# "Where's the Money Lebowski?"[1]—Charging Credit and Debit Card Larcenies Under Article 121, UCMJ

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*This is a very complicated case, Maude. You know, a lotta ins, a lotta outs, a lotta what-have-yous. And, uh, a lotta strands to keep in my head, man. Lotta strands in old Duder's head.*[2]

## I. Introduction

The facts of the case are these: Chief Warrant Officer Four (CW4) Neil S. Lubasky was detailed as Ms. Mary Shirley's Casualty Assistance Officer following the death of her husband.[3] He quickly gained Ms. Shirley's trust. When his official duties ended, he offered to continue assisting Ms. Shirley with her affairs; she was seventy-seven years old.[4] To facilitate his management of her affairs, CW4 Lubasky added himself to Ms. Shirley's debit account and gained possession of her credit cards.[5] He bought her groceries, brought her cash, and paid her bills.[6]

As they say, the opportunity makes the thief.[7] While Ms. Shirley lay in a nursing home, CW4 Lubasky used her credit and debit cards to steal from her.[8] He used her credit card to buy things for himself. He used her debit card to buy merchandise. He withdrew cash from her debit account and obtained cash advances from her credit card accounts.[9] He took vacations with his family and used her accounts to pay for their incidentals—CW4 Lubasky bilked Ms. Shirley of her savings.

When his villainous conduct was discovered,[10] CW4 Lubasky was charged with and convicted of, among other crimes, fourteen specifications of larceny.[11] He was initially sentenced to confinement, total forfeitures, and dismissal;[12] however, that sentence would later be markedly reduced. In every specification, CW4 Lubasky was charged with stealing *money* that was the property of *Ms. Shirley*.[13] Ms. Shirley died before the case reached the U.S. Court of Appeals for the Armed Forces (CAAF). She would never find out that, according to CAAF, it was not actually her money.[14]

Nine years after the trial, CAAF set aside the findings of seven larceny specifications—half of the specifications of which CW4 Lubasky was convicted.[15] The CAAF held that Ms. Shirley did not "own" the property that CW4 Lubasky stole: the bank did.[16] Consequently, CAAF returned the case for a sentence rehearing on the remaining thefts which only amounted to $2,052, a fraction of the approximately $68,000 he was originally convicted of stealing.[17] Thus,

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[1] THE BIG LEBOWSKI (Polygram Filmed Entertainment & Working Title Films 1998).

[2] *Id.*

[3] United States v. Lubasky, 68 M.J. 260, 262 (C.A.A.F. 2010).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] BRAINY QUOTE, http://brainquote.com/quotes/quotes/f/franncisbac148956.html (last visited Nov. 12, 2014) (quote attributed to Francis Bacon).

[8] *Lubasky*, 68 M.J. at 262.

[9] *Id.*

[10] A "fraud alert" service contacted Ms. Shirley, alerting her to the unusual purchases being drawn on her bank account. *Id.* at 263.

[11] Chief Warrant Officer Four (CW4) Lubasky was also convicted of a fifteenth specification of larceny, alleging CW4 Lubasky opened a money market account on Ms. Shirley's behalf, and one specification of conduct unbecoming an officer, alleging CW4 Lubasky dishonorably took out life insurance on Ms. Shirley and named himself as the sole beneficiary. United States v. Lubasky, No. 20020924, 2006 WL 6625281, at *1 (A. Ct. Crim. App. Jan. 31, 2006) (mem. op.). Pursuant to its power to review cases for legal and factual sufficiency, the Army Court of Criminal Appeals set aside the findings of guilty for the money-market larceny specification, *id.* at *3 ("Ms. Shirley denied authorizing appellant to open the money market account. She testified that appellant must have duped her into signing the paperwork necessary to establish the account by covering up the entire document except for the space in which she signed. After examining the membership application and signature card pertaining to the money market account, we have misgivings concerning the feasibility of the actions described by Ms. Shirley . . . . As such, we will set aside the finding of guilty as to [that specification]."), and it also set aside the finding for the conduct unbecoming an officer specification, *id.* at *2 ("Mrs. Shirley admitted that around the same time the insurance policy was purchased, she prepared a holographic will wherein she designated appellant as the trustee of her estate and named him as a beneficiary of certain property. Under these circumstances, and 'recognizing that the trial court saw and heard the witnesses,' UCMJ art. 66(c), we are not persuaded beyond a reasonable doubt that appellant 'wrongfully and dishonorably name[d] himself as the sole beneficiary on a certain insurance policy on the life of Mrs. Mary Shirley.'").

[12] *Id.* at 262.

[13] *Lubasky*, 68 M.J. at 263.

[14] *Id.*

[15] *Id.* at 265.

[16] *Id.* at 263.

[17] *Id.* at 265.

after two sentence rehearings, the convening authority approved a sentence that included minimal confinement and forfeitures—CW4 Lubasky was not dismissed from the service.[18]

If nothing else, *United States v. Lubasky* is a cautionary tale about drafting larceny specifications. But more importantly, *Lubasky* illustrates the difficulty of determining the proper owner, property, and means of larceny committed through the wrongful use of credit cards and debit cards. In order to understand CAAF's conclusion that Ms. Shirley was not the owner of the money stolen through the wrongful use of her credit cards, it is necessary to understand not only the various, technical forms of larceny, but also the legal relationship between a cardholder and his or her bank, and the way in which a credit or debit card transaction is executed.

