IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201900073
Virginia S. MORATALLA, Yeoman Second Class (E-5) U.S. Navy Appellant	)	USCA Dkt. No. 21-0052/NA

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UNITED STATES CIRCUIT COURTS OF APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946 (2012):

REGULATIONS, RULES, OTHER SOURCES

Issue Presented

WHETHER THE APPELLANT'S GUILTY PLEA TO BANK FRAUD UNDER 18 U.S.C. § 1344 WAS IMPROVIDENT.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and confinement for one year or more. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to her pleas, of attempted larceny, larceny, forgery, drawing and uttering a check without sufficient funds, bank fraud, and dishonorably failing to pay debt, in violation of Articles 80, 121, 123, 123a, and 134, UCMJ, 10 U.S.C. §§ 880, 921, 923a, 934 (2012). The Military Judge sentenced Appellant to sixty months of confinement, forfeiture of $1000 per month for sixty months, reduction to paygrade E-1, and a dishonorable discharge. Under a Pretrial Agreement, the Convening Authority approved only so much of the sentence as provided for forty-eight months of confinement, forfeiture of $1000 per month for sixty months,

reduction to paygrade E-1, and a dishonorable discharge, and, except for the punitive discharge, ordered the sentence executed.

On July 27, 2020, the lower court affirmed the findings and sentence. *United States v. Moratalla*, No. 201900073, 2020 CCA LEXIS 242, at *11–12 (N-M. Ct. Crim. App. July 27, 2020).

On November 16, 2020, Appellant petitioned this Court for review. On March 15, 2021, this Court granted the petition. On April 27, 2021, Appellant filed his Brief, and on April 28, 2021, Appellant filed the Joint Appendix.

Statement of Facts

A. The United States charged Appellant with twenty-eight financial crimes. Under a Pretrial Agreement, Appellant pled guilty to, inter alia, bank fraud in violation of Article 134, UCMJ.

The United States charged Appellant with three specifications of attempted larceny; two specifications of larceny; forgery; drawing and uttering a check without sufficient funds; uttering a check without sufficient funds; making and uttering a worthless check by dishonorably failing to maintain funds; thirteen specifications of bank fraud; and six specifications of dishonorably failing to pay debt. (J.A. 19–25.)

Under a Pretrial Agreement, Appellant pled guilty to, inter alia, bank fraud under Article 134, UCMJ. (J.A. 31.) Charge V, Specification 2 read:

> In that [Appellant] did, at or near Chesapeake, Virginia, on or about 24 October 2013, knowingly execute or attempt to execute a scheme or

> artifice to defraud a financial instruction, ABNB Federal Credit Union, or to obtain moneys, funds, credits, and assets owned by or under the custody and control of the ABNB Federal Credit Union, by means of false or fraudulent pretenses, representations, or promises involving Boatswain's Mate Second Class [BM2] [Morris Whiskey][1] and ABNB Federal Credit Union, in violation of 18 U.S.C. § 1344, a crime not capital.

(J.A. 106–07.)

B. During the providence inquiry, aided by a Stipulation of Fact, Appellant admitted her guilt and detailed her crimes.

Appellant wanted money for her house-flipping business but was unqualified for a collateral loan against her car. (J.A. 49–51.) BM2 Whiskey "wanted to make money" and invest in Appellant's business but had insufficient funds and would not qualify for a loan without collateral. (J.A. 49–50, 53–54.) Because Appellant knew that a "collateral loan" was "easier" and yielded a lower interest rate, she told BM2 Whiskey to apply for a loan at ABNB Federal Credit Union ("ABNB") and falsely represent that he intended to use the money to purchase her car. (J.A. 49, 51–52, 86.) In reality, Appellant and BM2 Whiskey always intended to use the money for her business—not for the car. (J.A. 44, 49–51, 53–55, 86.) Indeed, after ABNB loaned BM2 Whiskey $8900, he gave Appellant the money, and she applied it to her business. (J.A. 53–54, 86.)

