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	REPLY BRIEF ON BEHALF OF 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 the Case

On 1 December 2020, this court granted appellant's petition for grant of review on the issue above and ordered briefing under Rule 25. (JA001). On 28 December 2020, appellant filed his brief with this court. The government responded on 25 January 2021. On 2 February 2021, the court granted appellant's motion to extend time to file a reply brief. This is appellant's reply.

Argument

1. The larceny specification cannot be affirmed under a common law larceny theory.

Appellant and the government agree: "[t]he relevant question in determining the person to name in a larceny specification is *whom* did the accused steal the goods or money *from*?" (Gov't Br. 13) (quoting *United States v. Williams*, 75 M.J. 129, 132 (C.A.A.F. 2017)). The problem is the government named the wrong person. Appellant did not steal fuel from the GSA; he took title from the merchants who owned it, thus thwarting a common law larceny theory.

A. There is no authority for charging this specification under a common law larceny theory.

The government fails to cite a single case, civilian or military, in which a credit or debit card facilitated theft was charged under a common law larceny theory. That is because—contrary to the government's assertion—this theory does not apply. In fact, the exhaustive article the government cites in its brief explicitly makes this point: "[i]n a larceny committed by use of a credit or debit card, the relevant theories under Article 121 are false pretenses 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. [hereinafter Owens-Filice] (JA084); (Gov't Br. 8, 27).

As this article explains, under a common law larceny theory—whether larceny or larceny by trick—a thief does not acquire title to the stolen goods.

Owens-Filice, at 6 n.38 (JA084). However, in a point of sale (POS) credit card transaction, like appellant's use of the GSA fuel card, title to the goods transfers directly from the merchant to the thief. *Id.*

In appellant's case, when he used the GSA fuel card at the pump, the merchant transferred the fuel's title to appellant—not the GSA. Therefore, because appellant received title to the fuel, a common law larceny theory is inapplicable.

B. The government fails to show how the GSA obtained a greater possessory interest in the same fuel to which appellant had title.

Although appellant had title to the fuel, the government insists the GSA still owned it. Their theory is the GSA had an "arrangement" to repay merchants the cost of any fuel bought with its fuel card. (Gov't Br. 14). According to the government, because of this arrangement and the GSA's subsequent repayment for the fuel at issue, the GSA gained a greater possessory interest in that fuel. (Gov't Br. 10). Thus, "appellant pumped GSA-owned fuel directly into his personal vehicle and carried it away, which constituted an unlawful taking." (Gov't Br. 17).

There are several problems with this theory.[1] First is timing. Title to the fuel passed directly from the merchant to appellant. As a result, it is unclear when

[1] The government's hypothetical in footnote 4 is inapposite. (Gov't Br. 19 n.4). If appellant pumped gas from a GSA-owned fuel tank, as the hypothetical posits, clearly the GSA owned the fuel. But, in appellant's case, third-party merchants owned the fuel tank and transferred title to the fuel directly to appellant. Thus, the GSA never owned it.

the GSA obtained its greater possessory interest in the fuel, so that it was "GSA-owned fuel" appellant put in his vehicle. (Gov't Br. 17).

The second problem is the government misreads the authority it relies on: *United States v. Williams* and its treatment of *United States v. Cimball Sharpton*. (Gov't Br. 19). Under their interpretation, if the government agrees to repay merchants the cost of purchases a thief makes with a government credit card, and the government makes repayment, then the government gains a greater possessory interest in those goods than the thief who took title to them. *Id*. at 17-19. But, that is not what these cases say.

The combination of the contract in *Cimball Sharpton* (between the Air Force and the card issuer, U.S. Bank), and the Air Force's repayment of the merchants, did not give the Air Force a possessory interest in the *goods* Cimball Sharpton unlawfully purchased with her government purchase card (GPC). *Williams*, 75 M.J. at 133-34 (interpreting *Cimball Sharpton*). Instead, this agreement was important because Cimball Sharpton was charged with stealing the Air Force's *money*. *Cimball Sharpton*, 73 M.J. at 300. As the *Williams* Court found, this contract induced the Air Force to repay the merchants whom Cimball Sharpton made unlawful purchases from, using her GPC. 75 M.J. at 133-34. Thus, Cimball Sharpton's conviction was upheld under the larceny by false pretense theory first discussed in dictum in *United States v. Ragins*, 11 M.J. 42 (C.M.A. 1981).

(Appellant's Br. 13-14, 23). Any possessory interest the Air Force had in these goods stemmed from its agency relationship with Cimball Sharpton, so that when the agent (Cimball Sharpton) withheld the goods from her principal (the Air Force), she embezzled the goods from the principal. *Williams*, 75 M.J. at 134.

