (BAH-WITHOUT), unless they requested and received a certificate of non-availability (CNA) from their commander.[16]

Despite his divorce and Fort Bragg policy, appellant did not adjust his personnel records to reflect he no longer had dependents, or request and receive a CNA from his commander so that he could draw BAH-WITHOUT and live off-post.[17] Instead, appellant continued drawing BAH-WITH on a monthly basis at the Fort Bragg rate until 19 October 2010, when he arrived at Fort Campbell, Kentucky, on permanent change of station (PCS) orders.[18] In sum, between 27 May 2008 and 19 October 2010, appellant received BAH-WITH in the amount of $30,623.27 over thirty monthly payments.[19] With the exception of the 27-31 May 2008 payment, each monthly BAH-WITH payment exceeded $500.00.[20]

On 21 April 2009, appellant deployed from Fort Bragg to

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[14] JA 35, 42.
[15] JA 42-43.
[16] JA 42-43.
[17] JA 33-34, 42-43.
[18] JA 42.
[19] JA 42, 44.
[20] JA 44.

Afghanistan.[21] Appellant was assigned to Bagram Airfield and Forward Operating Base (FOB) Gardez in Afghanistan.[22] In April 2009, appellant submitted a DD Form 1561[23] on which he falsely indicated he was still married.[24] Based on the false DD Form 1561, appellant received Family Separation Allowance (FSA) on a monthly basis until he redeployed on 8 June 2010.[25] Appellant received a total of $3,408.33 in FSA over fourteen payments during his deployment.[26] No single payment was over $500.00.[27]

On 20 October 2010, at Fort Campbell, appellant submitted two documents, a DA Form 5960[28] and a DD Form 1351-2[29], on which he stated that he was married.[30] Based on those false documents, appellant began to receive BAH-WITH at the Fort Campbell rate and received PCS entitlements, such as dislocation allowance at the with-dependents rate, spousal per diem, and spousal travel allowance, to which he was not entitled.[31] Fort Campbell also

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[21] JA 30, 43.
[22] JA 30, 43.
[23] Dep't of Def., Form 1561, Statement to Substantiate Payment of Family Separation Allowance (Nov. 2006).
[24] JA 32-33, 43.
[25] JA 30, 43.
[26] JA 31, 33, 44.
[27] JA 44.
[28] Dep't of Army, Form 5960, Authorization to Start, Stop, or Change Basic Allowance for Quarters and/or Variable Housing Allowance (Sep. 1990).
[29] Dep't of Def., Form 1351-2, Travel Voucher or Subvoucher (Mar. 2008). Appellant was not charged with stealing the monies he received pursuant to the falsified travel voucher.
[30] JA 16-17, 26, 42, 44-45.
[31] JA 42.

had a policy requiring soldiers who were below a certain rank and had no dependents to live in the barracks.[32] Such soldiers were not entitled to any amount of BAH, including BAH-WITHOUT, unless they received a CNA from their commander.[33] Appellant did not receive (or even request) a CNA from his commander.[34]

In sum, between 19 October 2010 and 18 April 2011, appellant received BAH-WITH in the amount of $5,328.00 over seven monthly payments.[35] With the exception of the 19-31 October 2010 payment, each monthly BAH-WITH payment exceeded $500.00.[36]

With respect to Specification 1 of Charge II, appellant and the military judge discussed whether appellant was, after his divorce, entitled to any amount of BAH. The specific discussion follows:

> MJ: So did you obtain something of value from the United States, without compensation, because of that?
>
> ACC: Yes, I did, Your Honor.
>
> MJ: And that was what, the money you were talking about?
>
> ACC: Yes, Your Honor, the BAH with entitlements.
>
> MJ: And would they have given you that money if you hadn't made this false representation?

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[32] JA 42-43.
[33] JA 29, 42-43.
[34] JA 29.
[35] JA 23.
[36] JA 44.