[1] The United States incorporates the lower court's pseudonym. *See Moratalla*, 2020 CCA LEXIS 242, at *2 & n.2.

Appellant transferred her car's title and registration to BM2 Whiskey, but she kept possession of the car. (J.A. 51–52, 86.) Although she did eventually give BM2 Whiskey possession of the car after a "[c]ouple of months," she agreed that she acted "contrary to the promises made in the loan application" by keeping and using the car while also having the money. (J.A. 52–53.) Appellant also admitted that the misrepresentation "influenced [ABNB] to give the loan." (J.A. 55–56.)

C. The Military Judge confirmed and accepted Appellant's pleas, found her guilty, and sentenced her.

The Military Judge explained to Appellant that the bank fraud statute "has two very distinct theories of criminality" and she was pleading guilty to both. (J.A. 65.) Appellant replied, "I understand." (J.A. 65.) Before he accepted Appellant's pleas, she twice reiterated her desire to plead guilty because she was "in fact guilty of the offenses to which [she has] pled guilty." (J.A. 73.)

The Military Judge accepted her pleas, found her guilty, and sentenced her to sixty months of confinement, forfeiture of $1000 per month for sixty months, reduction to paygrade E-1, and a dishonorable discharge. (J.A. 77–78, 80.)

D. The lower court unanimously affirmed the findings and sentence.

On appeal, Appellant argued her plea was improvident because she actually sold her car to BM2 Whiskey when she transferred the title and registration to him and received the loan money. (Appellant's Br. at 6–7, Dec. 17, 2019.) Because BM2 Whiskey therefore owned the car, there was no "false representation." (*Id.*)

The lower court disagreed, unanimously affirming the findings and sentence. *Moratalla*, 2020 CCA LEXIS 242, at *10. It found Appellant and BM2 Whiskey agreed that BM2 Whiskey would "lie to ABNB and tell them he was buying the car, when they were actually funding to invest in Appellant's business." *Id.* at *9. And although Appellant transferred the title and registration to BM2 Whiskey, "at the time that the paperwork was signed, and the funds were transferred, Appellant maintained control and possession of the vehicle." *Id.* at *10–11. It concluded the Military Judge did not abuse his discretion in accepting Appellant's plea because Appellant "was convinced of her guilt" and "establish[ed] the facts necessary to establish her guilt." *Id.* at *11.

Argument

THERE IS NO SUBSTANTIAL BASIS IN LAW OR FACT TO QUESTION APPELLANT'S GUILTY PLEA TO BANK FRAUD WHEN SHE EXECUTED A SCHEME THAT FALSELY REPRESENTED THE PURPOSE OF THE LOAN AS A CAR SALE RATHER THAN HER INTENDED PURPOSE OF OBTAINING MONEY FOR HER BUSINESS.

A. The standard of review is abuse of discretion.

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007) (citations omitted). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which [this

Court] afford[s] significant deference." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citation omitted).

B. Appellate courts analyze guilty pleas under the substantial basis test.

"The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." R.C.M. 910(e). "The factual predicate is sufficiently established if the factual circumstances as revealed by the accused himself objectively support that plea." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (citation and internal quotation marks omitted).

"This Court will not disturb a guilty plea unless [the] [a]ppellant has demonstrated that there is a substantial basis in law or fact for questioning the plea." *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (citation and internal quotation marks omitted). The substantial basis test "look[s] 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." *Inabinette*, 66 M.J. at 322. "[T]he issue must be analyzed in terms of providence of [the] plea[,] not sufficiency of the evidence." *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004).

Appellate courts "giv[e] broad discretion to military judges in accepting pleas . . . because facts are by definition undeveloped in such cases." *Inabinette*,

66 M.J. at 322. Appellate courts will not "speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas," especially "where the inference sought to be drawn . . . would contradict express admissions by the accused." *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

"Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citation omitted).

C. There is no substantial basis in law or fact to question Appellant's guilty plea because she intended to defraud ABNB and executed a scheme that falsely represented the purpose of the loan.

