IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant	) REPLY 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 the Case

On August 5, 2013, the Judge Advocate General of the Army certified the above issues for review with this Honorable Court. The Government filed its brief with this Court on August 28, 2013. Appellee filed his brief with this Court on September 26, 2013. The Government replies herein.

Summary of Argument

First, the Government's theory at trial is consistent with its theory on appeal. Second, appellee misreads *United States*

v. Bolden; that case specifically allows for aggregation in a BAH larceny case where the multiple takings arose from a single act of fraud. Third, appellee's reliance on the military cases he cites is misplaced, as those cases are distinguishable from the present case. Finally, appellee relies on federal case law that is not on point, and he misinterprets the federal cases that are on point with the present case.

Law and Argument

A. The Government's theories at trial and on appeal are consistent

Contrary to appellee's claim, the Government's theory on appeal is consistent with the theory presented at appellee's guilty plea. The Government charged appellee with three specifications because appellee committed three different offenses. The offenses were different because each arose out of its own "single act of fraud"[1] and were committed at different times and locations.[2] With respect to Specification 1 of Charge III, appellee stole BAH at Fort Campbell, and that theft arose out of submission of a false document.[3] With respect to Specification 2 of Charge II, appellee stole FSA while deployed

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[1] *United States v. Lepresti*, 52 M.J. 644, 653 (N.M. Ct. Crim. App. 1999).
[2] *See United States v. Davis*, 16 U.S.C.M.A. 207, 36 C.M.R. 363 (C.M.A. 1966).
[3] JA 41.

to Afghanistan, and that theft arose out of his submission of a different false document.[4] Finally, with respect to Specification 3 of Charge II, appellee wrongfully appropriated BAH at Fort Bragg, and his wrongful appropriation arose out of his failure to update his personnel records.[5] Those facts were presented during appellee's guilty plea; as such, there is no inconsistency between the government's theory at trial and on appeal.

Appellee cites several cases in support of his claim. However, none of them applies to the present case. While *United States v. Medina* and *United States v. Miller* both cite the proposition that "an appellate court may not affirm on a theory not presented to the trier of fact and adjudicated beyond a reasonable doubt," those cases deal with appellate courts that affirmed guilty findings that were not lesser-included offenses of the charged offense.[6] *Chiarella v. United States* rejected the Government's alternative theory of liability - that the defendant owed a duty to disclose inside information to the acquiring corporation in a pending takeover - because the jury was only instructed that the defendant owed a duty to sellers of

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[4] JA 42.
[5] JA 41.
[6] *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008) (citing *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999)); *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009) (quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980)).

the securities he purchased.[7] *Dunn v. United States* held that the defendant's conviction for making a false declaration in September 1976 could not be affirmed on the basis of an uncharged false declaration he made in October 1976.[8]

None of those authorities are on point with the present case. Appellee was convicted of two specifications of larceny of military property of a value over $500.00 and wrongful appropriation of property of a value over $500.00.[9] He committed each of those offenses through a single act of fraud, and those facts were presented at his guilty plea.[10] The Government is not asking this Court to affirm a finding of guilty as to a different offense, as in *Medina*, *Miller*, or *Dunn*, nor is it asking this Court to affirm the finding to the same offense for a reason not present in the record of trial, as in *Chiarella*. Rather, the Government asks this Court to affirm the findings of guilty on the same basis as was presented at trial. Therefore, this Court should disregard *Medina*, *Miller*, *Dunn*, and *Chiarella* as inapplicable and affirm the findings and sentence.

B. *United States v. Bolden* specifically allows for aggregation

Appellee's claim that *United States v. Bolden* "gives no indication that aggregation was at issue in that case" is

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[7] 445 U.S. 222, 235-37 (1980).
[8] 442 U.S. 100, 106 (1979).
[9] JA 36, 40-44.
[10] JA 40-44.

inaccurate and quickly disposed of.[11] While the primary issue in *Bolden* is whether the marriage of the accused's co-conspirator was a sham - a point appellant correctly notes - this Court specifically held that even if the marriage was valid, the accused would still have been guilty of larceny of over $100.00 because "[t]he *aggregate* amount of these overpayments was substantially in excess of $100.00[]."[12] *Bolden*, then, expressly approves of charging the ongoing theft of BAH that arises out of a single act of fraud in the aggregate, and this Court should therefore disregard appellee's incorrect claim to the contrary.

C. Appellee's reliance on *United States v. Davis* and its progeny is misplaced

Appellee relies on several military cases, including *Davis*, to argue that he was improperly charged. However, a review of those cases shows them to be distinguishable and inapplicable from the present case. In short, each of the cases appellee cites do not involve single continuing offenses where the amounts stolen were properly aggregated, but rather separate and distinct offenses where the amounts stolen in those separate offenses were improperly aggregated.