ACC: Not with entitlements, no, Your Honor.[37]

MJ: Okay. Well, I'm talking about all the money that we're--we're talking about. It just says over $500, but just so we know--I want to make sure that the stipulation of fact is correct too. How--how much of the--what money did you--when we're talking about BAH----

ACC: The entire amount, Your Honor. All----

MJ: Which is how much? Because, you know, this goes into the--the element that says the value is of a value of more than $500. What is the value of the property that you wrongfully obtained?[38]

Appellant consulted with the defense counsel and then admitted that he was not entitled to "[t]he entire amount" of BAH-WITH.[39] That "entire amount" was $5,328.00.[40] The stipulation of fact contains a table showing how much appellant received in BAH-WITH while at Fort Campbell.[41] Between 19 October 2010 and 18 April 2011, appellant received seven payments of BAH-WITH at the Fort Campbell rate.[42] Those payments totaled $5,328.00.[43]

The military judge also discussed with appellant the procedures required for appellant to live off-post. That discussion is as follows:

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[37] While appellant referred to BAH "with entitlements," a common-sense reading of the plea colloquy in conjunction with the stipulation of fact makes clear that appellant is referring to BAH at the with-dependents rate.
[38] JA 27.
[39] JA 28.
[40] JA 28.
[41] JA 44.
[42] JA 44.
[43] JA 44.

MJ: You had mentioned something--so I think I understand what's in the stipulation of fact. I just want to make sure I understand that correctly.

It's possible that if you had gone through the channels and requested other entitlements, like, to live off post and to get BAH at the without dependant [sic] rate, then it's likely that you would have gotten--been authorized to do that and obtain that. Is that--is that correct?

ACC: Yes, Your Honor.

MJ: Okay. Did you go through any of those steps?

ACC: No, I did not, Your Honor.

MJ: Okay, were you entitled to any part of the $5,328?

ACC: No, I was not, Your Honor.[44]

With respect to Specification 3 of Charge II, appellant admitted that he wrongfully appropriated BAH-WITH while at Fort Bragg in the amount of $30,623.27.[45] While the military judge and appellant did not repeat their earlier discussion about the procedure required to get permission to live off-post and draw BAH-WITHOUT, the stipulation of fact discusses the Fort Bragg policy and, again, notes that appellant did not follow that procedure and "specifically admits that his crimes involve wrongful receipt of the entire amount of BAH-WITH."[46]

All other facts necessary to dispose of the certified issues are set forth below.

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[44] JA 28-29.
[45] JA 35, 42, 44.
[46] JA 42-43.

Summary of Argument

The Army Court erred in two regards. First, the Army Court incorrectly held that "theft of BAH, under these circumstances, amounts to a separate larceny each month the money is received."[47] Under the Army Court's reasoning, theft of BAH or other military allowances that occurs over several months but arises out of one act must either be charged under one "on divers occasions" specification, thereby possibly exposing an appellant to a sentence less than commensurate with his criminality, or under a separate specification for each monthly payment, thereby exaggerating an appellant's criminality.[48] Not only does the Army Court's holding lead to an untenable result, it also goes against the weight of military case law - including contrary authority from the Court of Military Appeals - and

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[47] JA 3.

[48] This is most applicable to Specification 2 of Charge II, which charged appellant with stealing Family Separation Allowance (FSA) between May 2009 and June 2010. (Charge Sheet). No monthly amount of FSA was over $500.00, but the aggregate amount stolen was $3,408.33. (JA 44).

If appellant was charged with one specification of stealing FSA on divers occasions, he would receive only one conviction, which is proper, but his maximum sentence would include a bad-conduct discharge and confinement for one year. This creates a sentencing windfall for appellant.

If appellant were charged under separate specifications, he would receive fourteen convictions and his maximum sentence would include a bad-conduct discharge and confinement for fourteen years. This scenario overemphasizes appellant's criminality and exposes him to a harsher sentence than aggregating the sum would.

several federal cases.