First, this article provides a factual foundation for understanding a credit or debit card transaction. Part II discusses the processing steps that occur in both a point of sale (POS) transaction and an automated teller machine (ATM) transaction. Additionally, a general overview of the emerging area of virtual currency, e.g., Bitcoin, is provided.

Next, in order to provide a legal background, Part III discusses five primary legal principles that are generally applicable in every credit or debit card larceny. This discussion begins with an overview of the primary theories of larceny applicable in a credit or debit card transaction: false pretenses and embezzlement. Next, the discussion highlights that Article 121, Uniform Code of Military Justice (UCMJ),[19] is designed to only proscribe thefts involving tangible property. From there, it is necessary to understand the relationship between an account holder and his and her financial institution, because this creditor–debtor relationship informs the analysis as to who is in possession of the property that is the object of the larceny. Particularly because of the importance in a larceny case of ascertaining "ownership," this is determined in light of the character of the property, the legal relationship of the parties, and the legal theory of larceny. Part III concludes by highlighting problems that may arise due to the existence of an agency relationship between the thief and the account holder.

Finally, this article critically examines the legal theories available pursuant to the UCMJ[20] for prosecuting and defending against a theft accomplished by wrongfully using a credit or debit card. Part IV discusses the available theories of larceny under Article 121, applying the legal principles previously discussed, that may be employed in a credit or debit card larceny. What is essentially one course of conduct, can give rise to numerous charging options pursuant to Article 121, and each option possesses strengths for the government as well as weaknesses that can be exploited by the defense. In deciding on a particular theory of larceny, trial counsel should consider a variety of factors,[21] each of which will illuminate the merits of charging individual theories of larceny available in a given set of circumstances. Although attention will be given to factors that will inform a discretionary decision of which theory *should* be charged, the primary focus of the discussion in this article is on which theories of larceny are currently legally sufficient under the UCMJ, i.e., which theories *could* be charged. This analysis is important for defense counsel as well, as they should seek to preclude consideration of improper theories of the alleged crime.

## II. The Anatomy of a Credit or Debit Card Transaction

The swipe is just the beginning. In every case, the processing of a credit or debit card transaction involves numerous parties and can take days before it is ultimately completed. In a POS transaction, the customer runs the card through the merchant's card reader. If it is a debit card transaction, then the customer enters his or her personal identification number. In both credit card and debit card transactions, the card reader then sends data to the merchant's bank which requests approval from the cardholder's bank (the card-issuing bank). The card-issuing bank grants approval, and the merchant's bank sends approval to the card reader. The merchant then approves the sale and delivers the goods to the customer.[22]

In credit card transactions, at some point after the sale, the merchant sends a record of transactions to its bank for processing. The merchant's bank then requests payment from the card-issuing bank. Finally, the card-issuing bank transfers money to the merchant's bank, where it is deposited into the merchant's account, less processing fees. In debit card transactions, regional POS or ATM networks determine the net positions of the participating financial institutions, less processing fees, and settle their positions using the Federal Reserve's Automated Clearing House (ACH) network.[23] That completes the POS transaction.

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[18] *See* United States v. Lubasky, No. 20020924, 2011 WL 4701741, at *1 (A. Ct. Crim. App. Sep. 27, 2011) (summ. disp.) ("The convening authority approved only so much of the sentence as provided for confinement for 22 months, forfeiture of $5,811.00 pay per month for 22 months, followed by a forfeiture of $3,835.00 pay per month for 86 months.").

[19] UCMJ art. 121 (2012).

[20] 10 U.S.C. §§ 801–946 (2012).

[21] Those factors include the availability of witnesses and evidence, the admissibility of evidence, simplicity of proof, providing adequate notice to the accused, accurately describing the criminality of the accused's conduct, sentencing considerations, and factual sufficiency on appeal.

[22] THE FED. FIN. INSTS. EXAMINATION COUNCIL, RETAIL PAYMENT SYSTEMS, IT EXAMINATION HANDBOOK (2010), *available at* http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems.aspx.

[23] *Id.*

In an ATM transaction, the bank offering the ATM services[24] requests approval from the card-issuing bank. Once approval is granted, the ATM provides the currency. Similar to a debit card POS transaction, regional ATM networks later determine the net positions of the participating financial institutions, less processing fees, and settle their positions using the ACH network—which completes the ATM transaction.

From a transactional standpoint, the use of a government card works in the same manner as a credit card.[25] Take the Government Purchase Card (GPC) program for example.[26] The United States Government, through the Government Services Agency, has contracted with several banks to provide banking services.[27] Thus, the government, through its agents, is the account holder in a GPC card purchase, and the card-issuing bank is the GPC program bank. In a GPC card transaction, the GPC card is processed by a merchant or ATM, and undergoes the same transactional process as described above. In other words, approval is requested by intermediate financial institutions and ultimately approved by the GPC program bank. The transaction is completed when the GPC program bank later transfers money to the merchant's account.[28]

When a credit or debit card is used to make a purchase via the internet, the processing may be somewhat different. For example, if an internet merchant employs PayPal, a payment processing website, then the cardholder's credit or debit card information is processed by software developed by PayPal. Using special algorithms, PayPal determines the likelihood of sufficient funds in the cardholder's account. If approved, then PayPal transfers its own money into the merchant's PayPal account. PayPal then seeks reimbursement of the funds from the card-issuing bank, generally through a third-party processor.[29] In this manner, PayPal acts as the merchant bank.