Article 134, UCMJ, criminalizes "noncapital crimes or offenses which violate federal law." 10 U.S.C. § 934 (2012); *see* Manual for Courts-Martial, United States (MCM), pt. IV, para. 60.c.(1) (2016 ed.). The United States must satisfy each element of the federal statute. MCM, pt. IV, para. 60.b.(2)(a).

1. The bank fraud statute criminalizes schemes to defraud financial institutions or obtain money under false pretense.

The bank fraud statute reads:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (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;

> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344.

"The statute, which reads in the disjunctive, establishes two distinct, albeit closely related, offenses: (1) schemes to defraud financial institutions; and (2) schemes to obtain money . . . from financial institutions by false pretenses, representations or promises." *United States v. Doherty*, 969 F.2d 425, 427 (7th Cir. 1992). "Congress . . . intended that [the bank fraud statute] be construed broadly." *United States v. Hammen*, 977 F.2d 379, 382 (7th Cir. 1992).

The elements of bank fraud under 18 U.S.C. § 1344(1) are:

> (1) That the accused intentionally participated in a scheme or artifice to defraud another of money or property; and
>
> (2) That the victim of the scheme or artifice was an insured financial institution.

United States v. Goldsmith, 109 F.3d 714, 715 (11th Cir. 1997).

The elements of bank fraud under 18 U.S.C. § 1344(2) are:

> (1) That a scheme existed in order to obtain moneys, funds, or credit in the custody of the federally-insured financial institution;
>
> (2) That the accused participated in the scheme by means of false pretenses, representations, or promises, which were material; and
>
> (3) That the accused acted knowingly.

United States v. Williams, 390 F.3d 1319, 1324 (11th Cir. 2004).

"The terms 'scheme' and 'artifice' are defined to include any plan, pattern or cause of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived." *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987) (citation omitted). Accordingly, "a scheme can involve fraudulent misrepresentations to deceive a bank to obtain money." *United States v. Woods*, 335 F.3d 993, 998 (9th Cir. 2003) (citation omitted). And "because [the statute] punishes not completed frauds, but instead fraudulent scheme[s]," the success or failure of the scheme "is irrelevant." *Loughrin v. United States*, 573 U.S. 351, 364 (2014) (citation and internal quotation marks omitted).

"[A] false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999). "That occurs, most clearly, when a defendant makes a misrepresentation to the bank itself" and the "false statement is the mechanism naturally inducing a bank . . . to part with money in its control." *Loughrin*, 573 U.S. at 363. Indeed, "causing a bank to transfer funds pursuant to a fraudulent scheme reduces the funds the bank has available for its loans and other activities and almost inevitably causes it some loss." *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001).

2. Appellant intended to defraud ABNB and executed a scheme to obtain a loan under false pretenses.

In *United States v. Pizano*, 421 F.3d 707, 721 (8th Cir. 2005), the defendant misrepresented that she was the sole owner of the collateral property and that the purpose of the loan was to purchase a home for her brother in Texas; in reality, she co-owned the property and intended to purchase a home for her brother in Iowa. *Id.* The Eighth Circuit upheld her bank fraud conviction because she "engaged in a deceptive course of conduct" that "had a natural tendency to influence or was capable of influencing the bank[]." *Id.* at 722.

So too here. Appellant executed a scheme in which she had BM2 Whiskey falsely represent to ABNB that the purpose of the loan was to purchase Appellant's car, when in fact the true purpose of the loan was to get money to invest in her business. (J.A. 44, 49–51, 53–55, 86.) Appellant had BM2 Whiskey apply for a collateral loan because she was unqualified for a collateral loan and because BM2 Whiskey was unqualified for a business loan. (J.A. 53–54.) Then, after ABNB loaned BM2 Whiskey $8900, Appellant completed the scheme by getting the money and investing it in her business. (J.A. 53–54, 86.) Accordingly, like in *Pizano*, Appellant "engaged in a deceptive course of conduct" that "had a natural tendency to influence" ABNB by "causing [it] to transfer funds pursuant to a fraudulent scheme." *Everett*, 270 F.3d at 991; *Pizano*, 421 F.3d at 722.

