IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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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 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, at Fort Lee, Virginia, a military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of one specification of

violating a general order and one specification of larceny, in violation of Articles 92 and 121, UCMJ, 10 U.S.C. §§ 892 and 921 (2018). (JA 063). The military judge sentenced appellant to reduction to the grade of E-4, confinement for thirty days, and a bad-conduct discharge. (JA 095). On 14 August 2019, the convening authority approved the sentence as adjudged. (JA 070). The Army Court affirmed the findings and sentence in this case on 25 August 2020. (JA 003).

Statement of Facts

The General Services Administration [GSA] is a federal agency that provides services and products across federal agencies. (JA 074). Army units lease vehicles from GSA at a "flat rate." (JA 074). The GSA issues a corresponding GSA card with each leased vehicle, and the card can be used to purchase fuel and necessary maintenance. (JA 074).

Appellant was a trained and authorized GSA fuel card user. (JA 025). During his time as a GSA card user, appellant made multiple authorized fuel purchases. (JA 027). As part of his duties, appellant was also authorized to issue or assign GSA vehicles and their respective fuel cards to other soldiers. (JA 027–28). Appellant's position in this respect was not unique and several other soldiers in his unit shared that authority. (JA 028).

Between January and August 2018, appellant used the GSA fuel card to unlawfully acquire fuel for his personal vehicle. (JA 074–076). Appellant swiped

a GSA card in the fuel pumps and entered the required card information. (JA 029). In April 2018, GSA's Office of the Inspector General (OIG) initiated an investigation after noticing anomalies in the reports for GSA vehicles leased to appellant's unit at Fort Lee, Virginia. (JA 074). As part of the investigation, OIG agents obtained receipts of the unauthorized fuel purchase transactions and video surveillance footage of appellant's fuel theft. (JA 075). In August 2018, after he was confronted with screenshots of the video surveillance footage, appellant admitted he was the person in the video, and he had fueled his personal vehicle using the GSA fuel card in Virginia and South Carolina. (JA 075).

The government initially preferred 78 specifications of larceny against appellant. (JA 007-016). To limit his punitive exposure, appellant offered to plead guilty in exchange for dismissal of numerous specifications. (JA 078–80). Appellant's plea agreement required him to reimburse GSA upon direction. (JA 079). Apart from the quantum, appellant's agreement to plead guilty contained no conditions. (JA 078-80). The amended larceny specification contained within the plea agreement included a handwritten change whereby the word "money" was struck through and the word "fuel" substituted in its place. (JA 078).

In the stipulation of fact, appellant admitted that "purchase of fuel with a GSA fuel card required GSA to pay the cost of the fuel to the vendor," that "he had the intent to permanently deprive the [GSA] of the fuel," and "that at no time did

he have authorization to spend GSA funds to purchase fuel for his personal vehicle." (JA 076). Appellant further stipulated "[a]lthough the GSA viewed the transactions at issue in this case as unauthorized, the GSA made full payment to all of the merchants." (JA 074). The appellant told the military judge during his providence inquiry, "the payment to the merchant comes direct from GSA and they pay the merchant directly." (JA 032).

During the providence inquiry, the military judge discussed the elements of larceny of fuel from the GSA and specifically defined the term "owner" as "any person, or entity who at the time of the obtaining or taking has a greater right to possession than you did in light of all the conflicting interests. Property belongs to a person or entity having a greater right to possession than you." (JA 022–23).

Appellant admitted that by inputting the code associated with the card and the corresponding government vehicle's mileage but then putting the gasoline in his personal vehicle rather than the associated GSA vehicle, he stole gasoline belonging to the GSA. (JA 034). Appellant admitted that, "whatever [he] purchased with the fuel card, the GSA would personally own that." (JA 033),

The military judge and appellant discussed the terms of appellant's pretrial agreement, the changes to the amended larceny charge, and the accompanying stipulation of fact. (JA 050). The military judge asked appellant if he had a chance to discuss with his defense counsel the amended specification, which

alleged appellant had stolen "money" rather than "fuel," and he answered that he had. (JA 050).

Standard of Review

This court reviews the military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Murphy,* 74 M.J. 302, 305 (C.A.A.F. 2015) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). A variance from the plea requirements set forth in Article 45, UCMJ (2019), "is harmless error if the variance does not materially prejudice the substantial rights of the accused." Article 45(c), UCMJ (2019).

