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
Appellant	)	
v.	)	
	)	
Sergeant (E-5)	)	Crim. App. Dkt. No. 20140126
Randy L. Simpson, Jr.,	)	
United States Army,	)	USCA Dkt. No. 17-0329/AR
Appellee	)	

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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, Appellant	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim. App. Dkt. No. 20140126
	)	USCA Dkt. No. 17-00329/AR
Sergeant (E-5) **Randy L. Simpson, Jr.** United States Army, Appellee	)	

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 Army Court of Criminal Appeals reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter pursuant to Article 67(a)(2), UCMJ, which mandates review in "all cases reviewed by a Court

of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

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 of Criminal Appeals [hereinafter 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 the Court's 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.

Summary of Argument

The military judge failed to address the numerous inconsistencies in appellee's plea that he stole money from a zero-balance "checking account" that never actually contained the alleged victim's money. Similar to the "usual" cases involving credit cards, any money obtained at the time of transaction was possessed by the *bank*, not the alleged victim. However, even if (as the government suggests) the alleged victim had a possessory interest in the contents of a zero balance account, such interest was intangible and not cognizable under Article 121, UCMJ.

Furthermore, alternate charging theories are not available for two reasons. First, this case remains similar to the "usual" credit card larceny, and the President's limitation on charging theories applies. *Manual for Courts-Martial, United States* (2008 ed.)[hereinafter *MCM*] Part IV, para. 46.c(1)(i)(vi). Second, this case is distinguishable from both *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010), and *United States v. Cimball Sharpton*, 73 M.J. 299 (C.A.A.F. 2014).

Finally, the military judge also failed to address multiple inconsistencies in appellee's plea to conspiracy to commit larceny. As with the underlying offense, the President's limitation on charging theories for electronic larcenies should

similarly apply to conspiracy to commit such larcenies. Again, any money obtained at the time of transaction was possessed by the *bank*.

Statement of Facts

Between September 29, 2009 and August 16, 2010, numerous transfers were made from a "checking account" at J.P. Morgan Chase Bank (JP Morgan) to various creditors of SGT Simpson.[1] (JA 93). During this time period, this "checking account" was maintained and operated by JP Morgan as a zero-balance account on behalf of its customer, Credit First National Association (CFNA).[2] (JA 93).

The JP Morgan "checking account" used by CFNA is a zero-balance account. (JA 93). At the beginning and end of every day, there is no money in the account. (See JA 93). Credit First National Association "uses the account to pay tire and automotive repair dealers/retailers and to process cardholder credit balance refund checks." (JA 93). At the end of each business day, CFNA initiates a wire transfer to pay the amounts drawn on the account. (JA 93). The

[1] According to the stipulation of fact and providence inquiry, the majority of these transfers were for services such as insurance, cable, and utilities, or to extinguish debts such as loan payments or credit cards debts. (JA 46-47, 92-97).

[2] Even though CFNA is itself a financial institution, the government provided nothing to show it acted in any way other than as only an accountholder. (JA 92-97).

record does not contain any information or evidence of an agreement or contract regarding the wire transfer. (JA 93).

After learning of the unauthorized withdrawals, CFNA "was able to reverse all of the unauthorized debits going back to January 2010. No debits prior to 1 January 2010 were reversed." (JA 93). Those debits were reversed as "authorized under federal banking law," not by agreement of the parties. (JA 93).

The government charged SGT Simpson with one specification of larceny and one specification of conspiracy to commit larceny by stealing money with a value of greater than $500, the property of CFNA. (Charge Sheet; Additional Charge Sheet). Appellee entered into a pre-trial agreement with the convening authority and signed a stipulation of fact. (JA 92-97).

The stipulation of fact did not include details of any contractual relationship, fiduciary duty, or terms of the "checking account" held by JP Morgan, but did cite "federal banking law." (JA 92-97). The stipulation stated SGT Simpson "obtained property from the possession [of CFNA], by using their account information to transfer money from their account into accounts that [SGT Simpson] owned or was responsible for." (JA 96-97).

The military judge never inquired into the relationship between CFNA and JP Morgan, nor the nature of the "checking account" that contained no funds. (R. at 1-105). The military judge did elicit that SGT Simpson did not know the

identity of the victim at the time of the transactions. (JA 45-47). Further, the military judge elicited that by April of 2010, SGT Simpson no longer honestly believed the money paying his bills belonged to his girlfriend. (JA 57). Finally, the military judge did not address how SGT Simpson obtained funds "possessed" by CFNA from an empty account or whether any property interest was tangible.[3] (R. 1-105; JA 96-97).

