IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant,	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20120024
Sergeant **Shawn M. Hines,** United States Army, Appellee	)	USCA Dkt. No. 13-5010/AR

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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."

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866

(2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On January 11, 2012, a military judge sitting as a general court-martial convicted Sergeant (SGT) Shawn M. Hines, in accordance with his pleas, of false official statement (two specifications) and wrongful appropriation of military property greater than $500 (three specifications), in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921 (2006). The military judge sentenced SGT Hines to reduction to the grade of Private E-1, to forfeit all pay and allowances, three months confinement, and a bad-conduct discharge. The convening authority approved only so much of the sentence as provided for a reduction to E-1, three months confinement, and a bad-conduct discharge and waived automatic forfeitures for six months or the length of confinement, whichever was less.

On May 24, 2013, the Army Court found SGT Hines was not provident to his pleas of larceny of over $500 (Charge II, Sp. 1 and 2), or his plea to wrongful appropriation in excess of $500 (Charge II, Sp. 3), and affirmed only pleas to larceny of military property of less than $500, and wrongful appropriation of military property of less than $500, but affirmed the sentence. On August 5, 2013, the government filed a Certificate

of Review challenging the Army Court's modification of the three specifications in excess of $500 to less than $500.

Summary of the Argument

The question presented in this case is whether the UCMJ and the Manual for Courts-Martial places an accused on notice he can be charged in the aggregate for a single transaction that results in multiple larcenies, or, in other words, his several misdemeanor larcenies can be transformed by government pleading into a felony larceny. First, the government is advancing a theory on appeal it did not advance at trial. Additionally, nowhere in the providence inquiry does the military judge discuss the government's theory of liability now advanced on appeal with SGT Hines.

In any event, there is no basis in law for the theory advanced by the government. Congress did not indicate that the amounts of separate larcenies can be aggregated, nor does the President so indicate in the Discussion of Article 121. The Army Court correctly determined SGT Hines theft and wrongful appropriation of basic allowance for housing (BAH) and Family Separation Allowance (FSA) was a separate larceny each month the money was received, and thus he was provident only to offenses the value of which were less than $500.00. Thus, consistent with the plain language of Article 121, this Court should affirm the Army Court's decision.

Even if this Court accepts the government's notion that aggregation is appropriate, the military judge abused his discretion in accepting SGT Hine's plea because the military judge failed to elicit from SGT Hines that he understood that the amounts of his larcenies and wrongful appropriation could be aggregated, and misinformed SGT Hines of the proper maximum punishment.

Statement of Facts

In Charge II, SGT Hines was charged with three specifications of larceny of BAH from three separate locations. (JA 11-12). Each specification alleged SGT Hines did "steal Basic Allowance for Housing entitlements, military property, of a value of more than $500.00 . . . ." (JA 11).

Sergeant Hines pled guilty to larceny as alleged in Charge II, Sp. 1 and 2, and guilty to wrongful appropriation in Charge II, Sp. 3. (JA 15). The military judge only established that SGT Hines stole money of a value less than $500.00 on nearly a monthly basis over various periods of time.[1] (JA 43).

Specification 1 alleges larceny of BAH in that SGT Hines improperly claimed the "with dependent rate" rather than the "without dependent rate." The stipulation of fact states that

[1] The government did not charge larceny on divers occasions, but charged a single larceny of certain entitlements over a broad time-frame. (JA 11-12). The amount of entitlement stolen each month is under $500.00.

SGT Hines stole $5,328.00 over approximately six months. (JA 28, 42-43).

During the providence inquiry, SGT Hines admitted that on October 20, 2010, he signed a DA Form 5960 while at Fort Campbell, Kentucky, that stated he was married when he was in fact divorced. (JA 16). Sergeant Hines admitted he did so because he wanted to continue to receive BAH. (JA 17). Sergeant Hines handed the document to the finance clerk. *Id.* On that same date, SGT Hines admitted he also claimed to be married when he submitted a permanent change of station (PCS) travel voucher.