For example, in *United States v. Davis*, the accused

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[11] Appellee's Br. at 10-11 n.4.
[12] *United States v. Bolden*, 28 M.J. 127, 129 (C.M.A. 1989) (emphasis added).

stole a total of $77.96 in salary overpayments in four different transactions.[13] The accused obtained the overpayments by lying to different finance officers in New York, Illinois, and Kansas, but the record never established that he received more than $50.00 during a single transaction.[14] The Government charged the accused with one specification of larceny, alleging that the accused stole "in excess of $50.00" at the three locations.[15] This Court held that the accused committed "undeniably separate crimes" since the thefts occurred "from different Finance Officers on different dates and in widely separated cities."[16] As such, the aggregation of those separate larcenies into one offense was improper.[17]

Davis, then, stands for the proposition that the Government may not aggregate the values of items taken in separate larcenies. It does not, however, prohibit the aggregation of money stolen in one continuous offense arising out of a single act of fraud. In other words, if the Government had charged appellee with one specification of larceny, alleging that appellee stole in excess of $500.00 in BAH and FSA at Fort Bragg, Fort Campbell, and in

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[13] 16 U.S.C.M.A. 207, 208, 36 C.M.R. 363, 364 (C.M.A. 1966).
[14] *Id.* at 208-09, 36 C.M.R. at 364-65.
[15] *Id.* at 208, 36 C.M.R. at 364.
[16] *Id.* at 209, 36 C.M.R. at 365.
[17] *Id.*

Afghanistan, then under *Davis*, such aggregation may have been improper.

However, that is not how the Government charged appellee. Rather, appellee was charged with committing one continuous offense at Fort Bragg, a different continuous offense in Afghanistan, and a third continuous offense at Fort Campbell.[18] Such a charging decision was proper and complies both with *Davis* and the three-part test from *United States v. Lepresti*.[19]

Appellant's reliance on the other military cases to which he cites is misplaced for the same reason. In a nutshell, those cases prohibit the aggregation of separate offenses into one for the purpose of increasing the accused's maximum punishment.[20] They do not, however,

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[18] JA 11.

[19] 52 M.J. 644, 653 (N.M. Ct. Crim. App. 1999).

[20] *United States v. Poole*, 24 M.J. 539, 541 (A.C.M.R. 1987), *aff'd* 26 M.J. 272 (C.M.A. 1988), and *United States v. Mincey*, 42 M.J. 376, 377 (C.A.A.F. 1995), involved accuseds who were charged in "mega-specifications" with uttering bad checks. Those cases are distinguishable because each bad check that is uttered is a distinct act of fraud. In the present case, each of appellee's thefts arose out of only one act of fraud.

United States v. Christensen, 45 M.J. 617 (Army Ct. Crim. App. 1997), *United States v. Harding*, 61 M.J. 526 (Army Ct. Crim. App. 2005), and *United States v. Campbell*, 72 M.J. 671 (N.M. Ct. Crim. App. 2013), involved accuseds who committed multiple acts of larceny by using the victim's ATM/debit cards on different dates. Those cases are also distinguishable because the thefts arose out of distinct acts, not one single act of fraud.

Finally, *United States v. Rupert*, 25 M.J. 531 (A.C.M.R. 1987), is distinguishable for the same reasons as the cases above.

prohibit aggregating the total amounts stolen in a single ongoing offense arising out of a single fraudulent act. Those cases are, therefore, distinguishable from and do not apply to the present case. This Court should reaffirm *Bolden*'s holding regarding aggregation and apply the three-part test from *Lepresti* in determining whether a series of takings constitutes one or several offenses.

D. Appellee relies on inapplicable federal case law and misreads the federal cases that do apply

With respect to the federal case law in his brief, appellee's reliance on *United States v. Taylor*[21] and *United States v. DiGilio*[22] is misplaced, and appellee misreads *United States v. Smith*.[23]

First, a recap of *United States v. Billingslea*[24] is necessary. In *Billingslea*, the Fifth Circuit held that the defendant's "unlawful receipt of pay on several occasions constituted but one violation of [18 U.S.C. § 665]" because the defendant established a "scheme" or "mechanism which, when put into operation, [resulted] in the taking or diversion of sums of money on a recurring basis[]."[25] Therefore, because the defendant's multiple takings constituted but one offense, the

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[21] 869 F.2d 812 (5th Cir. 1989).
[22] 538 F.2d 972 (3d Cir. 1976).
[23] 373 F.3d 561 (4th Cir. 2004).
[24] 603 F.2d 515 (5th Cir. 1979).
[25] *Id.* at 520.

sum of the pay appellant stole was properly aggregated into one count, Count 10.[26]

The *Billingslea* court also held, though, that Count 11, which alleged that he improperly deposited the paychecks of seven other persons into his own account, was improperly aggregated because while the defendant had "an original intent to purloin . . . the evidence merely show[ed] that this intent was acted on from time to time" rather than on a recurring basis.[27] Aggregation into one count was improper here, then, because each taking constituted a separate offense.[28]

In short, *Billingslea* dealt with two of the eleven counts against the defendant, finding aggregation proper in one and improper in another. The monies that were stolen as a result of one offense were properly aggregated into Count 10, and those that were stolen via multiple offenses were improperly aggregated into Count 11. In that light, *Billingslea* is no different from military law regarding aggregation.