Another method of payment accepted by some merchants is Bitcoin. Bitcoin is virtual currency that "can best be described as digital cash."[30] The most important thing to remember about Bitcoin is that, under the current UCMJ approach, it cannot be the object of a larceny pursuant to Article 121, because it does not exist in a tangible form.[31] "Bitcoin is generated by computers, lives on the internet, and can be used to purchase real and digital goods across the world."[32] Bitcoin is stored by individuals in a virtual "wallet" and is spent without the use of third-party intermediaries, such as banks.[33] Thus, in a Bitcoin transaction, the buyer transfers the virtual currency, using software on his or her computer, from a virtual wallet directly to the virtual wallet of the seller. The transaction is processed with the help of open-source computing: computers on the Bitcoin network verify the authenticity of the Bitcoin being spent.[34] Bitcoin, and virtual currency in general, is still an emerging area that is not yet widely used.

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[24] Although not all ATMs are owned and operated by a bank, for discussion purposes, this article assumes that the entity offering the ATM services is a bank.

[25] *See* Captain David O. Anglin, *Service Discrediting: Misuse, Abuse, and Fraud in the Government Purchase Card Program*, ARMY LAW., Aug. 2004, at 1.

[26] The government has several methods by which it spends its money. At the root level, the government's money is spent through a federal reserve bank. "The biggest customer of the Federal Reserve is one of the largest spenders in the world - the U.S. government. Similar to how you have a checking account at your local bank, the U.S. Treasury has a checking account with the Federal Reserve. All revenue generated by taxes and all outgoing government payments are handled through this account." INVESTOPEDIA, *The Federal Reserve Duties*, http://www.investopedia.com/university/thefed/fed2.asp (last visited Feb. 11, 2014, 11:30 AM). Once this money is distributed or allocated to different agencies, then the actual financial institutions involved in a particular transaction may be different.

[27] Currently, U.S. Bank is contracted to provide account services to the U.S. Army. *See* United States v. Sharpton, 72 M.J. 777 (A.F. Ct. Crim. App. 2013), *aff'd*, 73 M.J. 299 (C.A.A.F. 2014).

[28] Although the card transaction is complete, there are unique contractual provisions in a GPC case that result in a transfer of money following the completion of the card transaction. Specifically, the government is obligated to pay to the GPC program bank the amount charged by its agents regardless of whether the agent's purchase is unauthorized. *See* United States v. Sharpton, 73 M.J. 299, 302 n.2 (C.A.A.F. 2014); U.S. DEP'T OF THE AIR FORCE, INSTR. 64-117, AIR FORCE GOVERNMENT-WIDE PURCHASE CARD (GPC) PROGRAM para. 3.8.5.2 (Sept. 20, 2011).

[29] PAYPAL, http://www.paypal.com/developer (last visited Nov. 27, 2013).

[30] *Beyond Silk Road: Potential Risks, Threats, and Promises of Virtual Currency: Hearing Before the S. Committee on Homeland Sec. and Govt Affairs*, 113th Cong. (Nov. 18, 2013) [hereinafter *Beyond Silk Road*] (statement of Sen. Thomas R. Carper, Chairman, S. Comm. on Homeland Sec. and Gov't Affairs).

[31] *See infra* Part III.C.

[32] *Beyond Silk Road*, *supra* note 30 ("Virtual currencies, perhaps most notably bitcoin, have captured the imagination of some, struck fear among others, and confused the heck out of many of us. Indeed, based on conversations my staff and I have had with dozens of individuals both inside and outside of government, it is clear that the knowledge and expectation gaps are wide. Fundamental questions remain about what a virtual currency actually is, how it should be treated, and what the future holds. Virtual currency can best be described as digital cash. It is generated by computers, lives on the internet, and can be used to purchase real and digital goods across the world. Some proponents believe virtual currencies can prove valuable to those in developing countries without access to stable financial systems. Others believe it could prove to be a next generation payment system for retailers both online and in the real world. At the same time, however, virtual currencies can be an effective tool for those looking to launder money, traffic illegal drugs, and even further the exploitation of children around the world. While virtual currencies have seen increased attention from regulators, law enforcement, investors, and entrepreneurs in recent months, there are still many unanswered questions and unresolved issues.").

[33] BITCOIN, http://www.bitcoin.org (last visited Nov. 27, 2013, 6:15 PM).

[34] Instead of relying on a trusted intermediary, such as a bank or credit-card network, to verify the authenticity of the digital currency being tendered, Bitcoins are embedded with a private key that is checked by the Bitcoin network of unaffiliated "mining" computers to ensure the authenticity and

In sum, when a credit or debit card is used to commit a theft, determining which bank ultimately grants approval of the transaction, and understanding the transactional process itself, is crucial to determining what property was stolen, who is the owner of the stolen property, and consequently, which theory must be proved to establish a larceny under Article 121. As the above descriptions illustrate, a single transaction can involve multiple parties, not the least of which is the account holder, the government, and the relevant financial institution. For that reason, it is also important to understand the legal relationships that may exist in a given case, to include that between the financial institution and the account holder, as well as that between the thief and the account holder (which may be the government).