Fort Campbell policy is to allow non-commissioned officers (NCO) to reside off post if they apply for a statement of non-availability. (JA 29, 42). Sergeant Hines stated that he would not have received BAH at the "with dependents rate" without his false representation that he was married. (JA 27). He also stated that each month he received a BAH payment. *Id.* Sergeant Hines stated the "entire amount" of his BAH payments amounted to $5,328. (JA 27-28). However, SGT Hines theft of money in the form of BAH was never over $500.00 on any one occurrence. (JA 43).

Specifications 2 of Charge II addresses the larceny of family separation allowance (FSA). The stipulation of fact

indicates SGT Hines received FSA in the amount of $250.00 per month. (JA 43).

In Specification 3 of Charge II, SGT Hines pled guilty to wrongful appropriation of BAH in an amount over $500.00. As established in the stipulation of fact, this amount was at most $200.00 on any single occurrence. *Id.* According to the stipulation of fact, "[a]t monthly intervals, [SGT Hines] reviewed his Leave and Earnings Statement (LES), where the accused read and understood he was receiving the BAH-WITH entitlement." JA 41. Sergeant Hines wrongfully withheld the difference between BAH and BAH-WITH rates after the his divorce. (JA 42 ("If the Accused had not been wrongfully appropriating and stealing BAH-WITH, he would have received BAH")).

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

The interpretation of statutes and the UCMJ are questions of law reviewed de novo. *United States v. Matthews,* 68 M.J. 29, 35-36 (C.A.A.F.2009); *United States v. Lopez de Victoria,* 66 M.J. 67, 73 (C.A.A.F.2008).

As Prosecution Exhibit 1 establishes, each transaction of larceny in the form of SGT Hines' BAH theft or wrongful appropriation occurred at a different time and for an amount under $500.00. The monetary amount of SGT Hines's thefts or wrongful appropriation is significant because it is the amount of the larceny or wrongful appropriation that determines whether the maximum punishment is, as the government proposes, twenty years and six months or, as the Army Court found, two years and three months.

Law

A. The UCMJ and the Manual for Courts-Martial

Article 121 of the UCMJ is silent as to maximum punishments, larceny values, and whether an aggregation of those amounts is appropriate. Likewise, the Manual for Courts-Martial [hereinafter M.C.M.] does not discuss aggregation, but merely discusses those situations in which multiple articles are stolen at "substantially the same time and place . . .," in which it is appropriate to charge "a single larceny even though the articles belong to different persons." M.C.M. ¶ 46.c.(i)(ii). In discussing maximum punishments for larceny and wrongful appropriation, the Manual again does not address aggregation, but simply provides an increased maximum for those thefts or wrongful appropriations in excess of $500. M.C.M. ¶ 46.e.(1) and (2). Rule for Courts-Martial 307(c)(4) states that "[e]ach

specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."[2] "'[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required in the text is not absurd—is to enforce it according to its terms.'" *United States v. Watson*, 71 M.J. 54, 57 (C.A.A.F. 2012) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *see* also *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (any ambiguity in a statutory scheme must be resolved to an accused's benefit).

B. Military Caselaw

From the advent of the Code, this Court and the service courts have struggled with the appropriateness of aggregating separate larcenies into a single specification and the consequent appropriate sentence, and have reached no consensus, thus this is a case of first impression.

In *United States v. Davis*, Davis was convicted of larceny from various finance offices on various dates, and the value of those thefts was aggregated in one specification, and sentence

[2] Treatises provide little more than general guidance in determining when aggregation is appropriate, but do indicate aggregation is dependent upon the statutory scheme. Perkins and Boyce, *Criminal Law*, (3d ed. 1982) at 338-39 (noting that the general trend in the statutory schemes, including the Model Penal Code, is toward aggregation).

to a sentence only appropriate for the a degree of larceny associated with a felony count. 16 U.S.C.M.A. 207, 36 C.M.R. 363, 365 (C.M.A. 1966). This Court determined the specification at issue violated "one of the rudimentary principles of pleading" because it alleged "more than one offense either conjunctively or in the alternative." *Id.* (quoting M.C.M., 1951, ¶ 28b). Thus, Davis's larcenies "c[ould] not be aggregated in one count as a single larceny, thereby increasing the amount stolen to a sum in excess of $50.00 and the permissible sentence to a term of five years."[3] 36 C.M.R. at 365.

