IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Sergeant (E-5) **CLOVIS H. CASTRO** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20190408 USCA Dkt. No. 21-0017/AR

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UNITED STATES Appellee	BRIEF ON BEHALF OF APPELLANT
v.	
Sergeant (E-5) **CLOVIS H. CASTRO** United States Army Appellant	Crim. App. Dkt. No. 20190408 USCA Dkt. No. 21-0017/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO SPECIFICATION 1 OF CHARGE II ("STEAL GAS, OF A VALUE LESS THAN $500, THE PROPERTY OF THE GENERAL SERVICES ADMINISTRATION").

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3).

Statement of the Case

On May 29, 2019, a military judge sitting as a special court-martial, convicted appellant, Sergeant (SGT) Clovis Castro, pursuant to his pleas, of one

specification of violating a general regulation and one specification of larceny, in violation of Articles 92 and 121, UCMJ, 10 U.S.C. §§ 892 & 921 (2018). (JA055 and JA078–079). The military judge sentenced appellant to reduction to the grade of E-4, confinement for 30 days, and a bad conduct discharge. (JA056). On August 14, 2019, the convening authority approved the sentence as adjudged. (JA070). The military judge entered the Judgment of the Court on August 19, 2019. (JA071).

On August 25, 2020, the Army Court affirmed the findings and sentence. *United States v. Castro*, 2020 CCA LEXIS 282 (Army Ct. Crim. App. Aug. 25, 2020) (mem. op.) (JA002). This Court granted Appellant's petition for grant of review on December 1, 2020 on the issue above and ordered briefing under Rule 25. (JA001).

Summary of Argument

Appellant cannot be convicted of stealing the General Services Administration (GSA) fuel at issue, because the GSA never possessed that fuel. In a larceny case, this Court's role "is to determine whether an accused's conduct as charged and proved could have been punished under any of the three predicate crimes encompassed by Article 121." *United States v. Antonelli*, 35 M.J. 122, 126 (C.A.A.F. 1992). Because of how this larceny specification is charged, none of those three predicate offenses—common law larceny, false pretense, and

embezzlement—criminalize appellant's actions. Therefore, there is a substantial basis in law and fact to question the military judge's acceptance of appellant's guilty plea, and the guilty plea cannot stand.

With a credit card-facilitated larceny, only the predicate crimes, sometimes referred to as Article 121, UCMJ larceny theories, of false pretense and embezzlement apply. Regardless of the larceny theory, Article 121, UCMJ, requires a thief to take, obtain, or withhold property "from the possession of the owner or of any other person." Article 121, UCMJ. Appellant cannot be convicted under a false pretense theory because his misrepresentation never induced the GSA to part with fuel, as the GSA never possessed it. Appellant cannot be punished under an embezzlement theory because embezzlement requires a thief to take possession or control of the property at issue lawfully. As explained below, appellant took possession of the fuel in question unlawfully.

Even if this Court finds a larceny theory could have applied, the military judge still abused his discretion because any such theory would require that an agency relationship exist between appellant and the GSA—and none did. Because appellant was not the GSA's agent, the GSA never possessed the fuel appellant is charged with stealing from its possession. As a result, the military judge could not accept appellant's guilty plea to stealing fuel from the GSA.

Finally, if this Court concludes there is a valid larceny theory and agency relationship, the military judge nonetheless abused his discretion by failing to conduct an adequate providence inquiry regarding the existence of an agency relationship between appellant and the GSA.

Statement of Facts

On several occasions between January and August 2018, appellant used a GSA fuel card to purchase fuel for his personal vehicle. (JA022). On February 4, 2019, the government preferred charges, alleging, *inter alia*, seventy-eight specifications of larceny. (JA007–0018). These seventy-eight specifications were grouped both by type of larceny and by victim. (JA008–JA016). Specifications 1–39 alleged larceny of money, at varying times and locations, from the GSA. (JA008–012). Specifications 40–55 and 57–78 alleged larceny of gasoline, at varying times and locations, from several fuel vendors. (JA012–016).