## III. Relevant Legal Principles in a Credit or Debit Card Larceny

What follows is a discussion of the five primary legal issues that inform pleading, proving, and defending against a credit or debit card larceny pursuant to Article 121: (1) the applicable theories of larceny; (2) the requirement of a tangible res; (3) the possessory interests in a creditor–debtor relationship; (4) the importance of "ownership"; and (5) the impact of an agency relationship. Each of these areas, outlined below, impact the legal sufficiency of a larceny charge.

### A. The Applicable Theories of Larceny

Article 121, UCMJ, states that a person is guilty of larceny when he or she:

> wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind . . . with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner.[35]

Although a plain reading of the statute may indicate it encompasses many theories of theft, case-precedent has clarified that the perimeter of Article 121 only extends as far as those thefts previously cognizable at common-law or by early statute.[36] In other words, Article 121 only encompasses and consolidates what were previously known as larceny, larceny-by-trick, embezzlement, and false pretenses.[37]

In a larceny committed by use of a credit or debit card, the relevant theories under Article 121 are false pretenses, and embezzlement.[38] The crime of false pretenses occurs when the thief, with the requisite intent, obtains property from the owner through the use of a false representation of a past or existing fact.[39] In a credit or debit card larceny, this occurs through the false representation that the thief is the cardholder[40] or that the thief has the authority to use the credit or debit card in that manner.[41] On the other hand, an

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ownership of the Bitcoin. SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM, *available at* http://www.bitcoin.org.

[35] 10 U.S.C. § 921(a)(1) (2012).

[36] United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010); United States v. Antonelli, 35 M.J. 122, 124 (C.M.A. 1992).

[37] *Lubasky*, 68 M.J. at 263; *see* United States v. Aldridge, 8 C.M.R. 130, 131–32 (C.M.A. 1953).

[38] The common-law theories of larceny and larceny by trick are generally not implicated in a credit or debit card larceny. Relevant to this discussion, what separates larceny and larceny by trick from false pretenses and embezzlement is that the latter two crimes result in the thief acquiring title to the stolen property, whereas the first two do not. *See* WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 19.7(a) (2d ed. 2013). In a credit or debit card larceny, it is difficult to conceive of a situation in which the thief would not acquire title to the stolen property. "Whether title to property delivered to the defendant passes to him usually depends upon whether the victim *intends* to transfer title to him." *Id.* § 19.7(d). In a POS transaction, the merchant transfers title to goods to the thief, and the card-issuing bank transfers title of money to the merchant's bank. In an ATM transaction, the ATM bank transfers title of money to the thief, and the card-issuing bank transfers title of money to the ATM bank. Although there may be an unusual case, in which the merchant somehow failed on his end to transfer title of the property he provides to the thief, the overwhelming majority of cases will result in the transfer of title of the object property in a credit or debit card larceny case. *Cf.* State v. Rhome, 462 S.E.2d 656, 666 (N.C. App. 1995) (holding there was no embezzlement of funds overpaid because title to overpaid sums did not pass to the defendant).

[39] United States v. Bulger, 41 M.J. 194, (C.M.A. 1994); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 46.c.(1)(e) (2012) [hereinafter MCM].

[40] *E.g.*, United States v. Sierra, 62 M.J. 539, 542 (A. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006).

[41] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(e) ("In addition to other kinds of facts, the fact falsely represented by a person may be that person's . . . authority. . . ."). *Contra* United States v. Sharpton, 72 M.J. 777 (A.F. Ct. Crim. App. 2013), *aff'd on other grounds*, 73 M.J. 299 (C.A.A.F. 2014). In *Sharpton*, Senior Airman Cimball Sharpton used her GPC card to purchase $20,000 in merchandise and gift cards. United States v. Sharpton, 73 M.J. 299, 300 (C.A.A.F. 2014). She was convicted of stealing money from the government. *Id.* At her first level of appeal to the Air Force Court, Senior Airman Sharpton claimed that this theory of larceny was legally insufficient and that she should have been charged with stealing money from the GPC program bank or goods from the merchant. In evaluating these claims, the Air Force Court concluded that neither of these entities was the proper owner of the stolen property because the appellant made no false representations to them due to her apparent authority. *Sharpton*, 72 M.J. at 781. Following the Air Force Court's logic, an agent is unable to make a false representation to a third party if he or she possesses the apparent authority to engage in the actually unauthorized transaction. This holding eviscerates the theory that a thief can make a fraudulent representation about the scope of his or her authority to a third party, and is a marked departure from the current state of the law. *See* MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(e) ("In addition to other kinds of facts, the fact falsely represented by a person may be that person's . . . authority. . . ."). This holding was neither affirmed nor discussed by Court

embezzlement occurs when the thief, with the requisite intent, withholds property by failing to "return, account for, or deliver property to its owner when a return, accounting, or delivery is due."[42] In a credit or debit card larceny, this usually occurs where a Servicemember misuses a GPC.

The general distinction between false pretenses and embezzlement is found in the manner in which the thief came into possession of the stolen property. In the case of an embezzlement, there is some form of an agency relationship[43] between the thief and the account holder that allows the thief to lawfully acquire the property.[44] Once the property is lawfully acquired, it is the thief's subsequent withholding or conversion of that property, with the requisite intent, which consummates the crime.[45] In the case of false pretenses, although title to property is obtained, the thief does so through the use of a false representation as opposed to the abuse of an agency relationship.