The Army Court addressed a similar issue in *United States v. Poole*, 24 M.J. 539 (A.C.M.R. 1987), *aff'd* 26 M.J. 272 (C.M.A. 1988). In *Poole*, the Army Court determined that the military judge erred in determining the maximum punishment for specifications of uttering worthless checks. *Id.* at 541-42. The Army Court found it impermissible to increase the maximum punishment through duplicitous pleading. *Id.* at 542. None of Poole's worthless checks exceeded $100.00, thus aggregating the checks to reach a greater maximum punishment was inappropriate. *Id.* at 541-42.

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[3] The maximum punishments have been revised since *Davis* to the current levels of over or under $500.00. MCM, App. 23, ¶46c.

In *United States v. Mincey*, another bad check case, Mincey was convicted of passing eighteen bad checks, but the eighteen were all aggregated within three specifications. 42 M.J. 376, 377 (C.A.A.F. 1995). Mincey, an airman, relying upon *Poole*, claimed error in that the Air Force Court aggregated the amount of the bad checks to arrive at the maximum punishment. *Id.* at 377. This Court agreed that Mincey's maximum punishment was incorrectly determined. *Id.* at 378. The maximum sentence for each bad check should have been six months, not the higher maximum punishment for the aggregated offenses. *Id.* "Notwithstanding the joinder of multiple offenses under each specification of Charge I, in reality appellant was convicted of 17 offenses of uttering bad checks, in violation of Article 123a." *Id.* This Court added its opinion addressed only bad check cases. "We neither condone nor condemn the practice of joining numerous offenses into one specification for ease of pleading and prosecuting the case. We now only hold that in bad-check cases, the maximum punishment is calculated by the number and amount of the checks as if they have been charged separately . . . ." *Id.*[4]

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[4] Contrary to the government's argument, this Court never "expressly affirmed" the notion aggregation and the consequent greater maximum punishment of ten years is appropriate in a case such as SGT Hines'. At issue in *United states v. Bolden*, 28 M.J. 127 (C.M.A. 1989), cited by the government, was "whether a

Two of the four service courts have addressed aggregating the dollar amounts of larcenies to determine the maximum punishment. The Army Court has taken an approach consistent with *Mincey*, prohibiting the aggregation of larceny amounts to increase the maximum punishment, and also finding the accused guilty of the misdemeanor type of larceny, in that none of the offenses at issue exceeded $500.00. "For an accused to be convicted of larceny of property having a value a value over [$500.00], the record must show either that one item of the property stolen has such a value or that several items taken at substantially the same time and place have such an aggregate value." *United States v. Rupert*, 25 M.J. 531, 532 (A.C.M.R. 1987); *see* also *United States v. Christiansen*, 45 M.J. 617, 619 (A. Ct. Crim. App. 1997); *United States v. Harding*, 61 M.J. 526, 528 (A. Ct. Crim. App. 2005).

The Navy-Marine Corps Court has taken a different approach from that enunciated by this Court in *Mincey* and by the Army Court, allowing aggregation and holding the accused responsible not only for a felony, but also for a maximum punishment that corresponds with the aggregated amount. *United States v.*

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servicemember may be prosecuted for obtaining government benefits as a married person, if he participates in a marriage ceremony but never lives with the purported spouse or intends to do so." 28 M.J. at 129. This Court noted that Bolden would be guilty of felony larceny because the amount he received each month was greater than $100.00. *Id.* The *Bolden* opinion gives no indication aggregation was at issue in that case.