Second, the Army Court incorrectly held that appellant's pleas to larceny and wrongful appropriation of property of a value over $500.00 were improvident.[49] The Army Court wrote that "appellant repeatedly stated that he understood that he was not entitled to BAH-WITH in a fashion expressing the understanding that he was entitled to BAH at the without-dependent rate" and that the military judge "never satisfactorily resolved the inconsistency between appellant's pleas to the entire amount in light of his apparent entitlement to a lesser amount."[50] However, in reaching that conclusion, the Army Court misinterpreted the record of trial; the plea colloquy and the stipulation of fact firmly establish that no such unresolved inconsistency exists. Therefore, appellant's pleas to Specifications 1 and 3 of Charge II were provident, and the military judge did not abuse his discretion in accepting those pleas.

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[49] JA 3.
[50] JA 3.

Certified Issue I

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT APPELLANT'S PLEAS TO SPECIFICATIONS 1, 2, AND 3 OF CHARGE II WERE IMPROVIDENT BECAUSE THEFT OF BASIC ALLOWANCE FOR HOUSING OCCURRING OVER MULTIPLE MONTHS "AMOUNTS TO A SEPARATE LARCENY EACH MONTH THE MONEY IS RECEIVED."

Standard of Review

Ordinarily, a military judge's acceptance of a guilty plea is reviewed for an abuse of discretion; however, "where the issue appealed involves pure questions of law, [this Court] utilize[s] a de novo review."[51]

Law and Argument

Military law has long permitted charging separate takings in the aggregate as one larceny when the takings arise out of a single criminal act, impulse, or motive. Additionally, four federal circuit courts of appeals apply like reasoning. However, the Army Court's reasoning in this case rejects (and outright ignores) the weight of military case law and misapplies the cases it does cite. Further, the Army Court's reasoning leads to one of two equally untenable charging decisions with respect to ongoing larcenies.

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[51] *United States v. Watson*, 71 M.J. 54, 56 (C.A.A.F. 2012) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

A. Under military law, ongoing larcenies arising out of a single criminal act, impulse, or motive may properly be charged in the aggregate

1. *United States v. Bolden*

Larceny of BAH or FSA that arises out of a single criminal act or impulse may be charged in the aggregate instead of on divers occasions or as separate specifications. This is not a novel concept and, in fact, has been the state of military law for over twenty years. In *United States v. Bolden*[52], this court expressly affirmed the practice of charging BAH larceny in the aggregate. In *Bolden*, the appellant was convicted of, *inter alia*, larceny of more than $100.00 in BAH and conspiracy to commit the same.[53] The appellant's co-conspirator, Bahre, with the appellant's assistance, entered into a sham marriage so that he could live off base and receive BAH.[54] Bahre reported his monthly rent as $750.00 and received monthly BAH in the amount of $700.00.[55] However, his actual monthly rent, and therefore the maximum amount to which he was entitled, was only $650.00.[56]

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[52] 28 M.J. 127, 129 (C.M.A. 1989).
[53] *Id.* at 127-28. At the time *Bolden* was decided, the threshold for increased punishment for larceny was $100.00, not $500.00. *Manual for Courts-Martial, United States* (1984 ed.), pt. IV, ¶ 46e(1). Additionally, *Bolden* refers to BAH as "BAQ," or "Basic Allowance for Quarters."
[54] *Id.* at 128-29.
[55] *Id.* at 128.
[56] *Id.*

Bahre drew these monthly allowances for five-and-a-half months.[57]

While *Bolden* primarily dealt with whether or not Bahre's marriage was a sham, this Court expressly held that the appellant would have been guilty of larceny over $100.00 even if the marriage was legitimate.[58] In so holding, this Court stated that:

> [I]n any event, the Government's evidence was sufficient to sustain the convictions for larceny and conspiracy. According to this evidence, Bahre had intentionally overstated the rent he was paying; and so he had received each month an allowance greater than he was entitled to, even if he was validly married. *The aggregate amount of these overpayments was substantially in excess of $100.00*, as alleged in both the larceny and conspiracy specifications.[59]

Bolden's holding is on point and could not be more clear - when BAH is stolen on a continuing basis and such takings arise out of a single criminal act or impulse, aggregation of the total sum stolen into a single specification is proper. However, *Bolden* was not the first case, and this Court was not the first court, to allow for charging several takings in the aggregate when those takings arose from a single criminal act, impulse, or motive.