Summary of Argument

Appellant's theft is not a usual credit card obtaining-by-false-pretenses case because of GSA's financial arrangement to reimburse vendors for all gas purchased with the GSA card. (JA 076). Because the GSA pays for all fuel acquired with the GSA card, the GSA owned the fuel appellant illegally put in his personal vehicle. Therefore, the government was not required to charge appellant with stealing fuel from the merchant gas stations, and the military judge properly accepted appellant's plea of guilty for larceny.

The law and the record also support the providence and legal sufficiency of appellant's plea when analyzed as a taking-type larceny.

Finally, under the newly-enacted Article 45, UCMJ (2019), in effect at the time of appellant's guilty plea, even if the military judge erred when he accepted appellant's guilty plea, the error was harmless because it did not materially prejudice appellant's substantial rights.

Law

When an accused enters a plea of guilty, a military judge must inquire into the facts of his plea to determine whether the plea is made knowingly and voluntarily. *United States v. Jones*, 34 M.J. 270, 272 (C.A.A.F. 1992). A plea is provident where an accused admits to the facts that established the charges, believes he is guilty, and there are no inconsistencies between the facts and the pleas. *Id.* (citation omitted).

Generally, "an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the pleas and the accused's statements or other evidence in the record." [1] *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)). Accordingly, a military judge does not commit reversible error, "if it is clear from the entire record that the accused knew the elements, admitted them

[1] The recently amended Article 45(c), UCMJ (2019), affects the standard required for reversal. This is discussed below in Section II of this brief.

freely, and pleaded guilty because he was guilty." *Jones*, 34 M.J. at 272 (citation omitted).

Article 121, UCMJ, prohibits the wrongful taking, obtaining, or withholding, "from the possession of the owner or of any other person" any money or article of value with the intent to permanently deprive. Article 121, UCMJ. A conviction under Article 121, UCMJ, "does not turn on identifying the 'victims,' 'impact,' and 'loss' as those terms are commonly used and employed. Rather, it requires, inter alia, that an appellant steal something *from* a person who owns it or has a greater possessory interest in it than the appellant." *United States v. Williams*, 75 M.J. 129, 130 (C.A.A.F. 2017) (emphasis in original) (citations omitted). "A general owner of property is a person who has title to it, whether or not that person has possession of it." *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*, 2016], pt. IV, ¶ 46.c.(1)(c)(iii).

A conviction for larceny is legally insufficient if the defendant did not steal from the person the government names in the larceny specification. *Williams*, 75 M.J. at 134 (citation omitted); *but cf. United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) ("[w]hether someone is an owner or any other person is a matter of proof which an accused may contest at trial. By pleading guilty, appellant knowingly waived a trial of the facts as to that issue [. . .] Because Faircloth

pleaded guilty, the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence.") (internal citations and marks omitted).

In a usual case of wrongful "credit, debit, or electronic transaction," an accused will be charged with "a larceny of those goods from the merchant offering them." *MCM*, 2016, pt. IV, ¶ 46.c.(1)(i)(vi). Larceny of money or a negotiable instrument "is usually a larceny of money from the entity presenting the money or negotiable instrument." *MCM*, 2016, pt. IV, ¶ 46.c.(1)(i)(vi). "In the usual case of a credit card or debit card larceny, the 'person' who should be alleged in the specification is a person from whom something is *obtained*, whether it is goods or money." *Williams*, 75 M.J. at 132 (emphasis in original) (citing *United States v. Lubasky*, 68 M.J. 260, 263 (C.A.A.F. 2010) (citation omitted)). *See also Simpson* 283 ("in the *usual case* involving a credit larceny, the bank was the proper object, not the account holder") (emphasis in original); 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 [Owens-Filice] ("[T]he account holder has neither title to nor possession of the money in his or her debit account ... [therefore] the account holder cannot be the 'owner' in a credit or debit card larceny case.") (JA 087).

This Court has "repeated that the general rule in such a case is that the money or goods are wrongfully obtained from the merchant or bank." *United*

States v. Simpson, 77 M.J. 279, 283 (C.A.A.F. 2018). However, "[a]lternative 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 (citation omitted).

Argument

I. The military judge did not abuse his discretion when he accepted appellant's plea of guilty to larceny.

A. Appellant's theft of gas from the GSA was not a usual case of obtaining by false pretenses theft via credit card or electronic transaction.