Lepresti, 52 M.J. 644 (N-M. Ct. Crim. App. 1999). Lepresti was charged with two specifications of larceny resulting from one phone call in which Lepresti used information from another person's bank account to order car parts. *Id.* at 652. However, because one of the parts was back-ordered, the parts were delivered on separate days. *Id.* Lepresti claimed the two specifications were multiplicious for findings purposes. *Id.*

The *Lepresti* court noted that a larceny is generally not complete until the thief takes the property of another, but found in Lepresti's case the actual larceny was set in motion by one phone call. *Id.* The *Lepresti* court noted the language in the Part IV, ¶ 46C(1)(h)(ii) stated that a single larceny occurs when several articles are stolen at the same time and place. *Id.* at 653. While admitting that language was "not directly on point," the Navy-Marine Corps Court determined, "[a]s a matter of policy, where a single act results in a theft of multiple items of personal property, only one larceny is to be charged." *Id.* The court consolidated the two specifications into a single specification and reassessed Lepresti's sentence. *Id.* at 658. Cf. *United States v. Campbell*, 72 M.J. 671 (N-M. Ct. Crim. App. 2013(court interpreted *Mincey* to state that if "the maximum authorized punishment for the individual larcenies had they been charged as separate specifications is equal to or exceeds the maximum punishment for the 'mega-specification' using aggregate

value, then . . . the 'greater than $500.00' maximum punishment [applies].") *Id.*

This Court should reject the Navy-Marine Corps Court's approach, and adopt that of the Army Court because its approach recognizes that neither the Code nor the Manual provides an accused notice that larcenies occurring at different times are to be aggregated.

C. Federal and State Caselaw

Recent federal and state cases interpreting the various theft type offenses generally provide that the underlying statutory scheme must indicate aggregation is appropriate before an accused can be subject to a conviction of a more serious offense, subjecting him to a greater penalty. Both the government and the *Lepresti* Court cite *United States v. Billingslea*, 603 F.3d 515 (5th Cir. 1979), as supporting the notion that larcenies can be aggregated. In *Billingslea*, the Fifth Circuit determined pursuant to 18 U.S.C. § 665 that aggregation was appropriate because Billingslea's embezzlement was put into operation by a single act—filing fraudulent paperwork. 603 F.2d at 520.

However, the federal and state cases interpreting the various theft type offenses in those jurisdictions, and even the Fifth Circuit's subsequent precedent, provide that the underlying statutory scheme must indicate aggregation is

appropriate before an accused can be subject to conviction of a greater offense and greater penalty. In *United States v. Taylor*, 869 F.2d 812 (5th Cir. 1989), Taylor was charged and convicted in the conjunctive for fraudulently endorsing six U.S. Treasury checks under 18 U.S.C. § 510(a). *Id.* at 814. On appeal, Taylor claimed she was not on notice that the six checks could be aggregated to arrive at the greater felony offense. *Id.*

The Fifth Circuit rejected Taylor's argument. *Id.* at 814-16. The court noted Taylor's argument would have merit absent the statutory scheme at issue. *Id.* at 816. However, Taylor was convicted pursuant to 18 U.S.C. § 510(c), which is "clear and unambiguous" because it contains an aggregation provision. *Id.* at 814.

Furthermore, the court explained its decision in *Billingslea*, and emphasized the central emphasis must be on the statutory scheme.

> When we compare the statutory scheme at issue in *Billinslea* with § 510(c), we must conclude that Congress intended sentencing courts to aggregate the value of checks passed or forged in violation of § 510—whether the individual checks form the basis of one or many counts. The defendant in *Billingslea* was convicted under 18 U.S.C. § 665 . . . [a statute that] contains a lenity provision . . . [but] does not contain an aggregation clause. Thus, in *Billingslea* we held that the district court could not aggregate the amounts involved in separate offenses so as to deprive the defendant of the lenity provision. As a result, a defendant who violate[s ???] § 665 may

> commit numerous offenses involving $99 or less and retain the benefit of § 665's lenity provision.

Id. at 814-15; *see also United States v. Smith*, 373 F.3d 561, 564 (4th Cir. 2004) (aggregation appropriate pursuant to 18 U.S.C. § 641 because that statute has an aggregation clause); *United States v. DiGillio*, 538 F.2d 972, 980 (3d Cir. 1976) (inappropriate to determine value of purloined documents simply by aggregating the document's individual value).

