

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

U N I T E D   S T A T E S,    )   REPLY BRIEF ON BEHALF OF  
                          Appellee    )   APPELLANT  
                                  )     
                          v.            )     
                                  )   Army Misc. Dkt. No. 20130284  
                                  )     
Specialist (E-4)            )   USCA Dkt. No. 15-0140/AR  
**Henry L. Williams, III,**    )     
United States Army,        )     
                          Appellant )

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

**Issue Granted**

WHETHER APPELLANT COMMITTED LARCENIES OF THE  
PROPERTY OF TWO SOLDIERS BY USING THEIR  
DEBIT CARD INFORMATION WITHOUT AUTHORITY.  
*SEE UNITED STATES V. LUBASKY, 68 M.J. 260*  
(C.A.A.F. 2010).

**Statement of the Case**

On April 30, 2015, this Honorable Court granted appellant's petition for review. On May 20, 2015, appellant filed his final brief with this Court. The government responded on June 10, 2015. The Appellant herein replies to the government's response.

**Argument**

The government stated in its brief that "[r]emand in accordance with *United States v. Gaskill* is inappropriate in this case." (Appellee's Brief at 14). Appellant agrees that remand is inappropriate, but disagrees with the government's

assertion that remand would be possible if there were sufficient facts on the record to indicate which person or entity "suffered harm." (Appellee's Brief at 14).

The government's position is that *Gaskill* left "open the possibility that this [C]ourt could remand a case to the Army Court to amend the specifications to allege the proper victim under the Army Court's Article 66, UCMJ powers." (Appellee's Brief at 14). Although remand to review the providence of a plea notwithstanding a charging error may be appropriate in a guilty plea case, in a contested case an appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact. *United States v. Bennitt*, 74 M.J. 125, 128 (C.A.A.F. 2015); *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980). And although Article 59(b), UCMJ, grants appellate courts authority to set aside a finding of guilty and affirm a finding of a lesser-included offense, "there is no authority for the proposition that larceny from one entity is an LIO of larceny from another entity." *United States v. Lubasky*, 68 M.J. 260, 265 (C.A.A.F. 2010).

Here, the government charged SPC Williams with stealing money from account-holders. The government also advanced this theory at trial. (JA 27, 81-82, 116-18). In such a case, remand is inappropriate because "appellate courts are not free to revise the basis on which a defendant is convicted simply

because the same result would likely obtain on retrial." *Dunn v. United States*, 442 U.S. 100, 107 (1979). A larceny against merchants or banks is an altogether different theory not presented to the factfinder, and is not a lesser-included offense of the offense charged. Thus, regardless of the facts, the Army Court could never amend a legally insufficient specification to conform it to the evidence presented at trial.

**Conclusion**

WHEREFORE, SPC Williams respectfully requests that this Honorable Court set aside and dismiss Specifications 1 and 2 of Charge VI.

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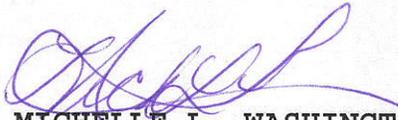
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## **CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing in the case of  
*United States v. Williams*, Army Dkt. No. 20130284, USCA Dkt. No.  
15-0140/AR, was electronically filed with both the Court and  
Government Appellate Division on June 17, 2015.



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