Although these theories may seem straightforward, their simplicity belies the complex issues that arise in their application when the theft is committed by wrongfully using a credit or debit card. These complexities arise through the determination of what property was stolen and who was the "owner"[46] of the stolen propery, often leading to counter-intuitive results and complicated theories of the crime. Nowhere is this more evident than in the *Lubasky* case, in which Ms. Shirley was found not to be the owner of money expended from her account when CW4 Lubasky wrongfully used her credit cards. Therefore, to properly understand a credit or debit card larceny, it is necessary to examine the relationships between the various parties to the transaction, and then to properly identify both the owner and the property involved in the theft.

of Appeals for the Armed Forces (CAAF) when it affirmed Airman Sharpton's conviction.

[42] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(e).

[43] "Agency is 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).

[44] *See* United States v. McFarland, 23 C.M.R. 266, 269–70 (C.M.A. 1957) ("Generally in embezzlement, the property comes lawfully into the accused's possession by virtue of the existence of a fiduciary relationship with the owner.").

[45] "A typical statute on embezzlement by servants punishes a servant, clerk or agent employed by a person, partnership or corporation who misappropriates his employer's property in his possession. Under such statutes, misappropriating employees who have possession of their employer's property are guilty of embezzlement . . ." WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 19.6 (2d ed. 2013).

[46] "'Owner' refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which may be involved in the particular case." MCM, *supra* note 39, pt. IV, ¶ 46c.(1)(c)(ii).

B. The Requirement of a Tangible Res

The first important limitation to keep in mind is the legal requirement that the object of any larceny charged under Article 121, must be of tangible personal property. This restricts the cognizable theories available in a credit or debit card larceny in three ways. First, this requirement prevents charging a theft of a debt or a line of credit. Second, it generally prohibits charging a theft of services as a violation of Article 121 (which is instead cognizable under Article 134, UCMJ). And finally, it makes it impossible to charge a theft of virtual currency, such as Bitcoin.

As discussed above, a larceny is the taking, obtaining, or withholding of personal property with the requisite intent.[47] To be cognizable under Article 121, "the object of the larceny [must] be tangible and capable of being possessed."[48] *United States v. Mervine*[49] is illustrative of this point. In *Mervine*, the accused was charged with attempted larceny from the Navy Post Exchange (NEX) when he altered a money order receipt and submitted it to the NEX in an attempt to expunge a previously acquired debt. Thus, the theory of larceny pursued by the government was that the accused attempted to steal the money that he owed to the NEX. In considering the government's theory of larceny, the Mervine Court concluded:

> This theory is flawed in view of the possessory nature of the debtor-creditor relationship recognized for purposes of larceny under Article 121, as explained in the Manual for Courts-Martial. "The taking obtaining, or withholding must be of specific property. *A debtor does not withhold specific property from the possession of a creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.*"[50]

Since the NEX did not have a possessory interest in any specific money belonging to the appellant—money that the appellant could have attempted to steal by submitting the false receipts—the government was left with the theory that the appellant attempted to steal the debt itself. The Mervine Court rejected this theory, holding: "'[P]ossession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of.'. . . Accordingly, we

[47] UCMJ art. 121 (2012). *See supra* Part III.A.

[48] United States v. Mervine, 26 M.J. 482, 483 (C.M.A. 1988).

[49] *Id.*

[50] *Id.* (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 46.c.(1)(b) (1984)) (emphasis in original). Part III.C, *infra*, explores this issue of creditor–debtor relationships in detail.

hold that a debt or the amount thereof is not the proper [object] of a larceny under Article 121."[51]

From this holding, it is obvious that an accused cannot be charged with stealing a debt or a line of credit. This is important to keep in mind in the case of a larceny committed through the use of a credit card specifically. Taking *Lubasky* as an example, CW4 Lubasky could not have been charged with stealing the line of credit extended to Ms. Shirley when he wrongfully used her credit cards. Thus, the allegation and proof of the thefts he committed when he wrongfully used her credit card could not be based upon her diminishing line of credit.[52]

Second, the requirement that the property be tangible prevents prosecution under Article 121 for a theft of services. If the object of the crime is "obtain[ing] services rather than tangible property, the offense is not a larceny, but a theft of services in violation of Article 134, UCMJ."[53] Thus, if a thief wrongfully uses another person's credit or debit card to rent a vehicle, then the thief has obtained services, not tangible goods.[54] Consequently, the thief could not be charged with a theft from the rental car company.[55] In a credit or debit card larceny, this issue can also arise when service fees are charged by a financial institution for the credit or debit card transaction. For example, in an ATM transaction, a fee is generally charged for the use of the ATM terminal. Where a thief is charged with obtaining cash from the ATM bank by false pretenses, the service fee charged by the bank cannot be properly included in the larceny.[56]

Finally, the principles discussed in *Mervine* have enormous ramifications in the area of virtual currency. Applying these principles to a Bitcoin transaction, it is apparent that there is no cognizable theory under Article 121 that could support the theft of a Bitcoin. A Bitcoin transaction is different from a credit or debit card transaction in that there is no tangible property underlying a Bitcoin exchange. Underlying a credit or debit card transaction is actual U.S. dollars stored in vaults. Although the transactions may never physically result in tangible dollars changing hands, instead only resulting in numbers being adjusted in accounts between banks, the simple fact remains that these numbers represent tangible currency that exists, somewhere. This is not the case for a Bitcoin transaction. A Bitcoin is itself a virtual currency that does not exist in tangible form. It is, very literally, only ones and zeros. A Bitcoin only exists in a virtual world of stored electronic information. Accordingly, when a Bitcoin, or a unit of a similar virtual currency, is the object of a theft, there is no tangible res being taken, obtained, or withheld; consequently, there is no legally cognizable theory under Article 121.[57]

### C. The Possessory Interests in a Creditor–Debtor Relationship

As alluded to in the *Mervine* discussion and in the *Lubasky* case itself, the relationship between an account holder and the card-issuing bank is fundamental to pleading, proving, and defending against a credit or debit card larceny. The legal framework for understanding the relationship between an account holder and his or her bank is found in commercial law. Therefore, it is necessary to employ the general tenants of commercial law where the means of theft involve the wrongful use of a credit or debit account.[58]

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[51] *Id.* (quoting Harris v. Balk, 198 U.S. 215 (1905)) (first alteration in original).