Similarly, state court cases emphasize the importance of the underlying statutory language in permitting a charge and specification to aggregate theft amounts. Thus, in *People v. Walton*, 990 N.E.2d 861 (Ill. App. 2013), the Illinois Court of Appeals addressed Walton's claim that aggregating the amount of his thefts was impermissible. The statute at issue allowed aggregation of thefts in the same indictment if the defendant was engaged "in a single intention or design or if the property" was stolen from the same person or persons having a "common interest" in the property. *Id.* at 868 (quoting 725 Ill.C.S. 5/11-4(c) (2010)). The court determined such charging would be appropriate pursuant to the statutory scheme, but found the government failed to properly charge Walton pursuant to the statute. *Id.* at 867-68; *see* also *State v. Thompson*, 48 A.3d 640, 647-48 (Conn. 2012) (statute provided for aggregation if one common scheme or plan); *Anderson v. Texas*, 322 S.W.3d 401,

407-08 (Tx. App. 2011) (aggregation appropriate for single scheme because Texas Penal Code provides for aggregation).

Argument

A. The Government Failed to Advance This Theory at Trial

First, the government is presenting a theory on appeal that was not presented at trial. Before this Court, the government maintains that a larceny that arises "out of a single criminal act or impulse may be charged in the aggregate." Gov't Brief at 12. However, as best can be determined, the government charged SGT Hines based not upon an act or impulse, but upon his duty location. Specification 1 addresses larceny of BAH at Fort Campbell, Kentucky. (JA 11, 44). Specification 2 addresses FSA larceny while SGT Hines was deployed, but overlaps with in time frame with Specification 3, which addresses wrongful appropriation of BAH at Fort Bragg, North Carolina. The theory of a "single act or impulse" is wholly one concocted by the government on appeal or the government would not have charged SGT Hines with three separate offenses. *United States v. Medina,* 66 M.J. 21, 27 (C.A.A.F. 2008) ("[A]n appellate court may not affirm on a theory not presented to the trier of fact and adjudicated beyond a reasonable doubt."); *United States v. Miller,* 67 M.J. 385, 388 (C.A.A.F. 2009); *cf. Chiarella v. United States,* 445 U.S. 222, 236-37 (1980) (stating that the Court would not affirm a conviction based on a theory not

presented to the jury); *Dunn v. United States,* 442 U.S. 100, 107 (1979) ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.")

B. No Aggregation Statute

In any event, nothing in the Uniform Code or the Manual indicates aggregating amounts of misdemeanors is appropriate. The Manual provides that the theft of several articles at one time may be a single larceny, M.C.M. ¶ 46.c.(1)(i)(ii), but the Manual states nothing about whether thefts occurring over a period of time can be one larceny. Indeed, the only precedent on point indicates the contrary. In *Davis*, 36 C.M.R. at 365, this Court found, Davis's larcenies "c[ould] not be aggregated in one count as a single larceny, thereby increasing the amount stolen to a sum in excess of $50.00 and the permissible sentence to a term of five years."

Before this court, the government maintains that a larceny or wrongful appropriation that arises "out of a single criminal act or impulse may be charged in the aggregate." Gov't Brief at 12. Even if the government had advanced the single act or impulse/aggregation theory at trial, the UCMJ, the Manual, nor any other authoritative sources provided notice recognized under military law that his misdemeanor larcenies could be transformed into felonies by aggregating the amounts of those misdemeanors.

The UCMJ is silent, and the Manual merely informs that articles stolen at "substantially the same time and place . . ." make it appropriate to charge "a single larceny even though the articles belong to different persons." M.C.M. ¶ 46.c.(i)(ii). The Manual does not discuss aggregation or any "single act or impulse" theory. Additionally, as established above, this Court's precedent and that of the service courts is at best unclear, and aggregation has never been expressly adopted by this Court.