Appellant's emphasis on the law of agency is misplaced. (Appellant's Br. 16–24). This case is "unusual" and allowed for an alternative charging theory for a more straightforward reason: unlike most cardholders, the GSA "was an appropriate person to allege in the larceny specification because it was an entity from whom the appellant wrongfully obtained goods or money." *Williams*, 75 M.J. at 134. GSA was the appropriate "person" to allege because GSA had "a greater possessory interest [in the stolen goods] than the appellant." *Id.* at 130 (citations omitted). Because GSA was an entity with a superior possessory interest in the fuel, and appellant wrongfully obtained and consumed that same fuel, an alternative charging theory was appropriate in this case. *See Williams* 75 M.J. at 132 ("Alternative charging theories are also available, as long as the accused

wrongfully obtained goods or money from someone with a superior possessory interest.") (citation and markings omitted).

In a "usual" case, a cardholder is not the appropriate person to allege in a larceny specification because it is the card *issuer's* money that passes to the merchant that in turn transfers its goods; the usual credit card or account holder has a possessory interest in neither the money nor the goods impacted by the thief's actions. *See Williams*, 75 M.J. at 134 ("The account holders here did not own either the goods or the bank funds available to satisfy the debit card purchases.").

But appellant's case fits comfortably within the "unusual" category. The record shows appellant's wrongful use of the GSA card caused GSA itself to spend its own money, rather than inducing a card-issuing bank to pay the merchants. (JA 033, 074, 076). The GSA had a greater possessory interest in the fuel than appellant because, as appellant admitted, "whatever [he] purchased with the fuel card, the GSA would personally own that," (JA 033), and appellant further admitted the "purchase of fuel with a GSA fuel card *required* GSA to pay the cost of the fuel to the vendor." (JA 076) (emphasis added). This case was investigated by GSA, not by the Army or local law enforcement. (JA 074). This is further support for the fact that the GSA was the entity from whom appellant stole.

Even assuming for the moment that appellant was not an agent of GSA, and that GSA or its agents therefore never had physical possession of the fuel—the

inquiry turns on "greater possessory interest" rather than actual possession. *See Williams*, 75 M.J. at 132 (citing *MCM*, 2012 Analysis of Punitive Articles app. 23 at A23-17). *See also id.* at 134 (describing goods wrongfully obtained with a government card as "belong[ing] to the Air Force") (citing *United States v. Cimball Sharpton*, 73 M.J. 299, 300 (C.A.A.F. 2016)). *See also United States v. Ragins*, 11 M.J. 42 (C.M.A. 1981) (commissary had superior possessory interest in the goods appellant wrongfully caused it to purchase, even though it never had actual possession of the goods due to larceny scheme).

Appellant's brief repeatedly references GSA's lack of physical possession of the stolen fuel, yet fails to address GSA's possessory *interest* in the fuel. (App. Br. 2, 3, 12, 23, 24). But "the elemental requirement [is] that the accused wrongfully obtain money or goods . . . *from* a person or entity with a superior *possessory interest*." *Williams*, 75 M.J. at 132 (second emphasis added). Appellant's argument assumes the physical possessor immediately prior to the theft is what matters, when in fact the question is: who is the owner or entity with the greater possessory *interest*. *See MCM*, 2012, Analysis of Punitive Articles app. 23 at A23-17 ("The key under Article 121 is that the accused wrongfully obtained goods or money from a person or entity with a superior possessory interest."); *see also Williams*, 75 M.J. at 132. Here the GSA's funds were used to buy fuel and the GSA therefore owned the fuel purchased.

The statute states that a larceny is committed when a thief takes "from the possession of the owner *or of any other person*." Article 121(a), UCMJ. The "any other person" in the first element is satisfied by any entity "other than the accused" that had "possession or a greater right to possession" at the time of the theft. *MCM*, 2016, pt. IV, ¶ 46.c.(1)(c)(iii). The first element thus requires a factual depiction of the means by which appellant came into possession of the stolen property.

The second element, however, identifies the person *from whom* a thief steals by specifying to whom the stolen property "belonged." *MCM*, 2016, pt. IV, ¶ 46.b.(1)(b). The "person" in the second element can be "any owner of [the] property." *MCM*, 2016, pt. IV, ¶ 46.c.(1)(c)(iv). In this case, the owner of the property, the entity to whom the fuel belonged at the moment of the theft, and who held a superior possessory interest, was GSA. (JA 033, 076). Therefore GSA was the "person" satisfying "the elemental requirement that the accused wrongfully obtain money or goods ... *from* a person or entity with a superior possessory interest." *Williams*, 75 M.J. at 132.

