IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	} BRIEF ON BEHALF OF APPELLANT
v.	} Crim. App. Dkt. No. 20140126
Sergeant (E-5) RANDY L. SIMPSON, JR., United States Army, Appellee	} USCA Dkt. No. 17-0329/AR

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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 [hereinafter UCMJ], 10 U.S.C. § 866(b). The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On February 19, 2014, a military judge, sitting as a general court-martial, convicted Appellee, pursuant to his pleas, of conspiracy and larceny, in violation of Articles 81 and 121, UCMJ, 10 U.S.C. §§ 881 and 921 (2012). (JA 030, 090). The military judge sentenced Appellee to be reduced to the grade of E-4, to be confined for two months, and to be discharged from the service with a bad-conduct discharge. (JA 091). The convening authority approved the adjudged findings and sentence and credited Appellee with five days credit for post-trial delay. (Action).

The Army Court summarily affirmed the findings and sentence on December 18, 2015. (JA 126). On June 10, 2016, this court granted review and remanded for consideration of whether the proper victim of a larceny was charged in this case in light of its recent decision in *United States v. Williams*, 75 M.J. 129 (C.A.A.F. 2016). (JA 129-130). On March 1, 2017 the Army Court set aside the findings and sentence and authorized a rehearing. (JA 001). On March 29, 2017, the Judge Advocate General of the Army certified this issue for review, and the case was docketed on April 3, 2017.

Statement of Facts

Credit First National Association (CFNA) is a limited purpose, credit card only, banking association. (JA 092). "This means that CFNA is not a conventional bank which accepts deposits or operates branches. Rather, CFNA

handles transactions for Bridgestone Americas with tire and automotive repair dealers/retailers and cardholders." (JA 092). Credit First National Association holds its accounts with other financial institutions including an account at JP Morgan Chase. (JA 092).

In this case, CFNA used the account it held at JP Morgan Chase to pay automotive repair dealers and retailers and to process cardholder credit balance refund checks. (JA 092). Rather than operating as a conventional checking account, CFNA was set up as a "zero-balance" account. (JA 092). As such, CFNA funded the account held at JP Morgan Chase by wire-transferring the money drawn on the account at the end of each business day. (JA 092). Because of this wire transfer, the account reached a zero balance at the end of each day. (JA 092). This account processed approximately 17,000 transactions a month totaling approximately $15,000,000.00. (JA 092).

Appellee's girlfriend, Ms. Jannie Lee, came into possession of the aforementioned CFNA account number and set up a scheme wherein she used the account number to pay utilities and other bills for people in order to earn a profit; she did not have legal authority to use the account number. (JA 091). Ms. Lee began paying Appellee's bills using the CFNA account number in September 2009. (JA 091). While Appellee was not initially aware of the scheme, he discovered that he was not legally entitled to use the account in May 2010 and he

chose to continue having his girlfriend pay his bills from it anyway. (JA 045). Appellee explained this during his providence inquiry, stating, "She was taking my account information onto a computer and then taking the funds from Credit First National and putting in their account information to misrepresent that I was a lawful owner of the account that I was using to pay my bills." (JA 046). Appellee paid $30,946.23 of utility bills and other debts from this account. (JA 093-094).

Appellee involved Sergeant (SGT) Richard Ramos in this scheme on May 14, 2010, when he arranged for SGT Ramos to contact Ms. Lee to set up his bill payment through the CFNA account number. (JA 061). He explained to SGT Ramos that the money was not lawfully Ms. Lee's and that "he was going to have to kick back some of the money to Jannie Lee but not all of it." (JA 061). Appellee explained that he and SGT Ramos agreed to "commit larceny by taking the money from the account." (JA 061). He further explained that he and SGT Ramos understood that by using this account number to pay SGT Ramos's bills, the owner would be permanently deprived of the money. (JA 062). Appellee explained that the overt act in the conspiracy was making a phone call and allowing SGT Ramos to talk to Ms. Lee "so they could exchange information on how to make the payment go through." (JA 066). Ms. Lee gave SGT Ramos the account information and he used it to pay his bills. (JA 095).