As the federal and state court cases make apparent, it is improper to hold an accused liable as a matter of law unless the statutory scheme allows aggregation. *Taylor*, 869 F.2d at 814 (Taylor's claim of lack of notice would have merit absent the statutory scheme); *Smith*, 373 F.3d at 564 (aggregation appropriate pursuant to 18 U.S.C. § 641 because that statute has an aggregation clause); *United States v. DiGillio*, 538 F.2d at 980 (inappropriate to determine value of purloined documents simply by aggregating the documents individual value); *Walton*, 990 N.E.2d at 868; *Thompson*, 48 A.3d at 647-48 (statute provided for aggregation if one common scheme or plan); *Anderson v. Texas*, 322 S.W.3d at 407-08 (aggregation appropriate for single scheme because Texas Penal Code provides for aggregation).

The theme running through *Davis* and the various federal and state cases is one of both the permissible reach of the various

statutes and of notice. Nothing in UCMJ, the Manual, or military jurisprudence provided SGT Hines notice that his various misdemeanor larcenies and wrongful appropriations could be aggregated into felonies. This Court has found such notice in the Manual, federal law, state law, military case law, military custom and usage, and military regulations. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). "Both [the Fifth and Sixth] [A]mendments ensure the right of an accused to receive fair notice of what he is being charged with." *United States v. Girouard,* 70 M.J. 5, 10 (C.A.A.F. 2011). A criminal statute must clearly define the conduct it proscribes. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

B. No Notice the SGT Hines That Aggregation Was an Issue at Trial.

Even if this Court adopts the government single act/ aggregation theory going forward, this Court should not disturb the relief afforded to SGT Hines by the Army Court to SGT Hines. Regarding Charge II, Specification 3, the record directly contradicts the government's theory that SGT Hines conviction of wrongful appropriation was a "single act." According to the Stipulation of Fact, SGT Hines never submitted any paperwork to receive BAH at Fort Campbell. (JA 41). The government's theory related to this specification appears to be that his wrongful act was the failure, on a monthly basis, to inform appropriate

authorities that he should not continue receiving BAH-WITH. *Id.* ("At monthly intervals, [SGT Hines] reviewed his Leave and Earnings statement (LES), where the accused read and understood he was receiving the BAH-WITH entitlement."). Thus, the stipulation of fact contradicts the government's "single act-aggregation" for Specification 3. It also calls into question the applicability of the government's theory as it pertains to the other Charge II specifications as well.

Thus, this Court should affirm the findings and sentence as found by the Army Court.

II

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT APPELLANT'S PLEAS TO SPECIFICATION 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."

The Army Court correctly concluded the military judge abused his discretion in accepting SGT Hines pleas to larceny and wrongful appropriation of over $500.00 in Specifications 1 and 3. (JA 3). A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 MJ 320, 321-22 (C.A.A.F. 2008)(citing *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). A military judge abuses his "discretion if he fails to obtain from the

accused an adequate factual basis to support the plea . . . ." *Id.* at 322 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

Rule for Courts-Martial [hereinafter R.C.M.] 910(e) states, "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." This rule implements the decision of the Court of Military Appeals in *United States v. Davenport*, which held that "[t]he factual predicate is sufficiently established if 'the factual circumstances as revealed by the accused himself objectively support that plea . . . .'" 9 M.J. 364, 367 (C.M.A. 1980) (citation omitted).

The accused must admit every element of the offense to which he pleads guilty. *See* R.C.M. 910(e) discussion. Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)(citing *United States v. Terry*, 21 U.S.C.M.A. 442, 45 C.M.R. 216 (1972)(holding that recital of the elements does not satisfy the requirements of *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969))).

As the Army Court found, the military judge never addressed SGT Hine's confusion about the difference between the BAH SGT Hines was rightfully entitled to and the greater amount he plead

guilty to. An accused must fully explain why he is guilty of the offense to which he pleads guilty. *See* R.C.M. 910(e) *discussion*. But mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). The record of trial must reflect that

> the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty.

United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969).