2. *United States v. McNett*

In fact, the Army Court of Military Review applied such

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[57] *Bolden*, 28 M.J. at 128.
[58] *Id.* at 129.
[59] *Id.* (emphasis added).

reasoning three years before this Court did in *Bolden*. In *United States v. McNett*, the appellant was charged in a combined specification with, *inter alia*, larceny of an aggregated sum.[60] The appellant stole money from a subordinate "under the pretext of investing it for the victim" on four occasions in the amounts of $500.00, $4,000.00, $5,000.00, and $1,356.00.[61] The takings occurred pursuant to appellant's scheme "to perpetuate a successful fraud."[62]

While *McNett* dealt with the issue of multiplicity, rather than the propriety of aggregation, the court did note "that these offenses were part of one prolonged, continuous criminal transaction entered into pursuant to a single criminal impulse (motive)[]."[63] Furthermore, while the court could have "decline[d] to treat [the offenses] as multiplicious for findings" due to "the time separations between the offenses in question," it declined to do so.[64] Instead, the court reconsolidated the specification "to reflect more accurately and

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[60] 21 M.J. 969 (A.C.M.R. 1986). The appellant was charged with larceny of $15,900.00. However, the A.C.M.R. found the evidence was sufficient only to prove larceny of $8,751.00. This sum took into account the total amounts the appellant stole from and paid back to the victim. The reduction in amount does not affect the proposition for which *McNett* is cited here.
[61] *Id.* at 970.
[62] *Id.*
[63] *Id.* at 971.
[64] *Id.*

fairly the gravamen of appellant's criminal misconduct."[65] Therefore, *McNett's* reasoning tracks that of *Bolden* and allows for several takings occurring pursuant to one criminal act or impulse to be charged in the aggregate.

3. *United States v. Lepresti*

While *Bolden* and *McNett* apply similar reasoning, neither case provides an explicit test to determine when separate takings may be charged in the aggregate as an ongoing larceny. In *United States v. Lepresti*[66], though, the Navy-Marine Corps Court of Criminal Appeals (Navy Court) did just that. In *Lepresti*, the appellant was convicted of, *inter alia*, two specifications of larceny.[67] The appellant used an acquaintance's credit card to purchase multiple items from an automobile parts store.[68] The appellant ordered all the items at the same time; however, the items shipped (and were therefore received by appellant) on different dates.[69]

The appellant argued that the specifications were "multiplicious for findings."[70] In its analysis, the Navy Court "analogize[d] this situation to BAQ fraud type cases."[71] In such

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[65] *Id.*
[66] 52 M.J. 644 (N.M. Ct. Crim. App. 1999).
[67] *Id.* at 652.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 653.

cases:

> The service member draws allowances to which he is not entitled over an extended period of time, either because of a single false claim of dependency or a failure to report a change in dependency. Routinely, those cases are charged as a larceny of the total amount of funds the service member fraudulently received.[72]

In addition, the Navy Court noted that:

> where we have seen [BAH larceny] charged as a new larceny each pay period, we have consolidated the specifications into a single offense . . . because we found the multiple specifications violated the policy that one transaction should not be made the basis for an unreasonable multiplication of charges."[73]

On that basis, the Navy Court held that a single larceny should be charged when the following three-part test is satisfied: "(1) An accused intends to steal several items; (2) The means of committing the larceny is through a single act of fraud; and, (3) The owner of the property delivers the items to the accused, but delivery is made at different times or dates.[74] Applying that test, the Navy Court held "that the two specifications address[ed] a single continuing larceny" and consolidated the specifications into a single specification.[75]

In sum, this Court and the Army and Navy Courts have held that charging BAH larceny as the Government did in the present case is proper. *Bolden* and *McNett* provide that when an accused

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[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Lepresti*, 52 M.J. at 652-53, 658.

commits one criminal act or possesses a singular criminal impulse and obtains monies on a recurring basis as a result of that act or impulse, charging those takings in one specification on an aggregated basis is proper, and *Lepresti* provides a common-sense, three-part test to determine whether aggregation is proper.