Appellee and SGT Ramos were not the only people involved in Ms. Lee's scheme. (JA 091-092). The scheme was uncovered when the Tacoma Public Utilities company reported that 324 customers paid their bills out of the same checking account. (JA 092-093). The Army and Air Force Exchange Service also had numerous people paying out of the same account. (JA 092).

Upon discovering the unauthorized transactions, CFNA was able to reverse all of the unauthorized debits going back to January 1, 2010; however, nothing prior to January 1, 2010, was reversed, and CFNA never recovered those funds. (JA 092-093).

Summary of Argument

The military judge did not abuse his discretion in accepting Appellee's guilty plea as there is no substantial basis in law and fact to question the plea in light of the Supreme Court decision in *Shaw v. United States*, 137 S. Ct. 462 (2016). In *United States v. Williams*, this Court found that *absent special circumstances*, a banking institution has a superior possessory interest to an account holder in a deposit account, and therefore the bank is the proper victim of a charge of larceny under Article 121, UCMJ. 75 M.J. 129 (C.A.A.F. 2016). Subsequently, the Supreme Court rendered a decision in *Shaw* that implies both the banking institution and the account holder have a possessory interest in the

account, leading to the conclusion that multiple parties can be the proper victim of a larceny.

The Army Court erred in ruling that CFNA was not a proper victim because JP Morgan Chase suffered the loss. The Army Court's ruling, while mentioning the *Shaw* decision, fails to take into account the gravity of the Supreme Court's ruling and relies solely on this Court's opinion in *United States v. Williams*.

The Army Court also erred in failing to find that the special circumstances contemplated in *United States v. Cimball Sharpton*, were present here. *Sharpton*, 73 M.J. 299, 302 (C.A.A.F. 2014). Due to the fact that CFNA was a "zero balance" account holder required by their contractual agreement to pay JP Morgan Chase daily for transactions and was not refunded the entire amount of money it paid out for Ms. Lee's scheme, CFNA was therefore a victim of the larceny in this case.

Finally, even if this Court were to find that CFNA was not a proper victim, Appellee's conviction for conspiracy to commit larcency should still stand as all the elements of conspiracy—an agreement and overt act—were completed in this case.

Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). Questions

of law arising from a guilty plea are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea will not be set aside on appeal unless there is a substantial basis in law and fact for questioning the guilty plea. *United States v. Smauley*, 42 M.J. 449, 450 (C.A.A.F. 1995).

Law and Argument

"Appellant bears the burden of establishing that the military judge abused [his] discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." *United States v. Phillips*, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (Citations omitted). Given the scope of the providence inquiry and the deferential review afforded to the trial court's acceptance of a guilty plea, the plea should be set aside only when the record depicts substantial conflict with the plea. *United States v. Smauley*, 42 M.J. 449, 450 (C.A.A.F. 1995); *see also* Rule for Courts-Martial [hereinafter R.C.M.] 910. "In reviewing a military judge's acceptance of a plea for abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show ''a substantial basis' in law and fact for questioning the guilty plea.'" *Inabinette*, 66 M.J. at 322 (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

"The full context of a providence inquiry must be considered before deciding on appeal that a substantial inconsistency with a guilty plea exists." *Smauley*, 42 M.J. at 452 (citations omitted). A military judge abuses his discretion

in accepting a guilty plea "if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which [appellate courts] afford significant deference." *Inabinette*, 66 M.J. at 322 (citation omitted). However, the "'mere possibility' of a conflict between the accused's plea and statements or other evidence in the record is not a sufficient basis to overturn the trial results." *United States v. Finch*, 73 M.J. 144, 148 (C.A.A.F. 2014) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

The adequacy of a guilty plea must be analyzed in terms of providence of the plea, not sufficiency of the evidence. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). Evidence supporting the plea need only be minimally sufficient to establish an adequate factual predicate for acceptance of the guilty plea. *See United States v. Bates,* 40 M.J. 362, 363 (C.M.A. 1994) (Appellant's testimony during guilty plea for carnal knowkedge was "I had attempted intercourse with my daguther. I touched my penis to her vagina. She said it hurt. I stopped. . . ." was sufficient without further inquiry).

A. In light of the Supreme Court's decision in *Shaw v. United States*, the Army Court erred in finding a substantial basis in law and fact to question Appellee's plea.