[52] Instead, a supportable theory of this theft would be that CW4 Lubasky stole from the bank by inducing it to pay money to various merchants, or from the merchants by inducing them to provide him goods. *See infra* Part IV.

[53] United States v. Sierra, 62 M.J. 539, 542 (A. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006). *See* MCM, *supra* note 39, pt. IV, ¶ 78.b (Obtaining Services under False Pretenses).

[54] *E.g.*, United States v. Abeyta, 12 M.J. 507 (A.C.M.R. 1981) (holding that failing to pay for a taxicab ride is a theft of services).

[55] However, alternative charging options are available under Article 121, UCMJ, for this crime. For example, the thief could be charged with obtaining money from the bank by inducing it to pay money to the rental car company. *Cf.* United States v. Plante, 36 M.J. 626 (A.C.M.R. 1992) (upholding conviction for larceny of money from an insurance company where the insurance company was fraudulently induced to pay money to a rental car agency from which the appellant rented a car after he torched his own car). This type of theory of false pretenses is discussed in detail below. *See infra* Part IV.A.2.

[56] However, alternative charging options that would include service fees in the amount of the larceny may be available under Article 121 so long as the ATM bank is not alleged as the owner of the stolen property. For example, if the thief had used a GPC card, then it may be possible to charge the thief with stealing money, to include the service fees, from the government, because the government paid the full amount to the ATM bank. *See* United States v. Sharpton, 73 M.J. 299, 302 n.2 (C.A.A.F. 2014). *See also infra* Part IV.A.3. The simplest method of charging a theft of services may be to allege a violation of Article 134. However, if an alternate theory of larceny under Article 121 is available, e.g., the theory just discussed, then defense counsel would be wise to argue that the Article 134 offense is preempted. *See, e.g.*, United States v. Erickson, 61 M.J. 230 (C.A.A.F. 2005); United States v. Kick, 7 M.J. 82 (C.M.A. 1979); United States v. Norris, 8 C.M.R. 36 (C.M.A. 1953).

[57] Furthermore, a theft of virtual currency, like a Bitcoin, could not be charged as obtaining services under false pretenses, Article 134, or as bank fraud, 18 U.S.C. § 1341 as applied through Clause 3 of Article 134. Moreover, although the definition of "military property" under Article 108 may be broad enough to encompass virtual currency, the government does not transact in virtual currency; thus, any prosecution under Article 108 would have to involve the thief wrongfully purchasing virtual currency with government money, on the government's behalf, and then withholding it. This unusual circumstance notwithstanding, the only remaining options would be a simple disorder pursuant to Article 134, the wrongful use of an access device under 18 U.S.C. § 1029 as applied through Clause 3 of Article 134, or the assimilation of an applicable state statute.

[58] In fact, the guidance contained in the *Manual for Courts-Martial* for charging "*Credit, Debit, and Electronic Transactions*" is based on this foundational premise. *See* MCM, *supra* note 39, pt. IV, ¶ 46c.(1)(i)(vi). The discussion for the 2002 amendment to Article 121, which added guidance for charging credit card and debit card thefts, cites two service

Ultimately, this analysis is crucial to determining the proper owner of property obtained through the wrongful use of a credit or debit card, which in turn, indicates the theory of larceny that the government must pursue to prosecute a larceny under Article 121.

In the case of a debit card relationship, an account holder has deposited money with the bank against which the POS or ATM transactions are drawn; however, due to the military courts' application of commercial law principles, the account holder is not the "owner" of her deposits within the meaning of Article 121. Absent special arrangements, the title to the money deposited is transferred to the bank when a deposit is made by the account holder into his her account.[59]

This is true because money deposited with a financial institution, absent special arrangements, is considered a general deposit. In the case of general deposits, "[t]he general transaction between the bank and a customer in the way of deposits to a customer's credit, and drawing against the account by the customer, constitute the relation of creditor and debtor."[60] As such, there "is nothing of a trust or fiduciary nature in the transaction, nor anything in the nature of a bailment . . . or in the nature of any right to the specific monies deposited."[61] Thus, the account holder has neither title to nor possession of the money in his or her debit account—only an agreement from the bank "to pay an equivalent consideration when called upon by the depositor in the usual course of business."[62]

The same is true in the case of a credit card agreement. The relationship between the bank and the account holder is one of creditor and debtor—the roles being reversed such that the account holder, not the bank, is the debtor. Just as in a debit card relationship, the credit-card account holder has neither title to nor possession of the line of credit that is extended by the bank.