Sergeant Hine's guilty plea to Specifications 1 and 3 of Charge II was inadequate because the military judge failed to elicit a factual basis that SGT Hines ever stole or withheld over $500.00 at substantially the same time and place, or that, under the government's new theory, that amount of SGT Hines's larcenies and wrongful appropriations were being aggregated, and, as such, his convictions were being enhanced in both maximum sentence and the difference in severity between a felony and misdemeanor.

B. Law and Argument

The value of currency stolen directly affects the maximum punishment. One incident of larceny of military property valued over $500.00 increases the maximum punishment from one year

confinement and a bad conduct discharge to ten years confinement and a dishonorable discharge. M.C.M. ¶ 46.e.(1) (reduction and forfeitures omitted). The same aggravating factor is present in wrongful appropriation. M.C.M. ¶ 46.e.(2). As such, wrongfully appropriating an amount over $500.00 increases the punishment from three months confinement and forfeiture of two-thirds pay for three months, to six months confinement and total forfeitures for six months. *Id.*

In this case, the military judge failed to elicit information to affirm a conviction of larceny in an amount greater than $500 for Specification 1 of Charge II. Specification 1 alleges larceny of BAH in that SGT Hines improperly claimed the "with dependent rate" rather than the "without dependent rate." The stipulation of fact states that SGT Hines stole $5,328 over approximately six months. (JA 28, 43). Sergeant Hines, however, only laid a factual predicate for stealing the extra money for basic allowance for housing at the "with dependent rate."[6]

The stipulation of fact shows that Fort Campbell policy is to allow NCO's to reside off post if they apply for a statement of non-availability. (JA 27, 42). Sergeant Hines stated

[6] The military judge apparently adopted a theory of liability to the entire amount SGT Hines received in housing pay because he did not go through proper procedures to get BAH without dependents. (JA 25).

specifically that he would not have received BAH at the "with dependents rate" without his false representation that he was married. (JA 27). He also points out that each month he received a BAH payment. *Id.* The military judge attempted to clarify that when SGT Hines said the entire amount, he meant the $5,328. (JA 28). Even though SGT Hines then agreed that the aggregate of his BAH was more than $500.00, this is not the proper legal test. Sergeant Hine's theft of money in the form of BAH was never over $500.00 on any one occurrence, which it needs to be for the sentence aggravator.

The same is true as to Specification 3 of Charge II, to which SGT Hines pled guilty to wrongful appropriation of BAH in an amount over $500.00. As established in the stipulation of fact, this amount was at most $200.00 on any single occurrence. (JA 43). In this case the government's theory was that SGT Hines wrongfully withheld the BAH amount. The facts establish that the only thing wrongfully withheld was the difference between rates after the SGT Hine's divorce. (JA 42). ("If the Accused had not been wrongfully appropriating and stealing BAH-WITH, he would have received BAH."). *Id.*

Furthermore, the military judge did not elicit a proper foundation for the plea because he did not understand the importance of determining that at least one theft exceeded $500.00 versus the aggregate amount being greater than $500.00.

(JA at 28-29, 31, 33, 35). Nothing in the record of trial indicates SGT Hines was informed of the significant difference between a plea of guilty to a misdemeanor versus a felony, or that the theory of the case was that his conviction was based upon "single acts" versus separate larcenies. The difference between a felony and misdemeanor is substantial. *United States v. Medina*, 71 M.J. 652, 655 (C.G. Ct. Crim. App. 2012). In fact, the record reflects the theory for the wrongful appropriation was that the wrongful appropriation occurred on a monthly basis when SGT Hines checked his LES and saw he was receiving more BAH then he was entitled to, and thus was clearly committing a separate wrongful appropriation each month of a value under $500.00. JA 42. Sergeant Hines was clearly not provident to wrongful appropriation over $500.00.

Accordingly, the Army Court's decision must be affirmed.

Conclusion

Accordingly, SGT Hines requests that this Honorable Court affirm the findings and sentence as determined by the Army Court.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hines,* Crim.App.Dkt.No. 20120024, USCA Dkt. No. 13-5010/AR, was electronically filed with both the Court and Government Appellate Division on October 1, 2013.

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