On May 23, 2019, appellant and the Convening Authority entered into a plea agreement in which appellant agreed to plead guilty to one specification of larceny, amended in the following manner:

> In that Sergeant Clovis H. Castro, U.S. Army, did, at or near Fort Lee, Virginia . . . on one or more occasions, between on or about 29 January 2018, and on or about 18 August 2018, steal money, of a value less than $500, the property of the General Services Administration.

(JA078). As part of this offer, the Convening Authority agreed to dismiss Specifications 2–78 of the larceny charge.[1] (JA079).

On May 29, 2019, the date of appellant's guilty plea, the parties amended the plea agreement by striking the word "money" and inserting in its place the word "fuel" in the paragraph containing the amended larceny specification. (JA078). This amendment resulted in a specification reading as follows:

> In that Sergeant Clovis H. Castro, U.S. Army, did, at or near Fort Lee, Virginia . . . on one or more occasions, between on or about 29 January 2018, and on or about 18 August 2018, steal ~~**money**~~ **fuel**, of a value less than $500, the property of the General Services Administration.

(JA078). Although it is unclear from the record who made the edit, the hand-written initials "M.R." and "J.S." appear with the change, presumably belonging to the government trial counsel and appellant's trial defense counsel. (JA077 and JA079). The parties also amended the stipulation of fact to conform to the change in the plea agreement. (JA076). The parties made all these amendments on the same date and each contains the same handwritten initials. (JA076 and JA078).

During the providence inquiry, the military judge announced appellant had "wrongfully obtained certain property, that is gasoline . . . from the General

[1] There are multiple discrepancies in the Plea Agreement. First, SGT Castro offered to plead not guilty to "Specifications 2–79 of Charge II," but Charge II originally contained only 78 specifications. (JA016 and JA079). Second, the Convening Authority agreed to dismiss "Specifications 2–78 of Charge II," (JA079), but this was not possible at the time of the deal because Specification 56 of Charge II had already been dismissed on March 8, 2019. (JA013).

Services Administration." (JA022). Additionally, as part of the providence inquiry, appellant agreed he stole "gasoline belonging to the GSA." (JA034). Finally, during appellant's discussion of the terms of his plea agreement with the military judge, the military judge drew appellant's attention to the change, and appellant attested that he was aware of the change. (JA050).

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA TO SPECIFICATION 1 OF CHARGE II ("STEAL GAS, OF A VALUE LESS THAN $500, THE PROPERTY OF THE GENERAL SERVICES ADMINISTRATION").

Standard of Review

During a guilty plea inquiry, the military judge must determine whether there is an adequate basis in law and fact to support the plea before accepting it. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). On appellate review, courts review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *Id.* at 323. In so doing, courts "apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Id.*

Law

"Article 121, UCMJ, sought to consolidate the various means of stealing—by larceny, false pretense, and embezzlement—under the single rubric of 'larceny.'" *United States v. Williams*, 75 M.J. 129, 131–32 (C.A.A.F. 2016) (citing *United States v. Lubasky*, 68 M.J. 260, 263 (C.A.A.F. 2010); *United States v. Cimball Sharpton*, 73 M.J. 299, 301 (C.A.A.F. 2014); *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], pt. IV, ¶ 46.c.(1)(a)). The statute uses the terms "wrongfully takes, obtains, or withholds," to incorporate the crimes of common law larceny, false pretense, and embezzlement, respectively. *Antonelli*, 35 M.J. at 124–27 (C.A.A.F. 1992); *MCM*, pt. IV, ¶ 46.c.(1)(a).

In doing so, Congress eliminated the often subtle and confusing distinctions previously drawn between these crimes, which had "conceptually (if not always logically) distinguished them." *Antonelli*, 35 MJ 122, 124 (C.A.A.F. 1992); *United States v. Buck*, 3 U.S.C.M.A. 341, 343, 12 C.M.R. 97, 99 (1953).[2] This consolidation, however, "did not enlarge the scope of the statutory crime of

[2] For example, historically, in order for a thief to commit the crime of false pretense—included in the Article 121, UCMJ, offense of larceny by obtaining—the thief must have acquired *title* to the property he steals from the owner, whereas if the thief merely secured *possession* from the owner he committed larceny by trick. *Bell v. United States*, 462 U.S. 356, 359–60 (1983). The UCMJ eliminated this theoretical distinction. As a result, under Article 121, UCMJ, a thief who secures possession rather than title to the property in question may be found guilty of a false pretense crime, a larceny by obtaining. Article 121, UCMJ; *MCM*, pt. IV, ¶ 46.c.(1)(b).