3. The Record refutes Appellant's three arguments.

First, Appellant did not tell the Military Judge that she had "transferred [BM2 Whiskey] the registration and title after he paid her the $8,900." (*Contra* Appellant's Br. at 12.) Instead, she "had provided information for the [car] to [BM2 Whiskey], to obtain a loan; the title and registration was transferred to him." (J.A. 44.) Under a common-sense reading, Appellant transferred the documents at the time BM2 Whiskey applied for the loan to convince ABNB that BM2 Whiskey was actually purchasing the car. Instead, after getting the loan, he could complete the scheme by giving Appellant the money to invest in her business because "the money [wa]s intended to be used for [the] house flipping investment." (J.A. 44.)

Second, the Record refutes Appellant's argument that she "did not make any false or fraudulent pretenses, representations, or promises" because "the loan *was* used to purchase Appellant's car, notwithstanding [her] statement" during the providence inquiry that the loan money "was for investing in her business." (Appellant's Br. at 11–12, 14) (emphasis in original). Indeed, over one dozen times, Appellant told the Military Judge—under oath—that her scheme had BM2 Whiskey lie to ABNB about the purpose of the loan. (J.A. 44, 49–55.) This Court should reject Appellant's unsupported claim of a bona fide car sale.

Third, Appellant relies on *United States v. Friedman*, 971 F.3d 700, 705 (7th Cir. 2020), and *United States v. Swearingen*, 858 F.2d 1555, 1556 (11th Cir. 1988),

to erroneously suggest that the bank fraud statute requires more egregious conduct when dealing with car sales. (*See* Appellant's Br. at 12–14.) But that claim is unsupported in law because "Congress . . . intended that [the bank fraud statute] be construed broadly." *Hammen*, 977 F.2d at 382. Indeed, Appellant violated the bank fraud statute—requiring only that the "false statement is the mechanism naturally inducing a bank . . . to part with money in its control"—because, as she admitted, her material lie "influenced the bank to give the loan." *Compare* (J.A. 55–56), *with Loughrin*, 573 U.S. at 363. That the schemes in *Friedman* and *Swearingen* involved quantitatively more fraudulent representations is immaterial. *See Friedman*, 971 F.3d at 705; *Swearingen*, 858 F.2d at 1556. This argument is without merit.

4. The Military Judge correctly relied on Appellant's continued possession of the car—not BM2 Whiskey's "presumptive ownership" of it—because the statute criminalizes "fraudulent schemes."

Appellant's argument that there was no false representation because BM2 Whiskey actually purchased her car when she transferred the title, registration, and—eventually—possession to him fails. (Appellant's Br. at 14–18.)

a. Appellant's continued use and possession of the car after getting the money shows the loan was always to invest in her business.

The Military Judge correctly relied on Appellant's continued possession of the car after she used the loan money BM2 Whiskey gave her for her business as

evidence of the fraudulent scheme. (J.A. 52–54.) Indeed, although her scheme had BM2 Whiskey claim the loan money was to purchase her car, Appellant knew it was "not to purchase the car, but to invest for the flipping houses" business. (J.A. 50, 52.) Thus, she was "still using the car" while also "getting the use of the money contrary to the promises made in the loan application." (J.A. 53.)

Appellant's conjecture that BM2 Whiskey, as "the presumptive owner," simply "let[] Appellant use his car for a couple of months" is nothing more than speculation. (Appellant's Br. at 16.) To otherwise infer "would contradict express admissions by [Appellant]." *Johnson*, 42 M.J. at 445.

b. "Presumptive ownership" is irrelevant because the bank fraud statute criminalizes "fraudulent schemes."