In conclusion, because GSA was an entity with a superior possessory interest in the gas than appellant, and appellant wrongfully obtained that same gas, the charging theory under which appellant pleaded and was found guilty was appropriate in this case. *See Williams*, 75 M.J. at 132. This case can be decided on

these grounds alone. Therefore, the military judge did not abuse his discretion when he accepted appellant's guilty plea.

B. Agents, joint accounts, and contracts: indicia of the unusual.

In contrast to usual cases of larceny via credit card, unusual cases may involve such complicating factors as agency relationships, joint accounts, and contracts—factors that suggest a given case may support alternative charging theories. *See Williams*, 75 M.J. at 134 (listing examples of factors that can make a larceny by credit card an "unusual"). If this Court's analysis in this case turns on the presence of such complexities in the record, this case provides them in spades.

While appellant's brief is laser-focused on the question of agency, appellant is unable to cite any case for the proposition that an alternative charging theory lives or dies by the existence of a principal-agent relationship. Rather, any facts tending to show from whom the goods or money were stolen are relevant to the analysis. *See Williams*, 75 M.J. at 132 ("The relevant question in determining the person to name in a larceny specification is *whom* did the accused steal the goods or money *from*?") (emphasis in original). *See also Simpson*, 77 M.J. at 284 (in order for military judge's acceptance of appellant's guilty plea to be proper, "the stipulation and charge sheet should have reflected that or the military judge should have inquired further to flesh out *any basis* for an alternative charging theory") (emphasis added).

Importantly in this case, the GSA had an arrangement to reimburse the merchants directly and was "required" to pay the cost of all fuel purchased with the card. (JA 032, 076). Not only was such an arrangement in place, but the record reflects that GSA did in fact pay the merchants regardless of appellant's unauthorized use of the card. (JA 074). These facts are directly analogous to one of the key facts this Court looked to in *Cimball Sharpton* when determining that an alternate charging theory was appropriate, and later ratified in *Williams*. *See Cimball Sharpton*, 73 M.J. at 301; *Williams*, 75 M.J. at 134 ("[I]t was the Air Force's agreement with U.S. Bank that it would pay all charges that raised the issue of whether the appellant's actions could also be theft from the Air Force [. . .] any wrongful use of the [government card] by the appellant would wrongfully induce payment by the Air Force."). This case presents an almost identical assignment of pecuniary liability for all purchases to GSA, in which any "purchase of fuel with a GSA fuel card required GSA to pay the cost of the fuel to the vendor." (JA 076).

The GSA manifested its assent for the Army to act on its behalf in its use of the GSA fuel card by assigning fuel cards to the Army. (JA 074). As an employee of the Army, appellant's agency was derived from his employer's relationship with GSA regarding the cards. As an authorized user of the GSA card and by virtue of his training and official duties, appellant was therefore also an agent of the GSA.

Unlike the vehicle leases, in which the Army paid a "flat rate" to GSA, the cost of fuel purchased with the card was paid directly by GSA to the fuel vendors. (JA074, JA076). This card user relationship therefore created a direct pecuniary connection between appellant and the GSA, one contemplated in the arrangement between GSA and the Army.

Certainly, when appellant filled his personal vehicle with the GSA's gas, he acted outside the scope of his authority. *See Williams*, 75 M.J. at 133 ("while aware of the limits on her authority, [Cimball Sharpton] exceeded that authority and misused the GPC to purchase items for herself."). But that means only that he was an agent that stole from his principal; it does not mean that he was not an agent. *See id.* (finding an "agency agreement" existed between Cimball Sharpton and the Air Force). But appellant need not be considered an agent in a technical sense because that is not required by the case law. Appellant's position of trust created apparent authority, which, from the merchant's perspective is all that is required to accept the GSA card's use, triggering GSA's obligation to pay the vendors. (JA 029, 033, 076). *See Cimball Sharpton*, 72 M.J. at 781.

Appellant was trained to use the GSA card, and was entrusted to use it as needed for official purposes. (JA 024). Because of his position of trust and access to the GSA card, appellant was able to cause the GSA to purchase fuel that he then stole by putting it into his personal vehicle and consuming it for unofficial travel.

See United States v. Leslie, 13 M.J. 170, 172 (C.M.A. 1982) ("none of the money in question would have come into [the thief's] hands had he not been serving the United States as a postal clerk at the time.").