In appellant's case, he did not have an agency relationship with the GSA. (Appellant's Br. 16-23). And even if he did, that would not mean the specification at issue could be affirmed under a common law larceny theory. *See supra* pp. 2-3. Nor could it be affirmed under an embezzlement theory, because he acquired the fuel unlawfully. (Appellant's Br. 9-12, 15-16). Yet, like Cole Porter, the government suggests anything goes—as long as there is an agreement to repay and repayment.[2] But, these facts mean *an* alternative charging theory may be available, not that *any* charging theory will suffice. *Williams*, 75 M.J. at 132 ("Such alternative theories are the exception, and not, as the ACCA assumed, the rule."). Here, the government squandered its alternative charging theory (the *Ragins* dictum) when it inexplicably sought to amend the charges.

2. <u>Even if Article 45(c) is the correct standard for appellate review of a guilty plea, the specification at issue still cannot be affirmed</u>.

For the first time in this case, the government argues that Article 45(c), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 845(c), is the correct

[2] COLE PORTER, *Anything Goes*, *on* ANYTHING GOES: THE NEW BROADWAY CAST RECORDING (Masterworks Broadway 1988).

standard for appellate review of a guilty plea and thus, by implication, the Army Court of Criminal Appeals erred when it analyzed appellant's guilty plea under the traditional substantial basis in law and fact test. (Gov't Br. 24-29); *United States v. Castro*, 2020 CCA LEXIS 282, at *8 (Army Ct. Crim. App. Aug. 25 2020) (No. 20190408) (mem. op.) ("[B]ecause we find no 'substantial basis in law or fact' to question appellant's plea, *Inabinette*, 66 M.J. at 322, we affirm.").

If the government thought the Army Court applied the wrong standard, they could have sought a certificate for review from The Judge Advocate General once appellant's petition was granted. This court changed its rules to allow the government time to raise an error in a case it won below if appellant's petition was granted. *United States v. Parker*, 62 M.J. 459, 469 (C.A.A.F. 2006) (Erdmann, J., dissenting) (recommending amending the court's rules to allow the government to cross-appeal from granted issues); (C.A.A.F. R. 19(b)(3)). Instead, the government chose to slip this critical issue in as the second argument in their answer.

Nevertheless, if this court assesses the military judge's errors in accepting appellant's guilty plea under this belatedly offered standard, the specification and charge should still be set aside and dismissed. That is because these are not just Article 45(a) errors but also constitutional ones. This court assesses prejudice differently for constitutional errors than for non-constitutional ones. Under Article 59(a), for most constitutional errors, the government must prove any material

prejudice to a substantial right of the accused was harmless beyond a reasonable doubt. The same standard should apply to constitutional errors under Article 45(c).

In appellant's case, the military judge made two constitutional errors. First, he abused his discretion by accepting appellant's guilty plea, which was not voluntary, knowing, and intelligent, because appellant did not know he was pleading guilty to a specification that failed to state an offense. Second, the military judge abused his discretion in accepting appellant's guilty plea to a specification that failed to state an offense. The specification failed to state an offense for two reasons: (1) as charged, the specification did not criminalize appellant's conduct under any Article 121, UCMJ, larceny theory; and (2) even if such a theory existed, it would require an agency relationship between appellant and the GSA and there was none. Because the government has failed to show these errors are harmless beyond a reasonable doubt the specification and charge should be dismissed.

A. Constitutional errors in a guilty plea should be assessed under the harmless beyond a reasonable doubt prejudice standard.

Both Article 45(c) and Article 59(a), UCMJ, use nearly identical language to describe how an error, under either article, must materially prejudice the substantial rights of the accused to warrant relief. *Compare* Article 45(c) ("materially prejudice the substantial rights of the accused."), *with* Article 59(a) ("materially *prejudices* the substantial rights of the accused.") (emphasis added).

This court's "settled practice" is "to assess prejudice—whether an error is preserved or not—based on the nature of the right." *United States v. Tovarchavez*, 78 M.J. 458, 467 (C.A.A.F. 2019). Under Article 59(a), "where a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in *Chapman v. California*." *Id.* at 460-61 (C.A.A.F. 2019) (citation omitted). Constitutional error requires reversal of a conviction unless the government can prove the error was harmless beyond a reasonable doubt. *Id.* at 462-463.

Given this court's "settled practice" of assessing prejudice based on the nature of the right, and given the two articles' virtually identical language, this court should assess the material prejudice from appellant's forfeited constitutional errors under Article 45(c) using the same harmless beyond a reasonable doubt standard applied under Article 59(a). *Id.* at 467.

The government insists a different prejudice standard should apply. Without citing the case, they argue for the standard announced in *United States v. Dominguez Benitez*: appellant "must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. 74, 83 (2004) (Gov't Br. 27) ("In this case, any error in the guilty plea process was harmless because there is nothing in the record to suggest that, even if the larceny specification alleged a

different 'person,' appellant would have pleaded not guilty."). Yet, a close reading of *Dominguez Benitez* shows why the government's standard should not apply.