B. The Army Court's reasoning is incorrect

The Army Court's holding inexplicably contradicts the above precedents and misapplies its own precedent in holding that appellant's larceny and wrongful appropriation of allowances "amount[ed] to a separate larceny each month the money is received."[76] In reaching this holding, the Army Court, noting *Lepresti*, expressly "reject[ed] the approach of the Navy and Marine Corps Court of Appeals[]."[77] Furthermore, the Army Court's opinion does not even cite, let alone attempt to distinguish, *Bolden* or *McNett*. As a result, the Army Court's analysis is, at a minimum, incomplete.

The Army Court also misapplied its own precedent. Instead of following this Court's holding in *Bolden* or applying its own reasoning from *McNett*, the Army Court

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[76] JA 3.
[77] JA 3.

relied on *United States v. Rupert*.[78] In *Rupert*, the appellant pled guilty to larceny of items with an aggregate value of over $100.00.[79] The items included "miscellaneous foodstuffs, numerous items of ammunition, pyrotechnics and explosives, medical and office supplies, a cot, thirty-five batteries and two protective mask carriers" and were stolen over a seventeen-month period from different locations on Fort Carson.[80] The Army Court found that appellant was only provident to larceny of items valued at $100.00 or less, as the military judge "failed to ascertain that any one item, or any series of items taken or withheld at substantially one time, had a value in excess of $100.00."[81]

Rupert is easily distinguished from the present case. In *Rupert*, the appellant committed multiple affirmative acts at different locations in order to complete his thefts. Here, by contrast, appellant only committed one affirmative act in each specification - failing to update his paperwork at Fort Bragg and submitting a false document in Afghanistan and at Fort Campbell - and passively received the stolen allowances on a monthly basis. Furthermore, nothing in *Rupert* indicates that the appellant

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[78] 25 M.J. 531, 532 (A.C.M.R. 1987); JA 3.
[79] *Rupert*, 25 M.J. at 531.
[80] *Id.* at 532.
[81] *Id.* at 532-33.

stole those items as part of a single criminal impulse or motive. Rather, it appears as though the appellant developed the intent to steal different items at different times. Again, the present case is different. Appellant had a singular intent to wrongfully appropriate BAH at Fort Bragg, a singular intent to steal FSA in Afghanistan, and a singular intent to steal BAH at Fort Campbell. Therefore, *Rupert* is distinct from the present case, and the Army Court's reliance upon it was misplaced.

C. The Army Court's reasoning leads to an absurd result, but *Lepresti* leads to the correct result

In addition to rejecting contrary case law and misapplying its own precedent, the Army Court's reasoning leads to a result that is untenable in light of common sense and public policy. Since the Army Court's ruling forecloses charging the ongoing theft of BAH or FSA that arises out of a single act as one aggregated specification, the government is left with two options. Either the government can charge each separate receipt as its own specification, or it can combine the thefts into an "on divers occasions" specification.

While charging each receipt of money as a separate specification may appear to be a workable, common-sense result, further analysis reveals that not to be the case. A simple hypothetical, sometimes discussed in film and television,

illustrates the obvious paradox that the Army Court's approach requires. In this hypothetical, a thief creates a computer virus that, once uploaded into a bank's computer network, siphons off a fraction of a cent for every transaction into or out of the bank and deposits those negligible amounts into a hidden account accessible only by that thief. The computer virus is designed to capture such negligible sums to avoid suspicion or automated security checks, yet accumulate a vast sum - potentially thousands or tens of thousands of dollars - over a long period of time, all triggered by a single uploading of the virus.

Under the Army Court's reasoning, the government could charge each theft of a fraction of a cent as a separate specification. This would quickly result in hundreds or thousands of convictions - one for every specification - for the thief. Such a result would exaggerate appellant's criminality to an absurd degree in terms of the number of convictions and, as discussed in *Lepresti* and *McNett*, run afoul of the policy prohibiting unreasonable multiplication of charges.

The alternative solution contemplated by the Army Court would be that the government could charge the theft of a fraction of a cent on divers occasions. In this scenario, appellant would only be convicted of one specification of larceny of property under $500.00. As a result, his sentence

would drastically underemphasize his criminality.