Of note, appellant's position as an authorized *government card* user distinguishes him from all of the recent appellants in cases this Court determined were usual cases.[2] *See Williams*, 75 MJ. at 130; *Simpson*, 77 M.J. at 282; *United States v. Endsley*, 74 M.J. 216(C.A.A.F. 2015) (summary disposition); *United States v. Gaskill*, 73 M.J. 207 (C.A.A.F. 2014) (per curiam) (summary disposition).

Finally, the specification to which this appellant pleaded guilty follows *more closely* the guidance in *Williams* than did the charging language in *Cimball Sharpton*. In *Cimball Sharpton*, the government charged appellant with stealing *money* from the Air Force when she used her government card to purchase personal items. *Cimball Sharpton*, 73 M.J. at 300. While this Court found that

[2] Viewed from a broader perspective, when a government employee uses a government-issued credit card, the web of obligations and liability will often (if not always) tend to make for an "unusual" case of larceny by credit card. This is because the government represents an additional (and atypical) entity in the transaction's flow of money. For instance the GSA was in some sense a card *issuer* as well as the cardholder. The record reflects the GSA "issued a fuel card" to the Army (and therefore the Army's agent, appellant). (JA 074). In *Williams*, this Court similarly described the Air Force as having "issued the appellant [in *Cimball Sharpton*] a General Purchase Card." *Williams*, 75 M.J. at 133. GSA's arrangement to reimburse vendors is also similar to the common federal government self-insuring approach.

charging theory to be legally sufficient, it counseled that "it seems the better charging theory would have been that she stole the *particular items* by exceeding her actual authority and keeping the items that were in effect purchased by the Air Force for herself." *Williams*, 75 M.J. at 134, n.6 (emphasis added). The parties in this case followed that guidance: appellant pleaded guilty to stealing a particular item (gas) that was purchased by the GSA. (JA 020–21). Therefore, the military judge acted within his discretion in accepting appellant's guilty plea.

This case was not the usual case of larceny-via-credit card. Therefore, an alternative charging theory was appropriate, and the military judge did not abuse his discretion in accepting appellant's plea of guilty.

C. Appellant's theft may also properly be viewed as larceny by taking, rather than obtaining by false pretenses.

The amended specification to which appellant pleaded guilty is also properly understood as a simple case of larceny-by-taking. While the mode of the taking involved an electronic card, the gravamen of the offense was that appellant pumped GSA-owned fuel directly into his personal vehicle and carried it away, which constituted an unlawful taking.

Although the Manual for Courts-Martial states "[w]rongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense," *MCM*, 2016, pt. IV, ¶ 46.c.(1)(i)(6), this language is not strictly prescriptive. *See MCM*, 2012, Analysis of Punitive Articles app. 23

at A23-17 (describing the passage: "[*MCM*, 2012, ¶ 46] Subparagraph c(1)(h)(vi) is new.[3] The language was added to provide *guidance* on how unauthorized credit, debit, or electronic transactions should *usually* be charged.") (emphasis added). The reference to "usual" cases and the characterization of the subsection as a "consideration" allows for flexibility depending on the facts in a given case. In other words, an unusual case does not allow only for an alternative theory of obtaining-type larceny, it also allows for an alternative theory of taking-type or withholding-type larceny. The cautions articulated in the *MCM* are not bright line rules for *all* theft cases that involve electronic transactions because "[a]lternative charging theories are also available," as long as "the accused wrongfully obtained goods or money" from someone "with a superior possessory interest." *Williams* at 132 (citing *MCM*, 2012, Analysis of Punitive Articles app. 23 at A23-17).

Conversely, reading the phrase "is an obtaining-type larceny" prescriptively places it in tension with Article 121, UCMJ's general applicability to all manner of thefts. The statute Article 121, UCMJ, prohibits taking, obtaining, or withholding property from the owner "by any means." Article 121, UCMJ is intended "to consolidate the various means of stealing — by larceny, false pretense, and embezzlement — under the single rubric of 'larceny.'" *Williams*, 75 M.J. at 131-132. "[T]he particular means of acquisition of the property [remains] relatively

[3] The equivalent of *MCM*, 2016, pt. IV, ¶ 46.c.(1)(i)(6).

unimportant" because the relevant question is "*whom* did the accused steal the goods or money *from*?" *Id.* at 133 (emphasis in original); *MCM*, 2016, pt. IV, ¶ 46.c.(1).(a) ("Any of the various types of larceny under Article 121 may be charged and proved under a specification alleging that the accused "did steal" the property in question."). *See also United States v. Antonelli*, 35 M.J. 122, 126 (C.A.A.F. 1992) (the traditional larceny types form the "outer boundaries of Article 121").