This Court should find that the Army Court erred in finding a substantial basis in law and fact to question Appellee's plea. The Army Court held that despite the Supreme Court's decision in *Shaw v. United States*, there was a

substantial basis in law and fact to question Appellee's plea based on this Court's decision in *United States v. Williams*. *United States v. Simpson*, ARMY 20140126 (Army Ct. Crim. App. Mar. 1, 2017) (Mem. Op.). The Supreme Court decided *Shaw* on December 12, 2016, approximately ten months after this court's decision in *Williams*. *Shaw*, 137 S. Ct. at 462; *Williams*, 75 M.J. at 129. In *Shaw*, the Supreme Court was presented with the issue of whether the Appellant was guilty of violating the Federal Bank Fraud Statute, which criminalizes "knowingly execut[ing] a scheme . . . to defraud a financial institution," because he "intended to cheat only a bank depositor, not a bank." *Shaw*, 123 S. C.t. at 465 (quoting 18 U.S.C. 1244(1)). The Court held, "The basic flaw in [the Appellant's] argument lies in the fact that the bank, *too*, had property rights in [the customer's] bank account." *Id.* at 466 (emphasis added). The implication from the aforementioned language in *Shaw* is that both the bank and account holder have a possessory interest in the account, and therefore, either one or both could be the proper victim of a larceny. *Id.*

The Supreme Court then analyzed the *ownership* aspect of bank account funds as a question of fact stating:

> When a customer deposits funds, the bank ordinarily becomes the owner of the funds and consequently has the right to use the funds as a source of loans that help the bank earn profits (the customer retains the right, for example, to withdraw funds). Sometimes, the contract between the customer and the bank provides that the customer retains

> ownership of the funds and the bank merely assumes possession. But even then the bank is like a bailee, say, a garage that stores a customer's car. And as a bailee, the bank can assert the right to possess deposited funds against all the world but for the bailor. This right, too, is a property right. Thus, [Appellant's] scheme to cheat [the customer] was also a scheme to deprive the bank of certain bank property rights.

Id. Moreover, the Court noted that "These facts are sufficient to show that [the Appellant] knew he was entering into a scheme to defraud the bank even if he was not aware of the niceties of bank-related property law." *Id.* The Court looked to his knowledge that the customer held the account at the bank and that he made the false pretenses to the bank to access the account. *Id.*

The Army Court recognized this recent decision stating, "In *Shaw*, the issue was the flipside of [Appellee's] argument in our case – whether the *bank* had a possessory interest in an account used by an individual. In answering the question, the Court appeared to say that *both* the bank *and* the account holder have possessory interests in the account." *Simpson*, ARMY 20140126 at *5 (emphasis in original). The Army Court further noted, "*Shaw* indicates that both the bank and the customer may have a possessory interest in an account, and that the loss of the right to access funds in an account is 'sufficient' to create property in an account." *Id.* The critical distinction made by the Army Court, though, is that *Shaw* treats the question of ownership as one of fact that may be determined by a contractual relationship and litigated at trial. *Id.* Thus, in a guilty plea a stipulation that one

party (in this case CFNA) was the owner of the funds should be enough to prove ownership if not otherwise contradicted by facts during the plea. *Id.*

The Army Court further noted that in this case the parties stipulated that the account that CFNA held at JP Morgan Chase was a zero-balance account; the account was contractually unique in that it was funded by a wire transfer at the end of each business day to account for any funds drawn on it during that day. *Id.* This wire transfer covered the amount of money drawn on the account each day. The court noted that there cound be an inference drawn from these facts that CFNA's contractual relationship with JP Morgan Chase included a possessory interest in the funds; however the opposite inference could also be made. *Id.*