'larceny' to include more than its components previously encompassed . . . that which did not constitute common law larceny, embezzlement, or false pretenses prior to the adoption of Article 121(a), supra, was not thereafter punishable as a violation thereof." *Antonelli*, 35 M.J. at 125 (quoting *Buck*, 3 U.S.C.M.A. at 343, 12 C.M.R. at 99.).

In a larceny committed by credit card or debit card the two relevant theories under Article 121, UCMJ, are false pretense and embezzlement. Major Benjamin M. Owens-Filice, *"Where's the Money Lebowski?"—Charging Credit and Debit Card Larcenies Under Article 121 UCMJ*, Army Law., Nov. 2014, at 6 n. 38. [hereinafter Owens-Filice] (JA084); Article 121, UCMJ. False pretense and embezzlement are statutory creations intended to criminalize behavior common law larceny did not. *Bell*, 462 U.S. at 359. As a result, no single definition exists for either crime. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, 536 (8th ed. 2018) (discussing embezzlement) (JA107).

Still, the MCM's description of an Article 121, UCMJ, obtaining-style larceny basically captures the essence of false pretense: "[a] larceny is committed when a person obtains the property of another by false pretense and with intent to steal, even though the owner neither intended nor was requested to part with title to

the property." *MCM*, pt. IV, ¶ 46.c.(1)(e); *Bell*, 462 U.S. at 359.[3] "A false pretense is a false representation of past or existing fact." *MCM*, pt. IV, ¶ 46.c.(1)(e).

As with the crime of false pretense, no single definition for embezzlement exists. Yet, by the late 19th century, embezzle had become "a word of settled technical meaning." *United States v. Northway*, 120 U.S. 327, 334 (1887). "Embezzlement," the U.S. Supreme Court wrote, "is the fraudulent appropriation of property by a person to whom such property had been entrusted, or into whose hand it has lawfully come." *Moore v. United States*, 160 U.S. 268, 269 (1895).

Under its established meaning, an embezzlement required a thief to first *lawfully* possess or control the property he later unlawfully withheld, whether the property was entrusted to him through a fiduciary relationship, or he took possession or control by other lawful means. *Id.*; Dressler, (JA107) ("At a minimum, however, embezzlement involves two basic ingredients: (1) *D* came into possession of the personal property of another in a *lawful* manner; and (2) *D* thereafter fraudulently converted the property . . . Most embezzlement statutes

[3] As discussed in footnote 2, the main difference between an obtaining larceny under Article 121 and false pretense is that historically the crime of false pretense required the thief to secure title of the goods from the property owner, whereas an Article 121 obtaining-style larceny does not.

include a third element; (3) *D* came into lawful possession of the property as the result of entrustment by or for the owner of the property.").

This Court's predecessor endorsed this embezzlement requirement. Interpreting Article of War 93, the antecedent to Article 121, UCMJ, the Court noted:

> Embezzlement may be defined as the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. Since the person has the property *lawfully*, by definition, the gravamen of the offense is the intent to convert the property to the possessor's own use.

United States v. Valencia, 4 C.M.R. 7, 12; 1952 CMA LEXIS 746, at *9 (C.M.A. 1952) (emphasis added) (internal citations omitted) (citing *Moore*, 160 U.S. 268); *Manual for Courts-Martial, United States Army*, 297 (1949 ed.) (containing Article of War 93, which criminalized various activities including larceny and stipulated, "*Provided*, That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article.") (JA112).

