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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

U N I T E D   S T A T E S,     )   BRIEF ON BEHALF OF APPELLEE  
                                  Appellee    )  
  )  
                                  v.            )   Crim. App. Dkt. No. 20130284  
  )  
Private First Class (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:

**Granted Issue**

**WHETHER APPELLANT COMMITTED LARCENIES OF THE  
PROPERTY OF TWO SOLDIERS BY USING THEIR  
DEBIT CARD INFORMATION WIHTOUT AUTHORITY.  
SEE UNITED STATES v. LUBASKY, 68 M.J. 260  
(C.A.A.F. 2010).**

**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, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ].<sup>1</sup> The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.<sup>2</sup>

**Statement of the Case**

On 19 March 2013, a military judge sitting as a general court-martial convicted appellant, in accordance with his pleas,

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<sup>1</sup> UCMJ art. 66(b), 10 U.S.C. § 866(b) (2012).

<sup>2</sup> UCMJ art. 67(a)(3).

of failure to go to his appointed place of duty, disobedience of a superior commissioned officer, disobedience of a non-commissioned officer (two specifications), false official statement, wrongful use of marijuana, larceny (three specifications), housebreaking (two specifications), and bigamy in violation of Articles 86, 90, 91, 107, 112a, 121, 130, and 134, UCMJ (2006).<sup>3</sup>

The military judge convicted appellant, contrary to his pleas, of two specifications of larceny in violation of Article 121, UCMJ.<sup>4</sup> The military judge sentenced the appellant to be confined for a period of eighteen months and to be discharged from the service with a bad-conduct discharge (BCD).<sup>5</sup> Pursuant to a pre-trial agreement, the convening authority approved only so much of the sentence as provided for a BCD and fifteen months confinement.<sup>6</sup>

On 28 August 2014, the Army Court affirmed the findings and sentence as adjudged.<sup>7</sup> This Court granted appellant's petition for grant of review of the Army Court's decision on 30 April 2015. Defense appellate counsel filed its brief on behalf of appellant on 20 May 2015.

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<sup>3</sup> JA 120.

<sup>4</sup> JA 120.

<sup>5</sup> JA 1.

<sup>6</sup> JA 1.

<sup>7</sup> JA 1-12.

### Statement of Facts

Appellant was assigned to Company B, 50th Signal Battalion (Expeditionary), 108th Air Defense Artillery Brigade, at Fort Bragg, North Carolina.<sup>8</sup> During the summer of 2011, appellant was deployed to Iraq and stationed at Contingency Operating Site Warrior.<sup>9</sup> While stationed in Iraq, appellant worked with Specialist (SPC) JA.<sup>10</sup> Specialist JA testified that while deployed, he logged into his account with BB&T Bank and noticed unauthorized transactions totaling approximately \$700 to Computergeeks.com.<sup>11</sup> The items were scheduled to ship to appellant in Iraq and a residential address in North Carolina.<sup>12</sup> The items were never shipped as SPC JA's bank had flagged the transactions due to the shipping addresses failing to match the billing address on the card.<sup>13</sup> As a result of the pending transactions with Computergeeks.com, SPC JA was unable to make his car payment and was charged \$70 in overdraft fees.<sup>14</sup> Appellant eventually paid for SPC JA's car payment that month after admitting to SPC JA that he may have accidentally used SPC JA's account information.<sup>15</sup>

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<sup>8</sup> JA 120.

<sup>9</sup> JA 18, 32, 38.

<sup>10</sup> JA 32.

<sup>11</sup> JA 44-45.

<sup>12</sup> JA 43-45.

<sup>13</sup> JA 40, 53.

<sup>14</sup> JA 52-53.

<sup>15</sup> JA 51-52.