In a creditor–debtor relationship, an account holder has neither title to nor possession of specific money in his or her account.[63] Furthermore, nowhere in the processing chain does the account holder acquire title to or possession of the money distributed from his or her account.[64] When a credit or debit card is wrongfully used to expend money, the money is not distributed to the account holder. In a POS transaction, the money is transferred to the merchant's bank and, ultimately, to the merchant. In an ATM transaction, the money is transferred to the bank operating the ATM and, ultimately, to the thief. The importance of the preceding is obvious: If an account holder does not have title to or possession of the money stolen, then the account holder cannot be the "owner" in a credit or debit card larceny case.[65]

Accordingly, the limitations of the creditor–debtor relationship must be kept in mind when prosecuting or defending against a larceny charge pursuant to Article 121. That relationship does more than define the legal relationship between the parties to a credit or debit card transaction; it provides the lens through which ownership in a larceny case is viewed. This is especially important when determining the theory by which an accused commits a theft (i.e., false pretenses or embezzlement). Many times, it is the allegation of ownership that drives proof as to the theory of larceny.

### D. The Importance of "Ownership"

In a larceny case pursuant to Article 121, it is necessary to allege the "owner"[66] of the stolen property, because it is an element of the offense.[67] It may be counter-intuitive, but

court cases as authority for its guidance: United States v. Duncan, 30 M.J. 1284 (N.M.C.M.R. 1990), *variance analysis abrogated by*, United States v. Lubasky, 68 M.J. 260, 264–65 (C.A.A.F. 2010); and United States v. Jones, 29 C.M.R. 651 (A.B.R. 1960), *variance analysis abrogated by*, *Lubasky*, 68 M.J. at 264–65. 2002 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 11, 2002). The Duncan Court cites Jones as the persuasive authority for its ruling, and the Jones Court in turn cites *United States v. Soppa* as its authority. 4 C.M.R. 619 (A.F.B.R. 1952). Relying on fundamental principles of banking law, the Soppa Court held that the proper owner of funds contained in a bank account was the bank and not the account holder. *Id.* at 621.

[59] Nat'l Bank of the Republic v. Millard, 77 U.S. 152, 154–55 (1869).

[60] Burton v. United States, 196 U.S. 283, 301 (1905).

[61] *Jones*, 29 C.M.R. at 653.

[62] *Soppa*, 4 C.M.R. at 621 (citing Cragie v. Hadley, 1 N.E. 537, 538 (N.Y. 1885)).

[63] *Id.* at 619.

[64] This statement must be qualified. An account holder can acquire constructive ownership of money received on his or her behalf by an agent. Furthermore, there is case-precedent in other jurisdictions that indicates an account holder gains "possession" of money transmitted to a third party in an embezzlement case, because the money is segregated from his account by the card-issuing bank immediately prior to transmission. There is also authority to the contrary. It is unclear whether this theory is viable in the military. These theories are discussed *infra* at Part IV.B.2.

[65] This statement is true where the focus of the crime is on the property involved in the transactional process, which is generally the case. However, as discussed in Part IV.A.3, there are more complicated theories of false pretenses that may allow charging the account holder as the "owner," and as discussed in Part IV.B, there are embezzlement theories available as well.

[66] A larceny charge requires proof of an owner or "any other person." This does not mean you can allege anyone—it means that the owner can be any person with a superior possessory interest: "'Any other person' means any person—even a person who has stolen the property—who has possession or a greater right to possession than the accused." MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(c)(iii).

[67] "The military is a notice pleading jurisdiction." United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (citing United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953)). "A charge and specification will be found sufficient if they, 'first, contain[ ] the elements of the offense charged and

it is this allegation of "ownership" that drives the theory of larceny to be proved at court-martial.

In *Lubasky*, CAAF examined the allegation of ownership in the specifications leveled against CW4 Lubasky when it assessed the legal sufficiency of the corresponding theory of the theft.[68] In this manner, the Lubasky Court tested the theory of the crime through the allegation of ownership. In other words, the Lubasky Court implicitly concluded that the allegation of ownership was tied to the theory of larceny itself, and not just to the comparative ownership interest CW4 Lubasky's had vis-à-vis Ms. Shirley. In doing so, the Lubasky Court concluded that the bank was the entity that owned the money used by CW4 Lubasky, not Ms. Shirley. Therefore, it was untenable to charge the theft of Ms. Shirley's money by wrongful use of her credit cards using any available theory.[69] Consequently, it is apparent that, following *Lubasky*, not only must the allegation of ownership jibe with the property alleged to have been stolen, but the property and its owner must also be constituent pieces of a cognizable whole: they must substantiate a legally sufficient theory of larceny, i.e., false pretenses or embezzlement.

Furthermore, the owner of the stolen property is not synonymous with the victim of the crime. However, in its recent case, *United States v. Sharpton*, CAAF made this very mistake—referring to the "victim" of the larceny instead of the "owner" of the stolen money.[70] Nevertheless, the foundational legal principle remains the same: Larceny is a crime against property, not against the person. "Owner" describes the person with the right of ownership superior to that of the thief, in light of the theory of larceny being pursued. That is not necessarily the person who is directly victimized. *Lubasky* is a good example of this concept. In that case, Ms. Shirley was victimized by CW4 Lubasky's crimes, but the various banks were the owners of the money he stole using her credit card.