After Article 121, UCMJ, took effect, this Court continued to reaffirm this lawful possession requirement. *See, e.g., United States v. McFarland*, 8 U.S.C.M.A. 42, 46, 23 C.M.R. 266, 270 (1957) (noting, "[g]enerally in embezzlement, the property comes *lawfully* into the accused's possession by virtue of the existence of a fiduciary relationship with the owner.") (emphasis added);

Antonelli, 35 M.J. at 127 (noting an Article 121, UCMJ, larceny by withholding "reflected the historic crimes of embezzlement and conversion" and concluding "[i]n either instance the accused had *lawful* possession at the time he 'stole' the property by wrongfully withholding it from the owner with the requisite statutory intent.") (emphasis added).[4]

Other federal courts interpreting the term embezzlement in various statutes have reached the same conclusion. *See, e.g.*, *United States v. Sampson*, 898 F.3d 270, 277 (2d Cir. 2018) (describing the "traditional meaning" of a person committing embezzlement as "when he: (1) with intent to defraud; (2) converts to his own use; (3) property belonging to another; in a situation where (4) the property initially *lawfully* came within his possession or control." (emphasis added)); *United States v. Stockton*, 788 F.2d 210, 217 (4th Cir. 1986) (noting "the traditional concept of embezzlement comprises (1) a conversion—or, in other words, an unauthorized appropriation—of property belonging to another, where (2) the property is *lawfully* in the defendant's possession (though for a limited purpose) at the time of the appropriation, and (3) the defendant acts with knowledge that his

[4] "The crime of embezzlement builds on the concept of conversion, but adds two further elements. First, the embezzled property must have been in the lawful possession of the defendant at the time of its appropriation. . . . Second, embezzlement requires knowledge that the appropriation is contrary to the wishes of the owner of the property." *United States v. Stockton*, 788 F.2d 210, 216–17 (4th Cir. 1986).

appropriation of the property is unauthorized, or at least without a good-faith belief that it has been authorized." (emphasis added)); *United States v. Dupee*, 569 F.2d 1061, 1064 (9th Cir. 1978) (finding "[t]his is a classic case of embezzlement - the fraudulent conversion of the property of another by one who is *lawfully* in possession of it." (emphasis added)).

Argument

1. The military judge abused his discretion by accepting a guilty plea to this larceny specification, because, as charged, appellant's conduct is not punishable under any of the three predicate charging theories encompassed by Article 121.

A. Specification 1 of Charge II does not criminalize appellant's conduct under the predicate crime of false pretense.

The charged specification does not support appellant's conviction under the predicate crime of false pretense because the GSA never possessed the fuel appellant allegedly stole. Regardless of the predicate crime or theory, Article 121, UCMJ, requires the wrongful taking, obtaining, or withholding, to be "from the possession of the owner or of any other person." Article 121, UCMJ. "Care custody, management, and control are among the definitions of possession." *MCM*, pt. IV, ¶ 46.c.(1)(c)(i).

The facts of this case prove the GSA never possessed the fuel in question. Appellant did not buy the fuel from the GSA. He bought it from the merchants who owned it. (JA074–076). He made false representations to these merchants—namely, that he had authority to use a GSA fuel card as he did—and they sold him

their fuel. (JA033–034). After buying the fuel, appellant never put it in a GSA-owned vehicle. (JA030–031). He always filled up his personal vehicle, keeping the fuel for himself and using it to visit family. (JA030–032). Based on these facts, the GSA never exercised any care, custody, management, or control over the fuel. Thus, the GSA did not have possession of this fuel.

What the GSA did possess was money, which it used to reimburse the merchants for these unauthorized purchases. (JA074). If the government had proceeded with a specification alleging that appellant stole the GSA's money, rather than its fuel, it might have a viable false pretense theory. (JA076 and JA078). This theory comes from dictum in *United States v. Ragins*, 11 M.J. 42, 46 (C.M.A. 1981).

Chief Ragins was a Sailor assigned to work in the commissary who was authorized to accept delivery of goods, for which the government would reimburse the sellers. *Id.* at 43, 46. Working with a bread company employee, Chief Ragins stole bread intended for the commissary, which his co-conspirator resold, and the two split the proceeds. *Id.* at 43. Chief Ragins was charged with stealing money from the government. *Id.* at 43 n. 1. Although the case was decided on an embezzlement theory, the Court speculated on another avenue to conviction: "[f]alse pretenses used by A to induce B to transfer property to C, who is

completely innocent, can probably fit within the literal language of Article 121." *Id.* at 46.