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)?

Standard of Review

This Court reviews a military judge's acceptance of an accused's guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).[4] "If an accused sets up matter inconsistent with the plea at any

[3] During the providence inquiry, the military judge did cover various theories of liability such as aider and abettor. (JA 50-51). Nothing in the record indicates the government intended to allege this was an unusual case warranting a deviation from charging limitations as discussed in *Cimball-Sharpton*.

[4] While the certified issue asks this court to review the Army Court's decision, this Court may review the military judge's ruling directly.

time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014). A guilty plea must be set aside if the record of trial shows a substantial basis in law and fact for questioning the plea. *Inabinette*, 66 M.J. at 322.

Finally, "[t]he providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on *an understanding of how the law relates to those facts*." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citation omitted) (emphasis added).

Law

As stipulated by the parties, the elements of larceny from "any other person" of property of a value over $500 were:

> (1) That between 29 September 2009 and 16 August 2010, on divers occasions, at or near Joint Base Lewis-McChord, Washington, [SGT Simpson] wrongfully obtained certain property, that is, money, from the possession Credit First National Association, by using their account information to transfer money from their account into accounts that [SGT Simpson] owned or was responsible for;
>
> (2) That the property belonged to Credit First National Association;
>
> (3) That the property was of a value of greater than $500; and
>
> (4) That [SGT Simpson] obtained the property with the intent to permanently deprive Credit First National Association

> of the use and benefit of the property, in that [SGT Simpson] obtained the money for my own personal use and enjoyment by paying my bills and purchasing things I wanted.

(JA 96-97); *see Manual for Courts-Martial, United States* (2008 ed.)[hereinafter *MCM*], Part IV, para. 46.

The President has defined "any other person" as necessarily having possession "*at the time of the*" taking, obtaining, or withholding. *See id*. at para. 46c.(1)(c)(ii) (emphasis added). Further, the *MCM* provides guidance on the owner of property in credit, debit, and electronic transaction situations.

> 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 larceny of those goods from the merchant offering them. *Such use to obtain money or a negotiable instrument (e.g. withdrawing cash from an automated teller or a cash advance from a bank) is usually a larceny of money from the entity presenting the money or negotiable instrument.*

MCM, Part IV, para. 46.c(1)(i)(vi)(emphasis added).

In *United States v. Lubasky*, this Court discussed the above provision in the *MCM* and found that the credit card holder was not the proper victim of a larceny based on the use of a stolen credit card to obtain cash advances or goods. 68 M.J. 260, 263 (C.A.A.F. 2010); *see also United States v. Endsley*, 2015 CAAF LEXIS 52 (C.A.A.F. 14 Jan. 2015) (summ. disp.) (stating the proper victim of a larceny of a debit card is usually the merchant), *United States v. Gaskill*, 73 M.J. 207

(C.A.A.F. 27 Jan. 2014). In examining credit transactions, this Court stated that, "[i]n using the credit cards in this case, Appellant did not obtain anything from [the person named on the card]. Rather, he obtained those things from other entities. For these reasons, *the proper subject of the credit-card-transaction larcenies in this case was not [the person named on the card]*." *Id*. at 263 (emphasis added).

In *United States v. Cimball Sharpton*, this Court also found that, under certain circumstances, the proper victim of a larceny of may not be the specific merchants, but the individual or organization from whom the money was obtained. 73 M.J. 299, 301 (C.A.A.F. 2014). Namely, the Air Force was the proper victim of unauthorized purchases on a Government Purchase Card (GPC) because, due to the contractual relationship between the GPC credit company and the Air Force, the money was obtained from the Air Force as a result of one of its agents violating the contractual agreement. *Id*. at 301-02.

However, in a normal checking account, the default rule is that funds held on deposit by a bank are presumed to be the exclusive property of the bank. *See* 5A Michie, Banks and Banking, ch. 9 §§1, 4b, 38 (2014) (citing the default rules in multiple states).[5] Once a bank receives a deposit the funds belong to the bank

[5] In the state of Washington, applicable to this case, the default rule is that the bank owns the deposits by accountholders. *See Allied Sheet Metal Fabricators v. Peoples Nat'l Bank*, 10 Wn. App. 530, 536, (Wash. Ct. App. 1974).

as a debtor who "agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on [it]." *Bank of Republic v. Millard*, 77 U.S. 152, 155 (1870). *See also* Benjamin M. Owens-Filice, *Where's the Money, Lebowski?"—Charging Credit and Debit Card Larcenies Under Article 121, UCMJ*, Army Lawyer, Nov. 2014, at 7-9.