United States v. Taylor does not deal with whether that defendant's forgeries constituted one offense or several offenses - there was no question that the defendant committed separate offenses, and she was charged with separate counts.[29]

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] 869 F.2d 812, 813 (5th Cir. 1989).

Rather, *Taylor* deals with whether, under the "unusual" sentencing provisions of the particular statute, the values of the forged instruments at issue in those separate counts could be aggregated to expose the defendant to a higher sentence for each count.[30] While *Taylor* cites to *Billingslea*, it only references the portion of *Billingslea* that held that the separate offenses alleged in Count 11 were improperly aggregated.[31] *Taylor* does not reference the other holding in *Billingslea* - that the multiple takings alleged in Count 10 constituted one offense and, therefore, were properly aggregated.[32]

Taylor deals with the propriety of aggregating the value of forged checks in multiple counts for sentencing purposes pursuant to a statute-specific sentencing provision. It has nothing to do with the issue in the present case - whether multiple takings constitute one offense or several offenses. Therefore, appellee's reliance on *Taylor* is misplaced.

Appellee's reliance on *United States v. DiGilio* is likewise misplaced. In *DiGilio*, the defendant was charged with, *inter alia*, converting government documents of a value over $100.00 for personal use.[33] While valuation of the stolen documents was

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[30] *Id.* at 813-14.
[31] *Id.* at 814.
[32] *Id.*
[33] 538 F.2d 972, 975 (3d Cir. 1976).

an issue in *DiGilio*, much of the valuation discussion deals with the methods by which the Government could have proved the value of the documents.[34] The opinion makes only a passing reference to aggregation, stating simply that because each theft of the documents "amount[ed] to a separate offense, the more-than-$100 figure [could not] be attained simply by aggregating the values of all the documents taken."[35]

Like *Taylor*, *DiGilio* did not deal with whether multiple takings arising out of a single act of fraud constitute one offense or several offenses. Rather, *DiGilio* simply assumed the thefts were separate offenses and stated that the values of all the stolen items could not be aggregated to reach the statutory threshold. That is not the situation here, where the appellant's multiple takings amounted to a single offense at each location. Therefore, appellee's reliance on *DiGilio* is misplaced.

Finally, appellee appears to misread *United States v. Smith*.[36] Appellee cites *Smith* for the proposition that aggregation was only appropriate in that case because the statute under which the defendant was charged contained an aggregation clause.[37] However, an accurate reading of *Smith*

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[34] *Id.* at 980-81.
[35] *Id.* at 980.
[36] 373 F.3d 561 (4th Cir. 2004).
[37] Appellee's Br. at 15.

shows that not to be the case. There, the statute at issue, 18 U.S.C. § 641, did not contain an aggregation provision; rather, it allowed for a felony conviction and increased punishment if the value of the stolen property exceeded $1,000.00.[38] Such a sentencing scheme is similar to the one for which Article 121, UCMJ, provides.[39]

Similar to appellee, the defendant in *Smith* was indicted for multiple takings in one count.[40] The amount of each monthly benefit payment was less than the $1,000.00 threshold, but altogether, the payments totaled $26,336.00.[41] The Third Circuit held that the defendant's multiple takings were properly aggregated and charged in one count because his conduct constituted a single ongoing offense.[42] The court based its decision not on a unique or unusual statutory aggregation provision, but rather on *Billingslea*.[43]

Because the defendant "formulated 'a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis," he was properly charged with one count of

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[38] *Smith*, 373 F.3d at 563.
[39] *Manual for Courts-Martial, United States* (2008 ed.), pt. IV, ¶ 46.e.
[40] *Smith*, 373 F.3d at 563.
[41] *Id.*
[42] *Id.* at 564, 567-68.
[43] *Id.* at 564, 568.

embezzlement of $26,336.00.[44] The court continued to explain that the defendant committed a single ongoing offense because "he set into place and maintained an automatically recurring scheme whereby funds were electronically deposited in his account and retained for his own use without need for any specific action on his part[]."[45]

Again, a plain reading of *Smith* shows that appellee's reading of it is inaccurate. The defendant's crime was not aggregated pursuant to a particular statutory provision, as appellee claims, but rather pursuant to the principle that multiple takings that occur on a recurring basis and arise out of a single act of fraud constitute one offense. The defendant in *Smith* was charged and convicted under the same principle that appellee was charged and convicted. Therefore, this Court should disregard appellee's interpretation of *Smith* and, instead, apply *Smith* correctly and affirm the findings and sentence.

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[44] *Id.* at 564 (quoting *Billingslea*, 603 F.2d at 520).
[45] *Smith*, 373 F.3d at 568.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court 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 4 October 2013.

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