By accepting delivery of goods, Chief Ragins, or "A," induced "B," the government, to transfer money to "C," the bread company. For this theory to work, the party induced to part with its property, must first have *possession* of that property. In *Ragins*, the government's possession was clear. The government sent the money it possessed to the bread company for reimbursement. *Id.*

Appellant's case presents starkly different facts. Here, the fuel did not come from the GSA. Third-party merchants possessed the fuel, and those same merchants were induced to release their fuel by appellant's false representation. The fuel then went directly from the merchant's possession to appellant's. The only thing the GSA ever possessed and was induced to part with was its money—which was not the object of the larceny specification as drafted by the government. Instead, the government charged appellant with stealing fuel from the GSA. But, unlike in *Ragins*, the GSA never possessed the allegedly stolen property. This is true regardless of whether appellant was in an agency relationship with the GSA. Therefore, as alleged in the specification, appellant's actions are not punishable under a false pretense theory, and the military judge abused his discretion in accepting the guilty plea under this theory.

B. This larceny specification does not criminalize appellant's conduct under the predicate crime of embezzlement.

An embezzlement theory of criminality is also inapplicable to this case. For this theory to work, the thief must take possession or control of the property *lawfully*. *McFarland*, 8 U.S.C.M.A. at 46, 23 C.M.R. at 270; *Moore*, 160 U.S. at 269. Here, appellant did not.

The Army Court's opinion, the stipulation of fact, and the record are replete with references to appellant's unlawful use of the GSA fuel card to buy gasoline for his personal vehicle. *Castro*, 2020 CCA LEXIS 282, at *1 ("Appellant's use of the GSA gas card in this way was unauthorized and resulted in the larceny of gasoline."); *id*. at *3 ("Because of the way that appellant committed this larceny—that is, his unauthorized use of a GSA gas card—we find that the government's charging theory was permissible. . ."); *id*. at *7 ("appellant was authorized to use GSA gas cards as part of his official duties, and knowingly exceeded that authorization to commit larceny."); (JA075 ("The Accused did not have any Army business in Columbia, South Carolina, and was not authorized to use a GSA fuel card to put fuel in his personal vehicle.")); (JA075 ("He admitted that he was not given permission to use the fuel cards for his personal vehicle.")); (JA024–026, JA 028, and JA 041–042). Appellant's unlawful means of taking possession precludes an embezzlement theory in this case.

During the providence inquiry, appellant repeatedly admitted that he knew the GSA fuel card's purpose, that each fuel card corresponded to a particular GSA vehicle, that a card was authorized to buy fuel only for its assigned vehicle, and that he had no permission to use a GSA fuel card to buy fuel for his personal vehicle. Accordingly, when appellant bought the fuel armed with this knowledge and put it in his personal vehicle, he was fully aware—and the military judge painstakingly established—that he was taking an *unlawful* action. (JA025–26, JA029, and JA031).

Because appellant took possession of this fuel unlawfully, an embezzlement theory cannot apply here. Accordingly, the military judge abused his discretion in accepting a plea of guilty to this larceny specification when no Article 121, UCMJ, predicate crime supports a conviction.

2. Even if a valid Article 121 predicate charging theory exists, the military judge still abused his discretion because any such crime would require an agency relationship between appellant and the GSA and there is none.

This Court has repeatedly stated, "[w]hen an accused engages in a wrongful credit [or] debit transaction, [he] has usually stolen from the merchant offering the purchased goods or the entity presenting the money." *Williams*, 75 M.J at 132 (quoting *MCM*, pt. IV, para. 46.c.(1)(i)(vi)) (internal quotations omitted); *see also United States v. Simpson*, 77 M.J. 279, 282 (C.A.A.F. 2018); *Cimball Sharpton*, 73 M.J. at 301; *Lubasky*, 68 M.J. at 263–64.