In harmony with that understanding, this Court recognized the difference (compared with a usual case) presented by *Cimball Sharpton*, where an appellant *took* goods that were both *paid for* and *owned by* the Air Force. *Cf. Williams*, 75 M.J. at 134, n.6 ("it seems the better charging theory would have been that she stole the particular items by exceeding her actual authority and keeping the items that were in effect purchased by the Air Force for herself."). In cases where the money *and* the goods in question belong *to the same entity*, the charging theories available can reasonably include both taking-type and obtaining-type theories.[4]

[4] Appellant's taking is legally equivalent to a case in which a thief had pulled his car up to a GSA-owned fuel tank for which he possessed a key or code, unlocked the pump, and taken the fuel for his own use without authorization. The fact that in this case appellant used a GSA card, rather than a GSA key or code, as his means to steal GSA gas is merely incidental and does not preclude such a taking-type larceny theory in this case.

Appellant's guilty plea is legally sufficient as a taking-type larceny, and therefore the military judge did not abuse his discretion in accepting appellant's guilty plea.

D. The stipulation of fact and appellant's colloquy with the military judge formed a sufficient factual basis to support appellant's guilty plea.

In contrast to the appellants in *Lubasky* and *Cimball Sharpton*, this appellant pleaded guilty to larceny. The facts in the record formed a sufficient basis for this military judge to accept appellant's plea of guilty. *See Inabinette*, 66 M.J. at 322 ("facts are by definition undeveloped in [guilty pleas]"). The stipulation of fact states that "the fuel [he stole] was the property of the [GSA]." (JA076). Appellant admitted to the military judge "whatever [he] purchased with the fuel card, the GSA would personally own that." (JA 033). The record reflects a background arrangement in which the GSA was required to pay vendors for all fuel purchased with the GSA card, and stated that in this case the GSA actually did pay for the stolen fuel. (JA 0076).

Because this was a guilty plea and appellant stipulated to the key facts, the government did not need to call a GSA fuel program employee to testify in detail about the flow of money and the underlying arrangements the GSA card program has in place with vendors or banks. *See Inabinette*, 66 M.J. at 322 (military judges are given broad discretion in accepting guilty pleas "because facts are by definition undeveloped in such cases").

The military judge's questions to appellant and the stipulation of fact in this case stand in stark contrast with, for example, those of *United States v. Simpson*. In *Simpson*, this Court held that where a military judge accepts a guilty plea to larceny charged under an alternate theory without adequate factual and legal basis, the military judge abused his discretion. 77 M.J. at 284. In concluding that the military judge in *Simpson* "failed to obtain from the accused an adequate basis in law and fact to support the plea of guilty to the larceny specification as charged," this Court pointed to the inadequacy of "the stipulation and charge sheet" and stated that "the military judge should have inquired further to flesh out any basis for an alternative charging theory." *Id.* at 284. But here, the charge sheet, stipulation, and the military judge's colloquy with appellant were consistent with each other and sufficiently supported appellant's plea of guilty and the military judge's decision to accept appellant's plea.

For the military judge to have erred in accepting appellant's guilty plea, either the facts adduced must have been insufficient in forming a factual basis for providence, or the military judge made a legal error because, as a matter of law, GSA could not have owned the fuel. *See Murphy*, 74 M.J. at 305 (this Court reviews the military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo).

Appellant argues the military judge failed to sufficiently develop the factual record. (Appellant's Br. 24–26). But in *Faircloth*, in determining there was no factual or legal basis to overturn that appellant's guilty plea, this Court explained:

> "[w]hether someone is an 'owner' or 'any other person' is a matter of proof which an accused may contest at trial. By pleading guilty, appellant knowingly waived a trial of the facts as to that issue. [. . .] Because Faircloth pleaded guilty, the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence."

Faircloth, 45 M.J. at 174 (internal citations and some marks omitted). *See also* Rule for Courts-Martial 910(j) (guilty plea waives objections related to the factual nature of guilt).

Appellant cannot ask this Court to speculate as to the existence of more favorable facts. *See Faircloth*, 45 M.J. at 174 ("We also will not speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas."). Appellant stipulated to the essential fact: GSA owned the fuel that he stole—an unremarkable conclusion given that its funds were used to obtain the good from a merchant. If appellant wanted to contest this fact, or require the government to more fully develop the record, he should not have pleaded guilty or stipulated to facts he now finds inconvenient. *See Faircloth*, 45 M.J. at 174.