Even assuming that BM2 Whiskey "held presumptive ownership" of the car after Appellant transferred the title and registration to him—and the loan money completed the sale—Appellant is still guilty of bank fraud "because [the statute] "punishes not 'completed frauds,' but instead 'fraudulent scheme[s]." *Compare* (Appellant's Br. at 14–18), *with Loughrin* 573 U.S. at 364; *cf. United States v. Simpson*, 77 M.J. 279, 284 (C.A.A.F. 2018) (noting conspiracy "punishes the *agreement* to commit a crime") (emphasis in original). Because Appellant always knew the loan money was "not to purchase the car, but to invest" in her business, yet executed a scheme to have BM2 Whiskey lie to ABNB that the loan was to purchase her car, she committed bank fraud regardless of whether she may have

constructively sold BM2 Whiskey the car. (J.A. 44, 49–55, 86); *see Loughrin*, 573 U.S. at 364 (noting scheme's success or failure "is irrelevant in a bank fraud case"). And because the Record is devoid of "clear evidence" to overcome this Court's presumption that the Military Judge knew and followed the law, there was no "clear inconsistency" that the Military Judge had to "clarify." *Erickson,* 65 M.J. at 224; (*contra* Appellant's Br. at 15–16).

There is no substantial basis to question Appellant's guilty plea, and the Military Judge did not abuse his discretion in accepting it. *Inabinette*, 66 M.J. at 322. Likewise, the lower court correctly affirmed the finding and sentence. *Moratalla*, 2020 CCA LEXIS 242, at *10.

D. <u>If this Court finds Appellant's guilty plea improvident, then it should order a rehearing so the Convening Authority can take further action</u>.

1. <u>Contrary to Appellant's assertion, this Court cannot reassess her sentence</u>.

This Court's "independent statutory jurisdiction is narrowly circumscribed." *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999). Because this Court "may not act unless Congress has given [it] the authority to do so, [it] must examine the statute that gives this Court jurisdiction." *Loving v. United States*, 62 M.J. 235, 239–40 (C.A.A.F. 2005). Under Article 67(d), UCMJ, "[i]f [this Court] sets aside the findings and sentence, it may . . . order a rehearing. If it . . . does not order a rehearing, it shall order that the charges be dismissed." 10 U.S.C. § 867(d) (2019).

Accordingly, this Court does not have the statutory authority to "reassess Appellant's sentence." (*Contra* Appellant's Br. at 18.)

2. This Court should order a rehearing so the Convening Authority can take further action.

"The remedy for finding a plea improvident is to set aside the finding based upon the improvident plea and authorize a rehearing." *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013) (citations omitted). "This remedy restores the appellant to his position before proferring the guilty plea and permits the [United States] the opportunity to prove the charged offense." *United States v. Negron*, 60 M.J. 136, 144 (C.A.A.F. 2004).

If this Court finds Appellant's guilty plea improvident, then it should order a rehearing so the Convening Authority can either (1) allow Appellant to again plead guilty; or (2) withdraw from the Pretrial Agreement and proceed to court-martial on all charged offenses. *See* R.C.M. 705(e)(4)(B) (permitting convening authority withdrawal from plea agreement "if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review"); *see also United States v. Cook*, 12 M.J. 448, 455 (C.M.A. 1982) (authorizing dismissed charges reinstated because "convening authority has . . . not received the expected benefit of his bargain" if appellant "can successfully attack the providence of his guilty pleas, escape the conviction based on those pleas, yet bar the convening authority from resurrecting the withdrawn charges").

Conclusion

The United States respectfully requests that this Court affirm the lower court's decision.

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Certificate of Compliance

1. This Brief complies with the type-volume limitation of Rule 24(c)(1) of this Court's Rules of Appellate Procedure because it contains 3,576 words.

2. This Brief complies with the typeface and type style requirements of Rule 37(a) of this Court's Rules of Appellate Procedure because it uses proportional, 14-point, Times New Roman font with one-inch margins on all four sides.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on May 27, 2021.

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