Recently the Supreme Court in *Shaw* reiterated that the default rule is that the bank owns the deposits within a normal checking account. *Shaw v. United States*, 137 S. Ct. 462, 466 (2016)(stating "the bank ordinarily becomes the owner of the funds") (citing 5A Michie, Banks and Banking § ch. 9, §1, pp. 1-7). There the Court rejected Shaw's argument that he intended to defraud the accountholder, not the bank. *See id*. Specifically, the Court found that both the default banking rule and any possible bailment agreement would have both vested some property interest in the bank sufficient to defraud the bank.[6] *See id*. Thus, the Court's analysis did not explicitly or implicitly overturn any previous jurisprudence and was clear the default ownership rule remains intact. *See id*.

Accordingly, as a creditor, depositors have no possessory interest in a bank's actual funds. Depositors, instead, own debt which the bank recognizes as a liability. *Delaware v. New York*, 507 U.S. 490, 503-04 (1993). Thus, the status

[6] The Court in *Shaw* reviewed a federal bank fraud statute that is wholly dissimilar to Article 121, and has none of the limitations imposed by Congress or the President. *Shaw*, 137 S. Ct. at 466.

of a depositor/creditor is that of an "owner of intangible personal property." *Id*. at 504.

Article 121, UCMJ, does not proscribe the theft of intangible property. As this court held in *United States v. Mervine*, Article 121 adopts the common law requirement "that the object of the larceny be tangible and capable of being possessed." 26 M.J. 482, 484 (C.M.A. 1988). The President also excluded the non-possessory property interest created by a debtor-creditor relationship from the ambit of Article 121, UCMJ. *Id*. Specifically,

> The taking, obtaining, or withholding must be of specific property. A debtor does not withhold specific property from the possession of a creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.

Id. (quoting *MCM*, pt. IV. ¶ 46.c.(1)(b)).

Argument

A. The military judge abused his discretion by not addressing the numerous inconsistencies that arose when appellee stipulated he obtained money from a "checking account" that did not contain any money at the time of the transactions.

The stipulation of fact was clear: there was never any money in CFNA's "checking account."[7] (JA 93). Namely, the account balance was either negative

[7] While the stipulation labeled this account as a "checking account," as discussed below, the relationship between CFNA and JP Morgan appears to be more akin to a debtor/creditor relationship. (JA 93-94).

or zero. (JA 93). The "checking account" was structured as a "zero-balance account" funded solely to "pay the amounts drawn upon the account." (JA 93). Thus, the automated clearing house (ACH) debits would draw the account into a negative balance like overdraft protection on a normal checking account. (JA 93). At the end of each day, either by agreement or practice, a wire transfer brought the balance back to zero.[8] (JA 93).

Accordingly, based solely on the stipulation, JP Morgan was the only entity which could have possessed the funds at the time of the transaction. Namely, the *MCM* defines possession as having "care, custody, management, and control." *MCM* at para. 46c.(1)(c)(i). Further, the *MCM* requires that an owner or "any other person" from whom property is wrongfully obtained, must possess that property "*at the time of the taking, obtaining, or withholding.*" *MCM* at para. 46c.(1)(c)(i)-(ii)(emphasis added).[9] By the plain language of the stipulation, CFNA never maintained any funds within the account while ACH debits occurred because it always had, at best, a zero balance. (JA 93). Thus,

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[8] There is nothing in the record which states CFNA and JP Morgan has a contract or that payment was as a result of contractual obligation. Even if there was, it would not remedy the factual inconsistencies in this case.

[9] This definition limiting possession at the time of obtaining is binding. *See United States v. Davis*, 47 M.J. 484, 486-87 (C.A.A.F. 1998) (stating when the President's narrow construction is favorable to the accused and not inconsistent with the language of a statute, this Court will not "disturb the President's narrowing construction").

the sole funds obtained at the time of transfer could only have been within the care, custody, management, or control of JP Morgan. However, throughout the stipulation of fact and providence inquiry, SGT Simpson stated otherwise. (JA 46-49, 96).