As to the second possibility—whether there could have been an error as a matter of law as to the possessory interest in the stolen fuel—this Court has approached such a question in a fact-sensitive manner in previous cases. In

Simpson, this Court explained (discussing *Williams*, a guilty plea) that "as a matter of law the [stolen] money was owned by the bank," rather than the cardholder. *Simpson*, 77 M.J. at 283. And for similar reasons this Court determined the thief's admission to having stolen money from the wrong entity in *Simpson* made his admission regarding the ownership of stolen property "clearly erroneous as a matter of law." *Id.* at 283.

In *Simpson* and *Williams*, such findings of law were restatements of the well-established principle that banks, not account holders, have title to the money in an account. (JA087). That, however, is categorically different from determining ownership or possessory interest in the specific quantities of stolen *fuel* at issue in this case, which necessarily turns on case-specific facts, not general legal principles regarding financial transactions. [5]

For this case, the more fitting lens is that used by this Court when it viewed a similar claim in *United States v. Faircloth*. In *Faircloth*, this Court found that, "As a matter of law, it was *possible* for FMCC [the "person" alleged in the specification] to have a superior possessory interest in the proceeds. As a matter of fact, Faircloth admitted that FMCC had a superior possessory interest." 45 M.J. at

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[5] It should be noted that the Army does not reimburse GSA for the fuel purchased with the GSA card. Instead, the Army, as lessee of the vehicle pays a flat rate to GSA for the lease. (JA 074). Accordingly, the fuel is appropriately viewed as a consumable resource provided by GSA as part of the lease agreement.

174 (emphasis added). As in *Faircloth*, because this Court can find that as a matter law it was *possible* for GSA to own the fuel, and because as a matter of fact appellant admitted GSA's ownership, there is "no legal or factual basis on which to overturn" appellant's plea. *Id.*

Therefore, the military judge did not abuse his discretion in accepting appellant's guilty plea, and this Court should affirm the findings.

II. Even if the military judge erred in accepting appellant's guilty plea, any such error was harmless error because it did not materially prejudice the substantial rights of the accused.

Congress recently amended Article 45, UCMJ, by adding subsection (c), which states, "variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused." Military Justice Act of 2016, Pub. L. No. 114-328, § 5227 (2016). One of the "major legislative proposals" contained in the Report of Military Justice Review Group (22 December 2015) [Report] was to establish "harmless error standards of review for guilty pleas similar to those applied by the federal civilian courts of appeal." Report at 6, 8. Congress adopted the exact language proposed in the Report. *Compare* Article 45(c), UCMJ, *with* Report at 400. The amendment to Article 45 was meant to "encourage error correction at the trial stage and would make no change to the responsibilities of the military judge under Article 45(a) [. .

.] [t]he changes seek to eliminate the sanction of reversal for harmless errors." (Report at 401).

The addition of subsection (c) to Article 45, UCMJ, therefore requires a finding that any irregularity actually prejudice an appellant's substantial rights before his plea should be found improvident. *Compare United States v. Negron*, 60 M.J. 136, 143–144 (C.A.A.F. 2004) ("the normal remedy for finding a plea improvident is to set aside the finding based upon the improvident plea of guilty and to authorize a rehearing at which the accused is permitted to plead anew."), *with* Article 45(c), UCMJ ("variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused."), *and* Report at 401 ("The changes [to Article 45] seek to eliminate the sanction of reversal for harmless errors."). *See also United States v. Hunter*, 65 M.J. 399, 403 (C.A.A.F. 2008) (Appellate courts "will reject the providency of a plea only where the appellant demonstrates a material prejudice to a substantial right," but noting that "[n]ot every error constitutes a material prejudice to a substantial right warranting relief under Article 59(a), UCMJ.") (citations and marks omitted). In contrast to the previous standard of "substantial conflict between pleas" and evidence, Article 45(c), UCMJ, considers whether material prejudice to substantial rights occurred. *Compare Shaw*, 64 M.J. at 462, (discussing the "substantial conflict" standard), *with* Article 45(c), UCMJ.