The *Lepresti* approach avoids these absurd results. Instead, *Lepresti* produces the correct result that benefits both parties. The government is permitted to aggregate the sums of the monies stolen, thereby exposing an accused to a maximum sentence commensurate to the total amount stolen. Furthermore, aggregation prevents an accused from facing a ridiculous number of specifications for what is, essentially, one continuing criminal act.[82]

The present case is tailor-made for the *Lepresti* test. First, with respect to each specification, appellant intended to steal several items - namely, each monthly receipt of BAH-WITH or FSA. Second, the means of committing each larceny was through a single act of fraud. At Fort Bragg, appellant failed to update his personnel documents to reflect his lack of dependents. At Fort Campbell and in Afghanistan, appellant affirmatively submitted official documents falsely stating that he was married. Third, the owner of the property - the United

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[82] Federal criminal law employs a similar approach. *See United States v. Billingslea*, 603 F.2d 515, 520 (5th Cir. 1979) ("[T]he formulation of a plan or scheme or the setting up of a mechanism which, when put into operation, will result in the taking or diversion of sums of money on a recurring basis, will produce but one crime."). Three other circuits have adopted *Billingslea*'s reasoning. *See United States v. Papia*, 910 F.2d 1357, 1364-65 (7th Cir. 1990); *United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004); and *United States v. Parisien*, 413 F.3d 924, 926-27 (8th Cir. 2005).

States military - delivered the stolen monies to appellant on different dates. Because the facts of this case satisfy the *Lepresti* test, appellant was properly charged with the aggregated amounts stolen.

In this case, Specifications 1, 2, and 3 of Charge II were properly aggregated under *Lepresti*, *McNett*, and *Bolden*, and the Army Court erred when it found that "theft of BAH, under these circumstances, amounts to a separate larceny each month the money is received."

Certified Issue II

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT APPELLANT'S PLEAS TO SPECIFICATIONS 1 AND 3 OF CHARGE II WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE "NEVER SATISFACTORILY RESOLVED THE INCONSISTENCY BETWEEN APPELLANT'S PLEAS TO THE ENTIRE AMOUNT [OF BASIC ALLOWANCE FOR HOUSING] IN LIGHT OF HIS APPARENT ENTITLEMENT TO A LESSER AMOUNT."

Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion.[83]

Law and Argument

Appellant's pleas to larceny of BAH over $500.00 and wrongful appropriation of BAH over $500.00 were provident. "This court must find 'a substantial conflict between the plea

[83] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

and the accused's statements or other evidence' in order to set aside a guilty plea."[84] While the Army Court held that the military judge failed to resolve an "inconsistency between appellant's pleas to the entire amount in light of his apparent entitlement to a lesser amount," an accurate reading of the record shows that no such inconsistency existed.

Specifically, the Army Court wrote that "[t]he stipulation of fact states that at both Fort Bragg and Fort Campbell appellant would have been entitled to [BAH-WITHOUT]."[85] The Army Court further wrote that "appellant repeatedly stated that he understood that he was not entitled to BAH-WITH in a fashion expressing the understanding that he was entitled to [BAH-WITHOUT]."[86]

Those statements are inaccurate. The stipulation of fact never states that appellant was entitled to BAH-WITHOUT after his divorce. Rather, it states that:

> [appellant] never applied for and received the authority to live off-post and receive BAH as a single Soldier without dependents. It was installation policy at both Fort Bragg and Fort Campbell that an E-5 would be placed in the barracks (and would receive no housing allowance) unless the E-5 sought and received a [CNA].[87]

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[84] *United States v. Watson*, 71 M.J. 54, 58 (C.A.A.F. 2012) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).
[85] JA 3.
[86] JA 3.
[87] JA 42-43.