SPC BI<sup>16</sup> testified at trial that from December 2011 through February 2012 he was roommates with appellant in the barracks at Fort Bragg.<sup>17</sup> Specialist BI stated that he was notified by a fraud agency employed by his financial institution, Boulder Valley Credit Union (BVCU) that there was potential fraudulent activity on his account, to include charges at various food establishments.<sup>18</sup> Based upon the information he received, SPC BI called several establishments where his card was used in an attempt to procure copies of receipts for the transactions.<sup>19</sup> Specialist BI was able to obtain a receipt from Pizza Hut which listed his card number and had the appellant's name and phone number as the individual who made the order.<sup>20</sup> Appellant utilized SPC BI's card at numerous food establishments, Verizon Wireless, an unidentified company, and the casual dating website Adult Friend Finder.<sup>21</sup> According to SPC BI, the total amount of fraudulent transactions totaled \$3,067.70.<sup>22</sup> While the charges were being investigated, SPC BI received provisional credit from

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<sup>16</sup> At the time of appellant's criminal misconduct, BI was a Private First Class as indicated on the Charge Sheet. (JA 18). At trial, BI was a SPC. (JA 55). BI will be identified by his rank at the time of trial throughout this brief.

<sup>17</sup> JA 56.

<sup>18</sup> JA 57-58.

<sup>19</sup> JA 59-60.

<sup>20</sup> JA 60.

<sup>21</sup> JA 63.

<sup>22</sup> JA 64.

BVCU.<sup>23</sup> Specialist BI indicated that to his knowledge, BVCU was never refunded the money for the purchases.<sup>24</sup>

At the close of the government's case in chief, defense counsel made a motion under Rule for Courts-Martial 917 for a finding of not guilty, citing *United States v. Lubasky*.<sup>25</sup> Defense counsel argued that the proper victims of appellant's larcenies were the merchants or banks, not the individual soldiers.<sup>26</sup> Specifically, with respect to the larceny from SPC JA, defense counsel argued there was no evidence of an actual taking of funds as the transactions had been flagged immediately and no money was ever paid to Computergeeks.com.<sup>27</sup> The military judge denied the defense counsel's motion.<sup>28</sup> Appellant was subsequently convicted of the two specifications of larceny over \$500 from SPC BI and SPC JA by utilizing their debit card information without authority.<sup>29</sup>

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<sup>23</sup> JA at 77.

<sup>24</sup> JA 77.

<sup>25</sup> JA 80.

<sup>26</sup> JA 80.

<sup>27</sup> JA 80.

<sup>28</sup> JA 85.

<sup>29</sup> JA 120.

### **Granted Issue**

WHETHER APPELLANT COMMITTED LARCENCIES OF THE PROPERTY OF TWO SOLDIERS BY USING THEIR DEBIT CARD INFORMATION WITHOUT THEIR AUTHORITY. SEE UNITED STATES v. LUBASKY, 69 M.J. 260 (C.A.A.F. 2010).

### **Summary of Argument**

The government agrees that the proper victims of appellant's larcenies were the financial institutions and not the individual soldiers whose information was used without authority. In accordance with this court's ruling in *United States v. Lubasky*, if the government wanted to proceed under a theory of larceny, BB&T Bank and BVCU were the proper victims not SPC JA and PFC BI.<sup>30</sup> Therefore, this Honorable Court should set aside and dismiss Specifications 1 and 2 of Charge VI.

### **Standard of Review**

Questions of legal sufficiency are reviewed de novo.<sup>31</sup> "Evidence is legally sufficient if, viewed in the light most favorable to the Government, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>32</sup>

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<sup>30</sup> 69 M.J. 260 (C.A.A.F. 2010).

<sup>31</sup> *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

<sup>32</sup> *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

## Law and Analysis

### A. Banks, not Individuals, own Money in Accounts.

Once an individual deposits money into a bank account, those funds become the property of the bank.<sup>33</sup> “[A] depositor does not have a possessory interest in his bank account[,]” rather, he is a creditor and the bank his debtor.<sup>34</sup> “Money deposited in a bank account creates a debtor creditor relationship between the bank and the depositor, and the funds constitute a loan.”<sup>35</sup> Funds in an individual bank account which are available to the individual account holder are “nothing but an acknowledgement of indebtedness from the bank to its depositor.”<sup>36</sup> While the individual has the right to utilize the funds in his bank account, the bank is the only party entitled to immediate control of those funds.<sup>37</sup>

Debit cards are linked to checking accounts which are a form of demand deposit accounts.<sup>38</sup> Checking accounts are established by the deposit of a sum of money into a bank, thereby making the bank a debtor and the depositor the creditor;

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<sup>33</sup> *Bank of the United States v. Bank of Georgia*, 23 U.S. (1 Wheat.) 333, 341 (1825).