Therefore, in ordinary credit card larceny cases, "the government should generally charge as the *object* of the larceny, the person or entity from whom the accused obtained the goods or money at issue, rather than any person who suffered a loss or consequence as a result of the defendant's actions." *Simpson*, 77 M.J. at 283 (citing *Williams*, 75 M.J at 132–134). In rare cases—typically those where there is some type of agency relationship, joint account, or contract—this general rule may change slightly, and alternative charging may be appropriate. *Id.* at 283 (citing *Williams*, 75 M.J at 134); *see generally Lubasky*, 68 M.J. 260; *Cimball Sharpton*, 73 M.J. at 299.

In order to support its alternative charging decision here—a theft of goods from the GSA that appellant acquired directly from third parties—the government must establish that an agency relationship existed between appellant and the GSA at the time appellant bought the fuel in question. Examining the record in this case, the military judge failed to elicit facts to support any agency relationship between appellant and GSA.

A. Appellant's case is not an agency case, but instead a garden-variety larceny.

Whether this Court considers legal dictionaries, other federal court decisions, or its own precedent, appellant did not have an agency relationship with the GSA, therefore his case should have been charged as a garden-variety larceny.

An "agent" is "one who acts for and represents the other party who is known as the principal, being a substitute or deputy appointed by the principal with power to do certain things which the principal may or can do." *Agent*, BALLENTINE'S LAW DICTIONARY (2010) (JA098). "An agent is a person or entity that has been authorized to act on behalf of another person or entity, the principal." *Agent*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (JA099). "Agency in a given situation is defined as a matter of its scope and duration." (JA099).

Based on these black-letter definitions, appellant did not have an agency relationship with GSA at the time he committed the offense in question. He was not undertaking any official duty on the GSA's behalf, and he lacked any authority whatsoever to buy gasoline for his personal vehicle with a GSA fuel card. (JA025–026).

Additionally, applying the standard other federal courts use, appellant did not have an agency relationship with the GSA. When interpreting common law agency concepts, federal courts look to the current Restatement of Agency.[5] Under

[5] *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) (defining an agency relationship's "most basic features" by reference to the Restatement (Third) of Agency); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 n.31 (1989) (observing that "[i]n determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency."); *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006) (relying on the Restatement (Second) of Agency in determining whether an agency relationship exists under the Fair Housing Act); *United States v. Aldridge*, 642 F.3d 537, 541 (7th Cir. 2011) (relying on the Restatement (Third)

the current Restatement, an agency relationship is defined as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (JA100).

Applying the Restatement definition, appellant was not the GSA's agent. First, the purported principal, the GSA, had not manifested assent to appellant serving as its agent. The GSA entered into a leasing agreement with U.S. Army units for vehicles. (JA074). As part of this agreement, the GSA provided a fuel card for each vehicle. (JA074–076). By leasing property to the Army, the GSA did not manifest its assent for appellant, an Army employee, to serve as its agent.

Similarly, appellant had not agreed to "act on the principal's behalf and subject to the principal's control." (JA100). Appellant used a GSA fuel card to fill up his personal vehicle. (JA075–076). His unauthorized actions evince no indication he agreed to act on the GSA's behalf. By the same token, there is no evidence appellant consented to the principal's control, an agency relationship requirement. Of course, as the lessor, the GSA had some power over its lessee, the

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Agency in determining whether a private party was acting as a government agent under the Fourth Amendment.); *United States v. Bonds*, 608 F.3d 495, 506–08 (9th Cir. 2010) (using the Restatement (Third) Agency to define the term agent under Federal Rule of Evidence 801(d)(2)(D)).

Army. But, as the Restatement points out, just because a person has a position of dominance or influence over another does not mean an agency relationship exists. (JA101–103). Control is more than "simply an ability to bring influence to bear." (JA101–103). In this case, there is no evidence that the GSA's lease with the Army gave the GSA sufficient authority over a specific Army employee to establish control and an agency relationship with that person. Moreover, even if such control did exist—a point appellant does not concede—there is no evidence that appellant assented to the GSA's control.