If this were a contested trial, the facts would have been developed to show the unique contractual relationship between the parties giving both parties an ownership interest in this specific account. However, in this case, Appellee pled guilty and stipulated to the facts of CFNA's ownership interest and the unique relationship between the parties. This is sufficient for this Court to find his guilty plea provident. Because this was a guilty plea, the lack of evidence supporting the contractual relationship does not creat a substantial basis in law or fact to question the plea. *Id.* As this Court stated in *United States v. Faircloth*, "There is no requirement that any witness be called or any independent evidence be produced to establish the factual predicate for the plea. The factual predicate is sufficiently

established if 'the factual circumstances as revealed by the accused himself objectively support that plea." 45 M.J. 172, 173 (C.A.A.F. 1996). In a single judge concurrence, this Court affirmatively stated that when dealing with the question of ownership, "This is a guilty plea, folks. Whether someone is an 'owner' or 'any other person' is a matter of proof which an accused may contest at trial. By pleading guilty, [A]ppellant knowingly waived a trial of the facts as to that issue." *Id* (quoting *United States v. Faircloth*, 43 M.J. 711, 716 (A.F. Ct. Crim. App. 1995) (Pearson, J. Concurring).

To the extent the Army Court declined to rely on *Shaw*, they cited this court's reliance in *Williams* on *United States v. Burton* and noted that *Shaw* did not overrule that case in coming to its decision. *Simpson*, ARMY 20140126 at *5 n.2 (citing *Burton*, 196 U.S. 283 (1905)). However, while *Burton* seems to suggest that ownership by the bank is a rebuttal presumption, it does not say that it is absolute. *Burton*, 196 U.S. 283 at 285. Instead, the Supreme Court stated, "If, as the [Appellant] insists, the check had been deposited for a specific purpose – for collection, the property would have remained in the depositor, but there is no evidence upon which such fact could be established, nor it is consistent with the dealings between the parties, or with any of the admitted circumstances." *Id.* The overwhelming interpretation of *Burton* is that ownership, or the possessory interest, is a question of fact: "In the case at bar the proof was not disputed. The

checks were passed to the credit of defendant unconditionally, and without any special understanding."[1] *Id.* Here, unlike in *Burton*, there was evidence of a special understanding representing a unique contractual agreement between CFNA and JP Morgan Chase. Thus, while in a contested trial the government would be required to put on evidence of this agreement to prove that CFNA had a superior possessory interest in the property to the accused, in this guilty plea, as acknoweledged by the Army Court, the Appellee's uncontested and fully consistent stipulation is enough to prove ownership.

In *Faircloth*, this Court applied similar logic to that used in *Shaw*. The Court stated:

> Unlike joint tenants in a bank account, who each have equal legal rights to the entire proceeds of the account, co-payees may have differing levels of possessory interests depending on circustances independent of the issuance of the check. . . . This case is not about enforcement of a check but about the rights of co-payees vis-à-vis each other. A lien or security agreement can give one co-payee a superior possessory interest. . . . As a matter of law, it was possible for FMCC to have a superior possessory interest in the proceeds. As a matter of fact, Faircloth admitted that FCC had a superior possessory interest, and he explained in considerable detail, couched in a layman's terms, the factual predicate for FMCC's superior

[1] While the Supreme Court did not overrule *Burton* in their *Shaw* decision, the two decisions seem at least minimally inconsistent regarding property rights in the account. While *Burton* suggests that the rebuttable presumption is that the bank has a possessory interest, *Shaw* suggests that both parties may have simultaneous possessory interests. Where the two cases are contradictory, this court should look to the recent decision in *Shaw*.

> possessory interest. Faircloth said nothing inconsistent with a guilty plea.

Id. In this Court's recent jurisprudence, it seems to have strayed away from the reasoning in *Faircloth*, instead applying a bright-line rule that "when larceny is by means of a wrongful credit or debit transaction, the money or goods were wrongfully obtained *from* the merchant or bank, making them the person stolen from." *Williams*, 75 M.J. at 132. This application assumes that the merchant or bank is the owner as a matter of law rather than determining the owner based on the individual facts.[2] *See e.g. Shaw*, 123 S. Ct. at 465. To the extent *Williams* treats ownership as a question of law rather than fact, this Court should overrule *Williams* in light of *Shaw* and find that there is no substantial basis in either law or fact to question Appellee's plea.

B. In light of this Court's decision in *United States v. Cimball-Sharpton*, the Army Court erred in finding a substantial basis in law and fact to question Appellee's plea.