<sup>34</sup> *Universal Group Dev., Inc. v. Wanzhong Yu*, No. 1:15-CV-0002, 2015 U.S. Dist. LEXIS 60201, at \*9-10 (D. N. Mar. I. 2015).

<sup>35</sup> *Id.* at \*9.

<sup>36</sup> *Reliance Ins. Co. v. U.S. Bank, N.A.*, 143 F.3d 502, 506 (9th Cir. 1998).

<sup>37</sup> *Universal Group Dev.*, 2015 U.S. Dist. LEXIS 60201, at \*9.

<sup>38</sup> *United States v. Visa U.S.A., Inc.*, 163 F. Supp.2d 322, 392 (S.D.N.Y. 2001).

the bank "agrees to discharge these debts by honoring the checks which the depositor shall from time to time draw on [it]."<sup>39</sup> In today's marketplace, debit cards have replaced checkbooks for many consumers; instead of writing a check, the consumer can immediately withdraw funds from their account held at a financial institution merely by swiping their card at the point of purchase.<sup>40</sup> Despite the individual account holder's ability to demand the entire amount of an account be returned to him immediately, some institutions require a period of no more than seven days notice for the bank to make the funds available.<sup>41</sup> Therefore, even funds in a demand deposit account, which can be drawn on instantaneously with a debit card, are the property of the bank and not the individual account holder.<sup>42</sup> Absent some form of agreement between the individual and the bank, usually in the form of a bailment or trust, by which the bank does not actually take ownership of the funds, money contained in an account is the sole property of the bank.<sup>43</sup> Therefore, the bank

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<sup>39</sup> *Bank of Republic v. Millard*, 77 U.S. (1 Wall.) 152, 155 (1870).

<sup>40</sup> Major Benjamin M. Owens-Filice, "Where's the Money Lebowski?" - Charging Credit and Debit Card Larcenies Under Article 121, UCMJ, ARMY LAWYER, Nov. 2014, at 4-5.

<sup>41</sup> 12 C.F.R. §§ 204.2(b)(1)-(2) (2011).

<sup>42</sup> *Universal Group Dev.*, 2015 U.S. Dist. LEXIS 60201 at \*9.

<sup>43</sup> *In re Multiponics*, 622 F.2d 725, 728 (5th Cir. 1989); *Universal Group Dev.*, 2015 U.S. Dist. LEXIS 60201, at \*9; see also *United States v. Butterworth-Judson Corp.*, 267 U.S. 387, 394-395 (1925) (stating "As a general rule, in the absence of an agreement to the contrary, a deposit, not made specifically

and not the individual account holder is the proper victim of a larceny charged under Article 121, UCMJ.<sup>44</sup>

To further illustrate in an example, PFC Smith receives a \$10,000 loan from Bank of America (BOA), and immediately converts the check he receives into cash. Smith is the debtor and BOA is the creditor. BOA certainly has an interest in the money as a creditor, but has no possessory interest. Smith goes to his barracks and places the money into a drawer. That evening another individual, SPC Jones, breaks into Smith's room and steals the money out of the drawer. Jones has committed a larceny of funds from Smith, not BOA. Despite the fact that BOA ultimately will want the \$10,000 repaid to their establishment, the larceny was of Smith's funds, not BOA's because Smith is in possession. As such, Jones could be charged under Article 121, UCMJ for larceny over \$500 from PFC Smith.

Along the same vein, when an individual deposits money into a bank account, that individual becomes the creditor and the bank the debtor. In this scenario, PFC Smith deposits \$10,000 into a demand deposit checking account at BOA and receives a debit card for his personal use. BOA is indebted \$10,000 to Smith, who is the creditor. While at work, SPC Jones writes

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applicable to some other purpose, may be applied by the bank in payment of the indebtedness of the depositor." (citation omitted)).