The government ignores the inconsistencies in the providence inquiry, arguing that stating ownership on the record is sufficient to form the factual basis for the plea. (Appellant Br. at 13-14). Citing *Faircloth*, government argues that appellee's statements and stipulation that CFNA possessed the money is all that is necessary for a guilty plea.[10] *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); (Appellant Br. at 13-14). However, *Faircloth* is distinguishable because "[Airman] Faircloth said nothing inconsistent with a guilty plea" whereas SGT Simpson stipulated to obtaining CFNA's money from an account that contained none of CFNA's money. *See id*.

At a minimum, this glaring inconsistency should have drawn additional questions by the military judge prior to accepting the plea. Addressing this inconsistency would have allayed the consternation by the government and the Army Court from the lack of information regarding the zero balance account.

[10] The government states that "Appellee pled guilty and stipulated to the facts of CFNA's ownership interest . . . ." In the interests of clarity, the stipulation indicates CFNA possessed the money. (JA 93). However, it does not state that CFNA had an "ownership interest."

However, the military judge's failure to do so created a substantial basis in law and fact to question the plea.

B. Contrary to the Government and the Army Court's position, *Shaw* is factually and legally distinguishable thus this Court need not address *Shaw*.

First, *Shaw* is distinguishable from this case because the Court interpreted a federal statute that is wholly different from Article 121, UCMJ. Namely the federal bank fraud statute[11] does not assimilate multiple common law crimes such as embezzlement, false pretense, and larceny. *See Lubasky*, 68 M.J. at 263.

Critically, the Army Court and government both ignore the impact of the plain language of the statute and the restrictive charging language within the *MCM*. Unlike the statute in *Shaw*, the plain language of Article 121, UCMJ, requires showing *from whom* the property is obtained. *Compare* 18 U.S.C. § 1344(1) *with* UCMJ, art. 121. Further, unlike in *Shaw*, the *MCM* restricts charging electronic larcenies when receiving money by false pretenses to the "entity presenting the money." *MCM*, Part IV para. 46.c.(1)(i)(vi).

Moreover, the logic employed by the Court in *Shaw* does not apply both ways. As stated by the Army Court, the issue in *Shaw* "was the flipside" of the

[11] 18 U.S.C. § 1344(1) prohibits "knowingly executing a scheme . . .(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises."

issue in this case – "whether the *bank* had a possessory interest in an account used by an individual."[12] The Court in *Shaw* rejected Shaw's argument that he intended to defraud the bank, not the accountholder, because a bank will *always* have a possessory interest to funds within the bank – regardless of default ownership laws or contractual bailment agreements.[13] *Shaw*, 137 S. Ct. at 466 (emphasis added). However, in this case, it impossible that CFNA had a possessory interest in any money in the zero balance account, because it always had none in it. Rather, the default banking laws and charging guidance under the *MCM* make it clear that JP Morgan did have possession of the money debited from the account. Thus, *Shaw* is inapplicable to this case.

[12] The Army Court also erred by saying that normally accountholders retain a property interest in deposited funds because an accountholder "retains the right, for example, to withdraw funds." (JA 3-4) (citing *Shaw*, 137 S. Ct. at 466). Contrary to the government's and Army Court's positions, the Supreme Court did not state there was always a property interest in the funds, only a right to withdraw funds. This is consistent with *Burton* in that the accountholder becomes a creditor able to call in debts with the bank. *Burton v. United States*, 196 U.S. 283, 302 (1905).

[13] The Court in *Shaw* discussed a contractual agreement based on the law of bailments analogizing holding funds for an accountholder like housing someone's car in one's garage. *Shaw*, 137 S. Ct. at 466. Under such a bailment agreement, it would require specific funds be kept separate and could not co-mingle with other funds. Clearly, this is not the agreement in this case. Using the *Shaw* Court's analogy would be like CFNA agreeing to pay for any of JP Morgan's cars taken from JP Morgan's garage.

C. Even if CFNA had a possessory interest in a "zero balance," such interest is intangible and not subject to larceny under Article 121, UCMJ.