Even if this court declines to follow *Shaw* and find that both CFNA and JP Morgan Chase could have simultaneous possessory interests superior to Appellee,

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[2] In so reasoning, the court looks to the language in the Manual for Courts-Martial [hereinafter *MCM*] stating, "when an accused engages in wrongful 'credit [or] debit' transaction, she has 'usually' stolen from the merchant offering the purchased good or 'the entity presenting the money.' *Williams*, 75 M.J. at 132 (citing *MCM*, pt. IV, para. 46.c.(1)(i)(vi)). However this language does not preclude a different owner based on the facts of each case. In fact, this Court has acknowledged as acceptable alternate charging theories in similar cases to this. *See United States v. Cimball-Sharpton*, 73 M.J. 299 (C.A.A.F. 2014).

this court should find that the Army Court erred in not following this court's decision in *United States v. Cimball Sharpton*, 73 M.J. 299, 302 (C.A.A.F. 2014). In *Cimball Sharpton*, this Court looked to the drafter's analysis in the *MCM*, and held that the victim is not *always* limited to the merchant. *Id.* Instead, "the victim of the larceny is the person or entity suffering the financial loss or deprived of the use or benefit of the property at issue."[3] *Id.* at 299 (citing *United States v. Lubasky*, 68 M.J. 260, 263-264 (C.A.A.F. 2010)). In *Cimball Sharpton*, the Court was presented with deciding whether the Air Force was the proper victim where, although the Appellant made unauthorized charges on her government purchase card (GPC) which would usually make that bank the victim, the Air Force had a contract requiring reimbursement to the bank. *Id.* at 300. This Court held that due to the special circumstances in that case, the Air Force was the proper victim and an alternate charging theory was appropriate. *Id.*

The facts at issue here are analogous to those in *Cimball Sharpton*. Here, although the funds used came out of CFNA's account held by JP Morgan Chase, that account was not a normal debit account. (JA 092). Therefore, principles

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[3] *Shaw* clarifies this in quoting Judge Learned Hand who stated, "[a] man is none the less cheated out of his property, when he is induced to part with it by fraud, even if he gets a quid pro quo of equal value." 123 S. Ct. at 467 (internal citations and quoations omitted). The Supreme Court looked to the Federal mail fraud statute in explaining that "we have held it sufficient that the victim (here, the bank) be deprived of its right to use the property, even if it ultimately did not suffer unreimbursed loss." *Id.*

applying to a normal debit account cannot be used in this scenario. *See Lubasky,* 68 M.J. at 263-264 ("While it is true that the 2002 amendments suggest that debit card transactions are '*usually* a larceny of those goods from the merchant offering them' and that ATM withdrawals are '*usually* a larceny of money from the entity presenting the money,' alternative charging theories remain available if warranted by the facts.") (quoting *MCM*, (2002 ed.), pt. IV, ¶ 46.c.(1)(h)(vi) (additional citation omitted)).

As in *Cimball Shaprton*, instead of normal theories applying to debit transactions, the facts here warrant an alternate charging theory be applied. Because the CFNA account held at JP Morgan Chase was zero-balanced and not a normal bank account, CFNA paid JP Morgan Chase at the end of each business day in accordance with the contract to reimburse the account for any funds that were spent that day.[4] (JA 092). The unauthorized transactions were not discovered until August 2010. At that point,

> When the unauthorized transactions were discovered, CFNA asked JP Morgan Chase to reverse all of the ACH debits which had occurred within the past 60 days, which was authorized under federal banking law. Eventually, CFNA was able to reverse all of the unauthorized debits going back to 1 January 2010. No debits prior to 1 January 2010 were reversed.

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[4] As noted above, the facts were not further developed as to how the contract between the parties operated because this was a guilty plea. However, based on the unique circumstances both parties stipulated that CFNA was the owner of the stolen funds. (JA 092).

(JA 091-092).

While some of the transactions were eventually reversed, no debits prior to January 2010 were reversed, making CFNA the entity that suffered those losses. (JA 093). Further, those that were reversed were not reversed until August 2010, almost a year after the funds were first debited from the CFNA account. (JA 091-092). Credit First National Association thus sustained a complete loss until the scheme was discovered months later. (JA 092-093). Once the scheme was discovered, CFNA still sustained losses for funds debited from September 2009 toJanuary 2010. (JA 093).