<sup>44</sup> *United States v. Endsley*, CCA 20130052, 2015 CAAF LEXIS 52, at \*1 (C.A.A.F. 14 Jan. 2015) (mem. op).

down Smith's debit card information and uses it to purchase items online, which are later delivered to his house. BOA is in possession of the funds, much like Smith was in the example above, and therefore is the proper victim of the larceny under Article 121, UCMJ.<sup>45</sup>

**B. Article 121, UCMJ Ordinarily Requires the Bank or Merchant be Named as a Victim of Debit Card Larceny.**

In accordance with Article 121, UCMJ, when a servicemember commits a larceny through the use of another's debit card, ordinarily the theft is from the bank or merchant, not the individual card holder as discussed in the hypothetical above.<sup>46</sup>

The President has stated that absent special circumstances:

Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them. Such use to obtain money or a negotiable instrument (e.g., a cash advance from a bank) is usually a larceny of money from the entity presenting the money or a negotiable instrument.<sup>47</sup>

Further, a larceny must be committed from the owner of the property.<sup>48</sup> The owner is "the person who, at the time of the

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<sup>45</sup> This hypothetical is based on the facts of appellant's case. This charging theory ignores that fact that Jones could potentially be prosecuted under wire fraud or identity theft statutes as assimilated under clause 3 of Article 134, UCMJ.

<sup>46</sup> *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 46.c.(1)(i)(vi).

<sup>47</sup> *Id.*

<sup>48</sup> *MCM*, pt. IV, ¶ 46.c.(1)(c)(i).

taking, obtaining, or withholding, had the superior right to possession of the property . . . ."<sup>49</sup> This court has clarified the meaning of the above provisions in three recent decisions: *United States v. Lubasky*, *United States v. Cimball Sharpton*, and *United States v. Endsley*.<sup>50</sup>

In *Lubasky*, the appellant was convicted of several specifications of larceny from an elderly woman, Ms. Shirley, whom the appellant was assigned to aid under the casualty assistance program.<sup>51</sup> The appellant gained Ms. Shirley's trust and was given access to her bank account as a joint owner.<sup>52</sup> Over the course of the next several years, the appellant utilized Ms. Shirley's debit and credit cards without her permission.<sup>53</sup> This court found that with respect to the credit card transactions, which the appellant was not named as a joint owner of, the larcenies were of the merchants from whom the appellant purchased items.<sup>54</sup> However, with regard to the debit card and automatic teller transactions (ATM), this court found that the appellant had gained access to the account under false pretenses and exceeded the scope of the authority given to him

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<sup>49</sup> *MCM*, pt. IV, ¶ 46.c.(1)(c)(ii).

<sup>50</sup> *Lubasky*, 69 M.J. 260; *United States v. Cimball Sharpton*, 73 M.J. 299 (C.A.A.F. 2014); *Endsley*, CCA 20130052, 2015 CAAF LEXIS 52.

<sup>51</sup> *Lubasky*, 69 M.J. at 262-263.

<sup>52</sup> *Id.* at 262.

<sup>53</sup> *Id.* at 262-263.

<sup>54</sup> *Id.* at 263.

by Ms. Shirley.<sup>55</sup> Therefore, due to the unique set up of appellant being a joint owner on Ms. Shirely's checking account, this court found that the appellant had committed a larceny directly from Ms. Shirley when he used her debit card and made ATM withdraws.<sup>56</sup>

In *Cimball Sharpton*, the appellant was the holder of a government purchase card (GPC) which was issued by U.S. Bank.<sup>57</sup> The Air Force was contractually bound to pay U.S. Bank for any charges on the GPC.<sup>58</sup> The appellant purchased approximately \$20,000 worth of goods utilizing her GPC and was charged with larceny of military property over \$500.<sup>59</sup> In rejecting the appellant's claim that the merchants or the bank were the correct victims in the case, this court found that "it was neither the merchants nor U.S. Bank but the Air Force who suffered the financial loss resulting from Appellant's larceny[,]" as the government had paid U.S. Bank the full amount for the unauthorized transactions as required by the terms of the contract.<sup>60</sup>

In *Endsley*, the appellant was charged with larceny when he utilized the debit card information of a SPC DT to purchase

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<sup>55</sup> *Id.* at 264-265.

<sup>56</sup> *Id.* at 264.

<sup>57</sup> *Cimball Sharpton*, 73 M.J. at 299.

<sup>58</sup> *Id.* at 299-300.

<sup>59</sup> *Id.* at 300.