Assuming, *arguendo*, CFNA could have a possessory interest in a zero balance (that is, possession of the money content in an account that by design never held money) as the government and the Army Court suggest, any interest would be to intangible property. To be cognizable under Article 121, UCMJ, "the object of the larceny [must] be tangible and capable of being possessed." *United States v. Mervine*, 26 M.J. 482, 483 (C.M.A. 1988). Critically, CFNA's account is merely a collection of debts from CFNA to JP Morgan until it wire transfers sufficient money to again reach a zero balance. (JA 93). The unauthorized ACH debits drawing money from CFNA's account merely created additional debt on behalf of CFNA to JP Morgan. *See, e.g.*, *Delaware v. New York*, 507 U.S. at 503-04 (holding debts created from a creditor-debtor relationship are intangible property). By design, the money content of the account was often negative, but never positive. Accordingly, any possessory interest by CFNA in a zero balance (or temporary negative balance) was an interest in intangible property.

Significantly, the government appears to ignore this distinction. The government focuses on the potential impact of a conjectured but not established contractual agreement which conferred some possessory interest to CFNA. (Appellant Br. at 12-13). Relying on *Shaw* and *Faircloth*, the government

focuses on whether a bank or accountholder owns deposits as a question of fact. *Shaw*, 137 S. Ct. at 466; *United States v. Faircloth*, 45 M.J. 172 (C.A.A.F. 1996) (decided before the 2002 amendments on electronic larceny at issue in this case). However, in doing so, the government ignores the facts of *this* case which precludes CFNA from having any cognizable property interest that could be charged.

Therefore, as a matter of both law and fact, the only cognizable tangible property interest that could have been charged by the government in this case was the larceny of money from JP Morgan. *See Mervine*, 26 M.J. at 483.

D. Contrary to the Government's position, alternate charging theories are not available because CFNA cannot have a possessory interest in zero money within an account.

"Alternative charging theories are also available," as long as "the accused wrongfully obtained goods or money" from someone "with a superior possessory interest." *Williams*, 75 M.J. at 132. Thus, as in the usual credit card larceny, because CFNA had no funds in the account, it did not have a possessory interest in the money obtained by the appellee.

Further, in spite of the unique facts of this case, the analytical framework is the same as the usual case of credit card theft. Similar to the theft of the widow Shirley's credit cards in *Lubasky*, the appellee obtained money from JP Morgan by false pretenses though fraudulent use of CFNA's account number. *See*

Lubasky, 68 M.J. at 263. Even though the ACH draws created debts for CFNA similar to the debts incurred by Shirley on unauthorized credit card transactions, appellee obtained nothing from CFNA, only from JP Morgan. *See id*.; *see also* Benjamin M. Owens-Filice, *"Where's the Money Lebowski?" — Charging Credit and Debit Card Larcenies Under Article 121, UCMJ*, Army Law., Nov. 2014, at 9 (explaining why cardholders do not own the money in the related account). Thus, alternate charging theories are not available.

E. Alternate charging theories are not available because this case is distinguishable from *Lubasky* and *Cimball Sharpton*.

Critically, neither circumstance found by this Court to warrant alternate charging theories exists in this case. First, unlike the debit transactions in *Lubasky*, there is no "fiduciary account relationship obtained through fraud" nor "joint account holder status" which would warrant alternate theories. *See Lubasky*, 68 M.J. at 264, n.4. Instead, here appellee was a complete third party without any relationship to CFNA, just as in the usual credit card larceny. (JA 93).

Second, and importantly, this case is distinguishable from *Cimball Sharpton* because there is no evidence CFNA was contractually obligated to pay JP Morgan at the end of every day. The government, without support in the record, erroneously argues "CFNA paid JP Morgan Chase at the end of each business day in accordance with the contract." (Appellant Br. at 16). However, there is

absolutely nothing within the stipulation or providence inquiry which states there was a contractual agreement.[14] (R. 1-105; JA 92-96). In fact, the stipulation cites federal law, not contract as the basis for the reversal of debits. (JA 93-94). Thus, based on the stipulation, CFNA's payment at the end of the day could have been an automatic bill payment like any other credit card account.

However, even if there was an obligation to pay, it was wholly different than the contractual obligation between the Air Force and U.S. Bank in *Cimball Sharpton*. Namely, the Air Force and U.S. Bank entered into an agreement creating an obligation to pay for unauthorized purchases by an agent of one of the parties. This Court noted "the agreement between the Air Force and U.S. Bank meant that U.S. Bank (and hence the merchants) would honor *any* charges made either with apparent or actual authority, and that *any* wrongful use of the GPC by the appellant would wrongfully induce payment by the Air Force." *Williams*, 75 M.J. at 133-34 (emphasis added).