Therefore, CFNA is the entity that ultimately suffered the loss by transferring the money to the account at the end of each business day well before the larceny was realized. (JA 092). As stated in *Cimball Sharpton*:

> The appellant's misconduct could not have been charged as a larceny from the merchants offering the goods, because those merchants made a sale for which they were compensated, and therefore they did not lose anything of value. Similarly, the appellant's misconduct could not have been charged as a larceny against US Bank, because US Bank was wholly repaid for the appellant's purchases, just as it would be for authorized purchases. The only victim in this case was the United States Air Force, whose funds were obligated by the appellant's unauthorized, repeated purchases for her personal use.

73 M.J. at 300.

Based on the principle applied in *Cimball Sharpton*, the victim can be the holder of the credit card, the credit card company, the merchant, the bank or another entity. *Id.* The deciding factor is the entity who suffered the loss. *Id.* (citing *Lubasky*, 68 M.J. at 263-64) (determining who the proper victim was, the court looked to who suffered the financial loss). Just as the Air Force suffered the loss by reimbursing US bank, CFNA ultimately suffered the loss by reimbursing JP Morgan Chase at the end of each business day. (JA 091-092).

As the Army Court's dissenting opinion noted, "Unlike *Williams*, CFNA suffered more than a 'consequence – such as a bank fee or loss of access to funds in the account.' The [Appellee] here obtained the money *from* CFNA. . . . Unlike *Williams*, [Appellee] did not pretend to be CFNA to steal from JPMorgan Chase. [Appellee] pretended to be an authorized CFNA vendor or merchant to steal from CFNA." *Simpson*, ARMY 20140126 at *7 (quoting *Williams*, 75 M.J. at 132). Instead, the dissent compared this case to *Cimball-Sharpton* comparing the unique zero-balance contractual agreement between the two financial institutions with the agreement between the Air Force and the GPC. *Id.* The dissent stated, "the agreement between JP Morgan Chase and CFNA meant that JP Morgan Chase would honor any charges made either with apparent or actual authority, and any wrongful ACH transfers from CFNA's zero balance account would wrongfully induce payment from CFNA's central account every day." *Id.*

Because CFNA held a non-conventional account at JP Morgan Chase, the court should decline to analogize this case to *Williams* and instead find that the Army Court erred in finding a substantial basis in law and fact to question Appellee's plea.

C. The Army Court erred by setting aside Appellee's conviction for conspiracy without addressing why there was a substantial basis in either law or fact to question his plea.

The Army Court set aside Appellee's conviction for conspiracy to commit larceny without addressing it. Setting aside Appellee's plea to conspiracy to commit larceny was error, even if this court finds that CFNA was not the proper victim of the larceny.

Conspiracy to commit larceny involves an agreement and an overt act in furtherance of that agreement. *MCM*, pt. IV ¶ 5.b.(1)-(2) (stating the elements of the offense of conspiracy). Here, the military judge addressed these elements with Appellee on the record, and Appellee stated that he told SGT Ramos "he would have to pay Jannie Lee and not CFNA the money." (JA 066). This fact supports the conclusion that Appellee believed CFNA owned the funds upon entering the conspiracy to commit larceny.

Further, when the military judge asked what the purpose of the phone call between Ms. Lee and SGT Ramos, Appellee answered, "so he could give her his information . . . so they could exchange information on how to make the payment

go through." (JA 066). The military judge clarified, "so that is the Credit First National Association's account information?" (JA 066). Appellee answered, "Yes, sir." (JA 066). Thus, the phone call to Ms. Lee was the overt act in furtherance of the conspiracy and everything on the record supports a conspiracy to commit larceny by stealing from CFNA.