While Fort Bragg had a policy permitting recently-divorced servicemembers to continue living off-post and receive BAH-WITHOUT, that policy also did not apply unless appellant's commander had signed a CNA.[88] Finally, the stipulation expressly provides that appellant "specifically admits that his crimes involve wrongful receipt of the entire measure of BAH-WITH."[89] Those specific admissions were that appellant "wrongfully appropriated BAH-WITH entitlements at the Fort Bragg rate in the amount of $30,623.27" and "stole BAH-WITH entitlements at the Fort Campbell rate in the amount of $5,328.00."[90] In sum, nothing in the stipulation of fact states that appellant was actually entitled to receive BAH-WITHOUT after his divorce. Rather, the stipulation of fact shows that appellant was not entitled to receive (and did not believe himself so entitled) any amount of BAH after his divorce.

Additionally, nothing in the providence inquiry shows that appellant "repeatedly stated that he understood that he was not entitled to BAH-WITH in a fashion expressing the understanding that he was entitled to [BAH-WITHOUT]."[91] In fact, the providence inquiry shows the exact opposite - that appellant understood he was not entitled to any amount of BAH. For

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[88] JA 43.
[89] JA 43.
[90] JA 42.
[91] JA 3.

example, with respect to Specification 1 of Charge II, the military judge and appellant discussed the procedures required for appellant to live off-post. That discussion is as follows:

> MJ: You had mentioned something--so I think I understand what's in the stipulation of fact. I just want to make sure I understand that correctly.
>
> It's possible that if you had gone through the channels and requested other entitlements, like, to live off post and to get BAH at the without dependant [sic] rate, then it's likely that you would have gotten--been authorized to do that and obtain that. Is that--is that correct?
>
> ACC: Yes, Your Honor.
>
> MJ: Okay. Did you go through any of those steps?
>
> ACC: No, I did not, Your Honor.
>
> MJ: Okay, were you entitled to any part of the $5,328?
>
> ACC: No, I was not, Your Honor.[92]

Based on that discussion, it is clear that appellant knew and understood that he was not entitled to any amount of BAH, including BAH-WITHOUT.

With respect to Specification 3 of Charge II, appellant admitted that he wrongfully appropriated BAH-WITH while at Fort Bragg in the amount of $30,623.27.[93] While the military judge and appellant did not repeat their earlier discussion about the procedure required to get permission to live off-post and draw

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[92] JA 28-29.
[93] JA 35, 42.

BAH-WITHOUT, the stipulation of fact discusses the Fort Bragg policy and, again, notes that appellant did not follow that procedure and "specifically admits that his crimes involve wrongful receipt of the entire amount of BAH-WITH."[94]

In both the providence inquiry and the stipulation of fact, appellant clearly and unequivocally admitted that he stole the entire amounts of BAH-WITH, and not just the difference between BAH-WITH and BAH-WITHOUT, while stationed at Fort Bragg and Fort Campbell. Those admissions correspond with, rather than contradict, his pleas of guilty. Therefore, contrary to the Army Court's reading of the record, there was no inconsistency (let alone a substantial one) between appellant's pleas and his admissions during the providence inquiry and in the stipulation of fact. As such, the military judge did not abuse his discretion in accepting appellant's pleas to Specifications 1 and 3 of Charge II, and the Army Court erred in holding to the contrary.

Conclusion

The Army Court erred by failing to apply and follow the reasoning of *Bolden*, *McNett*, and *Lepresti*. The Army Court should have applied, and this Court should apply, the three-part test from *Lepresti*. Doing so will validate the consolidation of

[94] JA 43.

separate receipts of unauthorized allowances into a single specification (or, in this case, three specifications) to reflect a single ongoing course (or three ongoing courses) of criminal conduct. Furthermore, the military judge did not abuse his discretion in accepting appellant's pleas to Specifications 1 and 3 of Charge II, and the Army Court erred in holding to the contrary. Because there was no inconsistency in appellant's pleas, the military judge properly accepted appellant's guilty pleas.

Wherefore, the Government respectfully requests this Honorable Court to reverse the decision of the Army Court of Criminal Appeals and affirm the findings and sentence in this case.

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I certify that the original was electronically filed to efiling@armfor.uscourts.gov, the Honorable Clerk of Court's office and the Appellate Defense Counsel on 28 August 2013.

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