Finally, under this Court's precedent, appellant and the GSA were not in an agency relationship. This is evident by comparing this case to *Cimball Sharpton*, another larceny case in which there was an agency relationship between the accused and the Air Force. *Cimball Sharpton*, 73 M.J. 299. Interestingly, the *Cimball Sharpton* opinion never uses the words agent, principal, or agency. *Id*. Yet, in a later decision this Court found Cimball Sharpton had in fact been in such a relationship. *Williams*, 75 M.J. at 133–34.

In reaching this decision, this Court noted several facts. First, the Air Force, Cimball Sharpton's employer, issued her a General Purchase Card (GPC) *in her name*. *Id.* at 133. Second, the decision highlighted the "agency agreement between the appellant and the Air Force was that the card could only be used for government purchases of medical supplies . . ." *Id*. Finally, it also noted an

"additional factual twist:" an agreement between the Air Force and the GPC-issuing bank, requiring the Air Force to reimburse any charges by the cardholder involving misuse or abuse. *Id*. Relying on these facts, without reference to the Restatement or another agency definition, this Court concluded that Cimball Sharpton was the Air Force's agent. *Williams*, 75 M.J. at 133–34.

Appellant's case is distinguishable from *Cimball Sharpton* because appellant was not a GSA employee, was not issued a GSA fuel card in his name, and had no agreement with the GSA. He was not the GSA's agent because none of the *Cimball Sharpton* agency indicia were present.

These facts take appellant's case out of the *Cimball Sharpton* agent-principal framework and place it squarely back into the "garden-variety" larceny landscape. Here, appellant walked into a brigade office and took a GSA fuel card. (JA024). There was no agreement between appellant and the GSA for appellant to act as the GSA's agent. Appellant was no more authorized to use the GSA fuel card than he was to use one of his fellow Soldier's personal credit cards. (JA028). Thus, appellant's actions were no different than if he walked into the same office, and took another Soldier's personal credit card from an unattended wallet.

The similarities to a usual credit card larceny do not end there. When appellant arrived at the fueling station, he procured the fuel just as he would have had he used a personal card stolen from another Soldier. He presented the GSA

fuel card under the false pretense that he was authorized to use the card and transferred fuel to his vehicle. (JA028-033). From appellant's perspective, the procedure for transferring fuel to his vehicle was nearly unchanged, regardless of whether he used a personal or GSA card to conduct his theft.

The facts of appellant's case present none of the hallmarks of an "unusual" case, as "there were no agency relationships, no joint accounts, and no contracts." *Williams*, 75 M.J. at 134. Because appellant was not an agent of the GSA when he took the card to commit the offenses at issue, his specific brand of larceny is the garden-variety type.

The Army Court's decision in this case makes no distinction between agency relationships and non-agency relationships, yet summarily states the government's charging decision was the "better charging theory." *Castro*, 2020 CCA LEXIS 282, at *8 (JA006). As a result, it endorses charging a theft of the government's property any time a servicemember unlawfully uses a government purchasing procedure of any type to obtain goods. This endorsement is contrary to what this Court has repeatedly stated—that the government should "cleave to the rule set forth in the *MCM* in the 'usual case,'" where there are no agency relationships, no joint accounts, and no contracts. *Williams*, 75 M.J. at 134 (citing *MCM*, pt. IV, para. 46.c.(1)(h)(vi)). Accordingly, whether considering legal dictionaries, other

federal case law, or this own Court's precedent, appellant and the GSA were not in an agency relationship.

B. Because appellant was not the GSA's agent, the GSA never possessed the fuel at issue in this case.

In dictum, *Williams* suggested that if an agency relationship exists, like the one in *Cimball Sharpton*, the government could establish its possession over goods a thief stole from a third party. *Williams*, 75 M.J. at 134 n.6. In this case, however, because appellant was not the GSA's agent, the GSA never possessed the fuel in question, which appellant got from third parties.

Cimball Sharpton was charged with stealing the Air Force's money—not its goods. *Cimball Sharpton*, 73 M.J. at 300 (quoting the specification at issue). She used her GPC to purchase unauthorized goods from third parties. Because of the contract between the Air Force and the GPC-issuing bank, and the Air Force's agency relationship with Cimball Sharpton, *Williams* found Cimball Sharpton had wrongfully induced the Air Force to reimburse the bank for the unauthorized purchases she had made. *Williams*, 75 M.J. at 133–34. In short, *Williams* interpreted the *Cimball Sharpton* decision by applying the *Ragins* false pretense dictum. *Id.* at 134 n.6.