Whether CFNA was the proper owner of these funds is immaterial. An agreement was reached by Appellee and SGT Ramos to steal from CFNA and an overt act was taken in an attempt to steal the funds, thereby making Appellee provident to conspiracy. It does not matter whether Appellee and SGT Ramos could in fact steal from CFNA. This Court stated in *United States v. Riddle* that the "general rule is that an accused should be treated in accordance with the facts as he or she supposed them to be." 44 M.J. 282, 286 (C.A.A.F. 1996) (citation omitted). The *Manual for Courts-Martial (MCM)* discusses this proposition in its discussion of factual impossibility under Article 81, UCMJ: "It is not a defense that the means adopted by the conspirators to achieve their objective, if apparently adapted to that end, were actually not capable of success, or that the conspirators were not physically able to accomplish their intended objective." *MCM*, pt. IV ¶ 5.c.(7).[5]

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[5] Factual impossibility is distinguishable from legal impossibility, in which there is no way for an accused to commit an offense, such as "[a] person accepting goods which he believed to have been stolen, but which were not then 'stolen'

Appellee's case is similar to *United States v. Thomas*, where the appellant was found guilty of attempted rape and conspiracy to commit rape, but acquitted of the rape itself. 13 U.S.C.M.A. 278, 292, 13 C.M.R. 278, 292 (1962). In *Thomas*, the appellant and two friends left a bar with a woman who had collapsed on the dance floor and placed her in their automobile and drove away from the bar. *Id.* at 280. One of the appellant's friends "suggested that this was a good chance for sexual intercourse as apparently this woman was just drunk and would never know the difference. Each of the three subsequently did or attempted to consummate this act and then started their return to town." *Id.* After the appellant and his friends completed their acts, the woman never regained consciousness. *Id.* After stopping for help, the police were called and the woman taken to the hospital; a subsequent autopsy showed that the woman died of heart problems and that her death likely occurred at the time she collapsed. *Id.* This Court reasoned that even though it was legally impossible for the appellant or his co-actors to rape the woman because she was deceased, it was not factually impossible for the the individuals to be convicted of the attempt and conspiracy; the co-actors all made an agreement to commit rape and made overt acts in order to accomplish the

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goods, [is] not guilty of an attempt to receive stolen goods." *United States v. Thomas*, 13 U.S.C.M.A. 278, 283, 13 C.M.R. 278, 283 (1962) (citation omitted).

purported goal of the conspiracy, thus making the appellant guilty of conspiracy to commit rape and attempted rape. *Id.* at 292.

Even if this Court finds that it was factually impossible for the Appellee and SGT Ramos to commit larceny from CFNA, a criminal conspiracy to commit larceny still existed. *See Thomas*, 13 U.S.C.M.A. at 292, 13 C.M.R. at 292. Appellee and SGT Ramos believed that they could steal money from CFNA and committed an overt act by having SGT Ramos speak to Ms. Lee. (JA 066). Based upon the facts as Appellee knew them at the time, he is guilty of conspiracy to commit larceny. *Riddle*, 44 M.J. at 286.

To hold that an accused must know that the intended target of the larceny actually holds the object of the larceny—goods or money—would lead to absurd results. Such a scenario could look like the following: two soldiers agree to steal money from a co-worker, go into that co-worker's office and take the money, then subsequently find out that the money actually belonged to the unit's cup-and-flower fund. The individuals would not be guilty of conspiracy because it was their intent to steal from the co-worker, not the unit. This Court should reject such a proposition. Based upon *Riddle* and *Thomas*, regardless of who the conspirators believe is the rightful owner, an agreement to commit larceny and an overt act in furtherance of that agreement took place, thereby making Appellee guilty of conspiracy to commit larceny. *See Thomas*, 13 U.S.C.M.A. at 292, 13 C.M.R. at

292; *Riddle*, 44 M.J. at 286. The law punishes the agreement to commit larceny and action in furtherance of said agreement, not whether the accused has knowledge of who possesses a superior interest in the property.

In order to accept a plea for a conspiracy to commit larceny, the military judge need not require evidence greater than that minimally sufficient to establish the plea. *Bates*, 40 M.J. at 363. Here, there was sufficient evidence supporting an agreement to steal money from the entity Appellee and SGT Ramos believed to hold the funds paying his bills, CFNA. Moreover, they took an overt act in furtherance of that agreement to achieve their goals. Therefore, the judge did not abuse his discretion by failing to establish a sufficient factual basis that CFNA was the proper target of the larceny in support of the conspiracy charge. As with the larceny charge, the Army Court erred in setting aside Appellee's plea to the conspiracy.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court set aside the Army Court's decision.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov and Ms. Laura Heltzel, on 1 May 2017 and served electronically to defense appellate on May 1, 2017.

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