[14] The government appears to rely only on the inference that a contract existed to support its argument. (Appellant Br. at 16). However, earlier in the brief the government argues that a guilty plea resolves all factual issues and cites cases warning against the specter of outside information when conducting the substantial basis test. (Appellant Br. at 11-12). The government cannot have it both ways. In effect, the government reinforces appellee's argument that the military judge did not develop further facts as necessary to have resolved the clear inconsistencies in the plea.

Unlike the agreement in *Cimball Sharpton*, the obligation for CFNA to pay debts did not apparently extend to *all* unauthorized transactions because all of the debits for seven months after January 1, 2010 were reversed. *See id*.; (JA 93-94). Thus, unlike the Air Force's agreement, it was not a foregone conclusion the money obtained by appellee would be from CFNA. *See Williams*, 75 M.J. at 133-34 (discussing *Cimball Sharpton*). Moreover, there was no agency relationship between appellee and CFNA making appellee's actions encompassed by the privity of any arrangement between CFNA and JP Morgan.

Most importantly, alternate charging theories are not available because the plain language of the MCM requires possession or a superior right of possession by CFNA *at the time of the obtaining*. See *MCM*, part IV, para. 46.c.(1)(c)(iii)(emphasis added). In *Cimball Sharpton*, the Air Force had a superior right to possess the goods and money wrongfully obtained due to the agency relationship with the purchase card holder. 73 M.J. at 300-02. However, in this case, at the time the money was obtained, it was solely within the care, custody, and control of JP Morgan and as discussed, *supra*, CFNA had no cognizable interest in the money provided to appellee. (JA 93).

Finally, allowing alternate charging theories under these circumstances of this case would cause the exception to swallow the rule. In this case, CFNA was essentially extended credit by JP Morgan until it "zeroed out" or paid the bill.

However, the government erroneously urges this Court to find the money CFNA paid on the debt as a result of third party fraudulent purchases was money obtained from CFNA. Under the government's argument, any time a credit card holder pays a bill including a fraudulent purchase – perhaps months after the transaction – then such payment will be money obtained from the cardholder. Thus, adopting the government's argument for alternate theories swallows the President's rule restricting charging and washes over this Court's precedent concerning credit card theft.

G. The military judge abused his discretion in accepting a plea to conspiracy to commit larceny.[15]

The military judge abused his discretion by accepting a plea that did not have a substantial basis in fact because the military judge failed to address the apparent inconsistency that CFNA could not possess money within an account devoid of CFNA's money. Thus, SGT Simpson conspired to steal as alleged in the Specification of Additional Charge II.

The military judge informed SGT Simpson that the elements of conspiracy included providing the CFNA account numbers for "the purpose of wrongfully transferring the property of Credit First National Association to the credit accounts of Sergeant Ramos." (JA 40). Yet when discussing the larceny, SGT

[15] The appellee adopts the law and arguments set forth in the previous sections above.

Simpson indicated that he did not know the owner of the money that was stolen. (JA 56). Further, it was apparent from the stipulation that CFNA could not possess funds in an account with a zero balance; however, the appellee stated it did.

At a minimum, the military judge did not ensure the appellee understood how the facts applied to the law in his case. In *Medina*, this Court reiterated that an appellee must not just understand the facts, but how the law applies to those facts. *Medina*, 66 M.J. at 26. Here, the record does not evince an adequate understanding by SGT Simpson from whom he obtained the property he was alleged to have stolen and conspired to steal. (R. at 1-105).

Finally, the charging limitations set by the president on charging electronic larcenies should apply to conspiracy to commit such larcenies. Holding otherwise would confuse practitioners and subvert the intent of the presidential limitation. Namely the presidential language would be undermined by allowing the government to charge wider theories of larceny for attempt and conspiracy when the President has narrowly restricted those theories for larceny. Thus, the military judge erred in accepting a plea to conspiracy to commit a larceny under a prohibited charging scheme

Conclusion

WHEREFORE, appellate defense counsel respectfully request this Court answers the certified question in the negative.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Sergeant Randy L. Simpson, Jr., Crim. App. Dkt. No. 20140126, Dkt. No. 17-0329/AR, was delivered to the Court and Government Appellate Division on **May 30, 2017**.

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