Because of an agency relationship, however, *Williams* suggested Cimball Sharpton could have been charged with stealing the Air Force's goods—goods she unlawfully bought from third parties—rather than its money. Cimball Sharpton

was the Air Force's agent, the Court reasoned, and when she possessed items she did so on behalf of the Air Force. *Williams*, 75 M.J. at 134. As a result, when she converted those items to her own possession she violated Article 121, UCMJ. *Id.*

The same logic cannot apply here. Because, unlike Cimball Sharpton, appellant was not the GSA's agent at the time of the wrongful purchases, he never possessed the fuel on the GSA's behalf. Likewise, the GSA never actually possessed the fuel at issue in this case. Instead, the fuel transferred directly from the vendor to appellant's possession. (JA029–030). As a result, the amended specification in this case cannot meet Article 121's possession requirement.

Because appellant was not the GSA's agent, it was impossible for appellant to steal fuel from the GSA's possession. Because the GSA never possessed this fuel, appellant pleaded guilty to a crime that was impossible *for him or anyone* to commit. Therefore, there is a substantial basis in law to question appellant's guilty plea, and the military judge abused his discretion by accepting appellant's guilty plea.

3. Even if both a valid Article 121 predicate charging theory and an agency relationship exist, the military judge still abused his discretion because he never explored the nature and extent of that agency relationship in the providence inquiry.

Even assuming a valid larceny theory applies and appellant was the GSA's agent at the time he used the GSA fuel cards, the military judge abused his discretion by failing to elicit facts to this effect during the providence inquiry.

United States v. Price, 76 M.J. 136, 138 (C.A.A.F. 2017) (noting "it is an abuse of discretion if a military judge accepts a guilty plea without an adequate factual basis to support it.") (citing *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012)); *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003) (reiterating a military judge's affirmative duty "to conduct a detailed inquiry into the offenses charged . . ." (citing to *United States v. Care*, 18 U.S.C.M.A. 535, 541–42 (1969)). *Williams* makes clear the presence of an unusual circumstance— an "agency relationship," "joint account," or "contract," for example—may allow for an unusual charging decision in a larceny case. *Williams*, 75 M.J. at 134. Therefore, if the unusual circumstance is what validates an unusual charging decision, the military judge must then inquire about the nature of those unusual circumstances during the providence inquiry. The military judge failed to do that in this case.

The military judge never discussed with appellant any of the following: whether he was the GSA's agent, the scope of any agency relationship, the duration of any agency relationship, whether appellant had any actual or apparent authority to bind the GSA to the purchases he made, whether the GSA had manifested its assent for appellant to serve as its agent, whether appellant had manifested assent to act on the GSA's behalf and subject to the GSA's control, or whether the *Cimball Sharpton* agency indicia cited in *Williams* were present. The only section of the providence inquiry even tangentially related to determining

appellant's agency relationship with the GSA were a few summary questions regarding whether the fuel belonged to the GSA. (JA033–034). As a result, the military judge could not adequately determine whether an agency relationship existed—and therefore abused his discretion in accepting appellant's plea without an adequate factual basis. *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004) ("advis[ing] against and caution[ing] judges regarding the use of conclusions and leading questions that merely extract from an accused 'yes' or 'no' responses during the providency inquiry."); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (emphasizing military judges must elicit actual facts from an accused not merely legal conclusions).

Conclusion

Wherefore, appellant asks this Court to set aside the guilty finding and dismiss Specification 1 of Charge II.

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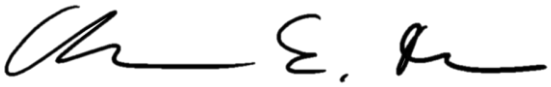

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1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 7192 words.

2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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I certify that a copy of the foregoing in the case of *United States v. Castro*, Crim. App. Dkt. No. 20190408, USCA Dkt. No. 21-0017/AR, was electronically filed with the Court and Government Appellate Division on December 28, 2020.

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