<sup>60</sup> *Id.* at 301.

items online.<sup>61</sup> The Army Court upheld the convictions stating that "SPC DT is the one who suffered financial loss in that the funds were used and his bank account was depleted."<sup>62</sup> However, in reversing the Army Court's ruling, this court stated that the proper victim was the bank, not SPC DT.<sup>63</sup>

The facts of appellant's case are similar to those in *Endsley*. There was no special relationship like in *Lubasky*, nor was there a unique circumstance in which the government was contractually obligated to pay for the fraudulent purchases as in *Cimball Sharpton*.<sup>64</sup> Appellant utilized the debit card numbers from two servicemembers and effectuated his larceny upon BB&T Bank and BVCU, respectively. The banks in this case had a possessory interest in the funds at the time of appellant's criminal activity and are therefore, the proper victims.<sup>65</sup>

**C. Remand in Accordance With *United States v. Gaskill* is Inappropriate in This Case.**

In *United States v. Gaskill*, this court reversed the decision of the Army Court with regard to an appellant who committed larceny by obtaining the bank card information of several other soldiers and using that information to make

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<sup>61</sup> 73 M.J. 909, 910 (Army Ct. Crim App. 2014), *rev'd in part*, 2015 CAAF LEXIS 52, *remanded to* 2015 CCA LEXIS 32.

<sup>62</sup> *Id.* at 911.

<sup>63</sup> *Endsley*, CCA 20130052, 2015 CAAF LEXIS 52, at \*1.

<sup>64</sup> *Lubasky*, 68 M.J. at 264; *Cimball Sharpton*, 73 M.J. at 301.

<sup>65</sup> *Universal Group Dev.*, 2015 U.S. Dist. LEXIS 60201, at \*9.

authorized purchases.<sup>66</sup> This court stated "that the proper victim [in the specifications] was the merchant who provided the goods and services upon false pretenses, not the debit cardholder/Soldier."<sup>67</sup> This court also stated that "the charge sheet, stipulation of fact, and providence inquiry focused on the three Soldiers as victims, and there was no discussion on the record of whether the merchants were victimized."<sup>68</sup> This leaves open the possibility that this court 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. Such a remand would only be appropriate if there was enough evidence on the record to indicate that the merchant or bank suffered harm.<sup>69</sup> However, in this case, there is nothing on the record that would allow for the Army Court to make a determination that the banks or merchants suffered any harm and were therefore, the proper victims of appellant's larceny. The record is devoid of any discussion of the harm suffered by the merchants or financial institutions. As such, dismissal of the affected specifications is the proper remedy.

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<sup>66</sup> *United States v. Gaskill*, 73 M.J. 207 (C.A.A.F. 2014).

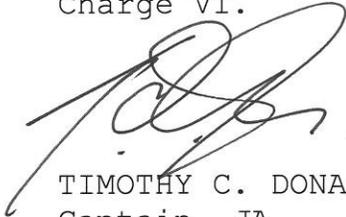
<sup>67</sup> *Id.*

<sup>68</sup> *Id.* This same language can be found in this court's opinion in *Endlsey*. CCA 20130052, 2015 CAAF LEXIS 52, at \*1 (stating "[T]he charge sheet, stipulation of fact, and the providence inquiry focused on the Soldier as the victim, and there was no discussion on the record of whether the merchants were victimized." (citation omitted)).

<sup>69</sup> *Gaskill*, 73 M.J. at 207.

Conclusion

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



TIMOTHY C. DONAHUE  
Captain, JA  
Appellate Government  
Counsel  
U.S.C.A.A.F. Bar No. 36279



DANIEL D. DERNER  
Major, JA  
Branch Chief, Government  
Appellate Division  
U.S.C.A.A.F. Bar. No. 36331



A.G. COURIE, III  
Major, JA  
Acting Chief, Government  
Appellate Division  
U.S.C.A.A.F. Bar No. 36422

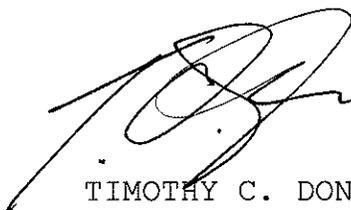
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TIMOTHY C. DONAHUE  
Captain, Judge Advocate  
Attorney for Appellee  
June 10, 2015

CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court ([efiling@armfor.uscourts.gov](mailto:efiling@armfor.uscourts.gov)) and contemporaneously served electronically on appellate defense counsel, on June 10, 2015.

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DANIEL L. MANN  
Lead Paralegal Specialist  
Office of The Judge Advocate  
General, United States Army  
9275 Gunston Road  
Fort Belvoir, VA 22060-5546  
(703) 693-0822