IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Issue Presented:

> WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED BY FINDING A SUBSTANTIAL BASIS IN LAW AND FACT TO QUESTION [APPELLEE'S] PLEA IN LIGHT OF THE SUPREME COURT DECISION IN [SHAW V. UNITED STATES], 137 S. CT. 462 (2016), AND THE COURT OF APPEALS FOR THE ARMED FORCES DECISION IN UNITED STATES V. CIMBALL-SHARPTON, 73 M.J. 299 (C.A.A.F. 2014)?

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

Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED BY FINDING A SUBSTANTIAL BASIS IN LAW AND FACT TO QUESTION [APPELLEE'S] PLEA IN LIGHT OF THE SUPREME COURT DECISION IN [SHAW V. UNITED STATES], 137 S. CT. 462 (2016), AND THE COURT OF APPEALS FOR THE ARMED FORCES DECISION IN UNITED STATES V. CIMBALL-SHARPTON, 73 M.J. 299 (C.A.A.F. 2014)?

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

The government hereby incorporates the facts from its original brief and supplements as follows:

On 21 January 2014, Appellee entered into a stipulation of fact that he stole $30,946.23 from Credit First National Association (CFNA). (JA094). The stipulation of fact explained that CFNA held accounts with other financial institutions across the country including JP Morgan Chase, the account at issue here. (JA093). The CFNA account held at JP Morgan Chase was "not a conventional checking account," instead, it was a zero balance account. (JA 093). Thus, according to the stipulation, the account operated in such a way that CFNA wire-transferred money to the account at JP Morgan Chase at the end of each business day to cover the amount debited from the account that day. (JA 093).

Appellee, amongst numerous others, accomplished his larceny by setting up automatic clearing house (ACH) debits through a third party financial institution. (JA 093). "In these cases, an individual with CFNA's compromised bank account number and routing number would notify their creditor . . . to move money from the CFNA account to their own account held with the creditor to pay a debt owed." (JA 093).

Once Appellee's theft from CFNA was discovered in August 2010, CFNA requested that JP Morgan Chase reverse all charges made by Appellee in the past sixty days pursuant to Federal banking law. (JA 094). Credit First National Association eventually recovered funds dating back to January 2010, however,

they were unable to recover any funds stolen by appellant between September 2009 and January 2010. (JA 094).

Appellee involved Sergeant (SGT) Richard Ramos in this scheme on May 14, 2010, forming the basis for the conspiracy to commit larceny charge. (JA 061). Appellee gave SGT Ramos Ms. Lee's information and explained that she could provide him the CFNA account number to use to pay his bills in exchange for a kick back. (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 CFNA account number to pay SGT Ramos's bills, the owner would be permanently deprived of the money. (JA 062).

Argument

Appellee's main contention is that there were inadequate facts on the record showing the unique contractual relationship between CFNA and JP Morgan Chase warranting unique treatment in light of either *United States v. Cimball Sharpton*, 73 M.J. 299 (C.A.A.F. 2014) and *Shaw v. United States*, 137 S. Ct. 462 (2016). (Appellee's Br. 12). This contention ignores the fact that this is a guilty plea. *See United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (holding that the adequacy of a guilty plea must be analyzed in terms of providence of the plea, not sufficiency of the evidence). By definition, the facts in a guilty plea are

undeveloped, which is one of the strong arguments in favor of broad discretion given to military judges in accepting pleas. *Inabinette*, 66 M.J. at 322 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). These undeveloped facts are the Appellee's "conscious choice to plead guilty in order to 'limit the nature of the information that would otherwise be disclosed in an adversarial contest.'" *Id.*

While Appellee asserts that their was no explicit contractual relationship between CFNA and JP Morgan Chase discussed on the record or in the stipulation of fact, the stipulation of fact implicitly makes clear that their was a unique contractual relationship requiring CFNA to zero out the account at the end of each business day. (JA 093). It would not be a zero-balance account if there was not an existing contractual relationship creating it. As the stipulation of fact makes clear, "CFNA's account was not a conventional checking account. Instead, it was a zero-balance account in which the account was funded by wire transfer each business day to pay the amounts drawn on the account. The daily wire transfer effectively zeroed out the account every day." (JA 093). Based on this unique contractual relationship, alternate charging theories were appropriate in this case as they were in *Cimball Sharton*, 73 M.J. at 300.

Appellee correctly describes the Supreme Court's holding in *Shaw*, that the bank will *usually have a possessory interest in funds*. 123 S. Ct. at 465-66.

However, this does not mean that other entities do not have a possessory interest. As the Army Court stated, "the Court appeared to say that *both* the bank *and* the account holder have possessory interests in the account." (JA 003).

Moreover, the touchstone of the *Shaw* decision, as noted by the Army Court's majority opinion, is that possessory interest is a question of fact rather than a question of law. (JA 004). While the Army Court's majority opinion ultimately found a substantial basis in law and fact to question the plea based on this Court's recent precedent in *United States v. Williams*, the Army Court noted that, treating it as a question of fact under *Shaw*, "there may be a factual basis to believe that CFNA had a possessory interest in the funds in the account" and that the parties stipulated to the nature of the account. (JA 004). The Court further stated, "in a guilty plea such as the one before us, when the accused states and stipulates that CFNA was the owner of the funds in the account, and that admission is not contradicted in a manner that would call into question the providence of his plea, his guilty plea would end the matter." (JA 004). Thus, based on the Supreme Court's decision in *Shaw* coupled with the fact that this is a guilty plea, this Court should not find a substantial basis in law and fact to question the plea.

Appellee further contends that "the government ignores the inconsistencies in the providence inquiry stating ownership on the record is sufficient to form the basis for the plea." (Appellee's Br. 13). However, in so asserting, he fails to point

out an inconsistency between the record and the stipulation unresolved by the military judge. "[Appellee] 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). Here, the assertion that the funds were stolen from CFNA was supported by the stipulation of fact and by Appellee's plea inquiry. (JA 093-94; 046). During his plea inquiry he stated, "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 the lawful owner of the account that I was using to pay my bills." (JA 046). Appellee never asserted that the funds belonged to JP Morgan Chase or anybody else, nor did the stipulation of fact.

Lastly, Appellee contends that because the account was a "zero-balance" account, it was intangible property that could not be stolen from CFNA. (Appellee Br. 16-17). However, Appellee did not raise this issue before the Army Court. Thus, this Court should decline to address Appellee's argument as it is beyond the scope of this Court's Article 67, UCMJ review at this time. Appellee has neither petitioned this Court on this issue nor has the issue been certified for consideration before this Court. However, to the extent that this Court deems there to be any merit to Appellee's argument, this Court should remand this case to the Army Court for the parties to brief on the issue.

Conclusion

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

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 9 day of June, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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