That case dealt with a non-constitutional violation of Federal Rule of Criminal Procedure 11 (specifically, a violation of its requirement that a judge advise the defendant he could not withdraw his plea if the court rejected the prosecution's recommended sentence). *Dominguez Benitez,* 542 U.S. at 83 ("[T]he violation claimed was of Rule 11, not of due process."). In fact, the Court explicitly "contrast[ed]" cases involving "the constitutional question whether a defendant's guilty plea was knowing and voluntary." *Id.* at 84 n.10. The Supreme Court stressed it was not suggesting that such pleas could "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id*. However, the opinion did not elaborate on whether or how to assess prejudice for these constitutional errors.

Thankfully, this court has a standard for assessing forfeited constitutional errors like appellant's: "[w]here the error is constitutional, *Chapman* directs that the government must show that the error was harmless beyond a reasonable doubt to obviate a finding of prejudice." *Tovarchavez*, 78 M.J. at 462. This court should apply that standard here.

B. By accepting appellant's guilty plea, the military judge committed two constitutional errors.

i. The military judge abused his discretion by accepting appellant's guilty plea, which was not voluntary, knowing, and intelligent.

A guilty plea is valid only if done voluntarily, knowingly, and intelligently. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). "Where a plea is not knowing and voluntary, 'it has been obtained in violation of due process and is therefore void.'" *United States v. Perron*, 58 M.J. 78, 81 (C.A.A.F. 2003) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). A plea is not intelligent "unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Moreover, "'because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.'" *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (quoting *McCarthy*, 394 U.S. at 466). Put differently, a plea may be rendered involuntary if the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976).

Neither appellant, his defense counsel, the trial counsel, nor the military judge realized the amended specification failed to state an offense. Thus, appellant's guilty plea to that facially deficient specification was not voluntary, knowing, and intelligent. *Bousley*, 523 U.S. at 618-619 ("[P]etitioner contends that

the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. Were this contention proven, petitioner's plea would be . . . constitutionally invalid."); *United States v. Ochoa-Gonzalez*, 598 F.3d 1033, 1037-38 (8th Cir. 2010) (applying plain error review and finding appellant's guilty plea was constitutionally invalid as it was not intelligently made. Neither appellant, her counsel, the government, nor the court understood the crime's essential elements.).

Unless the government can show this error was harmless beyond a reasonable doubt, this specification and charge should be set aside and dismissed.

ii. The military judge abused his discretion by accepting appellant's guilty plea to a specification that failed to state an offense.

"If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt." *United States v. Turner*, 79 M.J. 401, 403-04 (C.A.A.F. 2020) (citing *United States v. Humphries*, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012)).

This specification fails to state an offense for two reasons: (1) as charged, the specification did not criminalize appellant's conduct under any Article 121, larceny theory; and (2) even if such a theory existed, it required an agency relationship between appellant and the GSA and there was none. (Appellant's Br. 12-24). Even under the maximum liberality standard, there is a "'clear showing of

substantial prejudice to the accused'" because this specification is "'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986) (quoting *United States v. Thompson*, 356 F.2d 216, 226 (2nd Cir. 1965), *cert. denied*, 384 U.S. 964 (1966)).

Therefore, the military judge abused his discretion in accepting appellant's guilty plea to this constitutionally deficient specification and charge, and they should be set aside and dismissed.

Conclusion

Article 45(c) was drafted to prevent guilty pleas from being "overturned for minor or technical violations of Article 45(a) that amount to harmless error." Military Justice Review Grp., *Report of the Military Justice Review Group Part I: UCMJ Recommendations* 399 (Military Justice Review Group 2015). This case does not involve a minor or technical violation. The military judge did not skip some nicety in the *Care* inquiry. *United States v. Care*, 18 U.S.M.A. 535, 40 C.M.R. 247 (1969). At bottom, this case is about whether appellant's guilty plea to a specification that fails to state an offense—a specification the government insisted on amending the day of trial—may stand.

Clearly, it cannot. Nor can the government be allowed to warp and expand Article 121 to rescue its poor charging decision. This court must police "the

perimeter of Article 121" and not affirm this specification because as charged it "would not have been punished under any of the three predicate offenses." *United States v. Antonelli*, 35 M.J. 122, 126 (C.M.A. 1992).

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

David D. Hamstra
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(571) 408-9343
USCAAF Bar No. 37394

Christian E. DeLuke
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 36414

Angela D. Swilley
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar Number 36437

Michael C. Friess
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar Number 33185

CERTIFICATE OF COMPLIANCE WITH RULE 24(D)

This reply brief complies with the type-volume limitation of Rule 24(c) because it contains 2,947 words. It also 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.

David D. Hamstra
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(571) 408-9343
USCAAF Bar No. 37224

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing 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 February 10, 2021.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736