The addition of the harmless error standard to Article 45, UCMJ, also brings it in harmony with the simultaneously-revised Rule for Courts-Martial 905, which requires any objections to "based on defects in the charges and specifications" to be made prior to the entry of pleas, or else be forfeited. Rule for Courts-Martial 905(b)(2) and (e)(1). The amendments to Article 45, UCMJ, "fit within the larger goal of encouraging error correction at the trial stage." Report at 401. Forfeited objections are subject to plain error analysis, which considers whether an error resulted "in material prejudice to [an appellant's] substantial rights." *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017).

This Court has held (in the context of Article 59, UCMJ) that "material prejudice" is to be understood "by reference to the nature of the violated right." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019). For example, in *United States v. Hunter*, this Court concluded that an appellant "was not entitled to relief because he failed to establish the material prejudice to a substantial right required under Article 59(a), UCMJ," even where "the military judge legally erred in failing to explain the pretrial misconduct provision to Appellant prior to accepting his guilty plea." *Hunter*, 65 M.J. at 403 (citation omitted).

The relevant inquiry is: had the specification stated "money" instead of "gas," would appellant's plea have been different? Because it would not, he has suffered no prejudice and thus his plea should not be disrupted. *Cf. United States*

v. Riley, 72 M.J. 115, 124 (C.A.A.F. 2013) (Stucky, J., dissenting) ("Appellant has not demonstrated material prejudice under the circumstances of this case. She has not shown that, if she had been properly advised [by the military judge and defense counsel] of the consequences of pleading guilty, it would have been rational for her not to do so."); *United States v. Simpson,* 17 C.M.A. 44, 47, 37 C.M.R. 308, 311 (1967) (stating that there was no prejudice when there was nothing in the record that suggested accused would have changed their plea, but for the error).

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. To the contrary, the thrust of appellant's claim on appeal is that he did steal the fuel in question, just not from the entity he pleaded guilty to stealing the fuel from. But larceny is a crime against property, not persons. *See United States v. Calhoun*, 5 U.S.C.M.A. 428, 431 (C.M.A. 1955); *see also* Owens-Filice at 10 (JA088). There was no question of a notice issue in this case, and appellant suffered no fundamental injustice, no denial of constitutional rights, and his court-martial suffered from no structural or jurisdictional defects.

The evidence against appellant was overwhelming; he was caught on camera using the GSA card to fill his personal car with fuel and subsequently admitted his crime to GSA investigators. (JA 074). Had the military judge or appellant

identified his now-asserted error prior to the military judge accepting his plea, the only change in the outcome would have been another edit to the language of the specification to which he pleaded guilty. Appellant had the benefit of an agreement and a sentence cap. (JA 078). He bargained for and had the benefit of his plea: the government dismissed 78 specifications of larceny in exchange for appellant pleading guilty to one specification. (JA 079). Appellant knowingly admitted that the fuel belonged to GSA. (JA 033, 076). Appellant knew the nature and gravamen of the offense to which he pleaded, and he knew the precise property that he pleaded guilty to stealing as evidenced by his colloquy regarding the manner, times, and locations of his theft. (JA 029–040).

Therefore, even if this Court determines that the military judge erred in accepting appellant's guilty plea because it determines that, either as a matter of law or lack of factual basis, GSA was not the person from whom appellant stole, appellant has not suffered material prejudice to his material rights because he cannot reasonably show that he would have pleaded not guilty but for the error. *See* Article 45(c), UCMJ. *Cf. United States v. Ginn*, 47 M.J. 236, 247 (C.A.A.F. 1997) ("[T]he determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea.").

The new version of Article 45(c) is intended to make it more difficult for an accused to benefit from a technically flawed larceny specification, but one that still justly captures the gravamen of his misconduct. *See* Report at 399 (guilty pleas that are otherwise provident "should not be overturned for minor or technical violations of Article 45(a) that amount to harmless error."). Similarly, holding appellants to this standard prevents gamesmanship and invited error in guilty pleas for larceny.

In light of Article 45, UCMJ, if this Court determines that the military judge erred in accepting a guilty plea, this Court should still find that the military judge's error was harmless because it did not materially prejudice the substantial rights of appellant. Appellant knowingly and freely pleaded guilty to stealing gas from GSA. Any errors in his unconditional guilty plea were harmless. Therefore, this Court should affirm the findings.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the service court and deny Appellant's requested relief.

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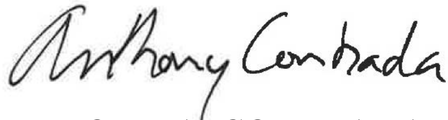
<td>
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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,108 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 25 January 2021 and electronically filed to Defense Appellate on January 25, 2021.

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