However, that is not to say that who ultimately bears the loss is irrelevant; unfortunately, the relevance of this is presently uncertain. In *Sharpton*, CAAF looked to after-the-fact payments made by the government to the card-issuing bank for fraudulent purchases made by one of its agents, Senior Airman Cimball Sharpton. However, the Sharpton Court failed to address any particular theory of larceny; consequently, the meaning and importance of this analysis is unclear. It is possible that CAAF meant to extend the processing chain of a credit or debit card transaction to include later payments pursuant to contractual arrangements between creditors and debtors. If *Sharpton* does support this position, then a card-issuing bank would not be the owner of money paid to a merchant for fraudulent purchases by a thief, because the card-issuing bank was later compensated by the account holder.[71] However, practitioners should be aware of the questionable logic presented in this interpretation, as the fact that a bank has later been made whole by a third-party does not change the fact that a theft occurred in the first place.[72] A second interpretation of CAAF's analysis in *Sharpton* is that it adopted the *Ragins* theory of larceny without citation or discussion (this theory is discussed in detail below).[73] This interpretation is supported by the Sharpton Court's use of the term "obtained," signaling that the theory involved was an obtaining by false pretenses as opposed to an embezzlement.[74] In either case, trial counsel should take these interpretations into account when deciding upon a theory of the crime, and defense counsel should be prepared to leverage these competing interpretations against a particular larceny charge.

### E. The Impact of an Agency Relationship

The existence of an agency relationship between the thief and the account holder is important to both an embezzlement charge and a false pretenses charge. In the case of an embezzlement, the authority of the agent, which is critical to sustaining an embezzlement theory, may be in factual dispute. And in a false pretenses charge, the

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fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id.* at 229 (quoting Hamling v. United States, 418 U.S. 87, 117 (1974) (internal citations and quotation marks omitted)) (citing United States v. Resendiz–Ponce, 549 U.S. 102, 108 (2007); United States v. Sutton, 68 M.J. 455, 455 (C.A.A.F.2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F.2006); United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953)) (alterations in original). "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." MCM, *supra* note 39, R.C.M. 307(c)(3).

[68] United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010).

[69] *Id.*

[70] United States v. Sharpton, 73 M.J. 299, 299 (C.A.A.F. 2014) (holding "the victim of the larceny is the person or entity suffering the financial loss or deprived of the use or benefit of the property at issue").

[71] *See infra* Part IV.A.2 (discussing this theory of false pretenses).

[72] *See, e.g.*, State v. Lomax, 14 S.W.2d 436, 438 (Mo. 1929) ("It is possible that the Brookfield school district was in a position to hold the Linn County Bank on account of the embezzlement of defendant, but this may be based on the ground, among others, that the bank had actual or imputed knowledge that it was crediting defendant with money belonging to the school district. [ ] The responsibility of the Linn County Bank to the Brookfield school district for defendant's acts is aside the question. It is also immaterial that said bank, through defendant's knowledge, knew, at the time the checks were presented and the money appropriated, that defendant intended to convert a portion of the proceeds of the respective checks to his own use." (internal citation omitted)).

[73] *See infra* Part IV.A.2.

[74] *Sharpton*, 73 M.J. at 301 (holding that the appellant "wrongfully obtained property").

existence of an agency relationship may make such a theory legally insufficient. For that reason, it is important to identify the existence of an agency relationship and take into account its scope when pursuing a particular theory of larceny.

The authority granted to the agent is an important issue for all embezzlements. "The 'authority of the agent' is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to the agent. . . . [T]he scope of the agent's authority is limited to what the principal has authorized the agent to do."[75] The scope of an agent's authority is a factual issue that may be difficult to determine in some cases. For example, in *United States v. Willard*, Private First Class (PFC) Clare was slated to deploy and gave a general power of attorney to his roommate, Specialist (SPC) Willard, instructing him to withdraw cash and pay various bills for him while he was away.[76] Specialist Willard instead withdrew cash from PFC Clare's accounts and used it for his own personal expenses.[77] Specialist Willard was convicted of embezzlement for misapplying the cash he withdrew from PFC Clare's bank accounts. On appeal, SPC Willard argued that the general power of attorney gave him authority to use PFC Clare's money in any manner he deemed fit, to include for his own benefit. The CAAF rejected this argument, stating, "The power of attorney may convey apparent authority *vis-[à]-vis* an innocent third party, but it does not empower the grantee to exceed the terms of his or her actual authority."[78] Thus, although SPC Willard held a general power of attorney, the actual scope of his authority was circumscribed pursuant to PFC Clare's instructions that the money be used to pay PFC Clare's bills.

Although a larceny by false pretenses does not require the existence of an agency relationship between the thief and the account holder, the existence of such a relationship may very well frustrate the viability of such a theory. Specifically, if an agency relationship exists and the thief purchases goods or withdraws money within the scope of his authority, then a straight-forward theory of false pretenses is untenable. The reason for this is plain—the thief made no false representation. For example, in *Willard*, SPC Willard was authorized to withdraw cash from PFC Clare's account. Therefore, when SPC Willard withdrew cash from PFC Clare's account, he made no false representations to the bank. Consequently, a charge of obtaining money from the bank by false pretenses would not be legally sufficient.[79] In contrast, if SPC Willard had not been authorized to make cash withdrawals, then a theory of false pretenses against the bank would be legally sufficient. In that situation, SPC Willard would have made false representations to the bank about the scope of his authority.

## IV. Application in the Digital Age

Suitably armed with the foregoing principles, it is possible to arrive at several alternative legally sufficient[80] charges under Article 121 where a debit or credit card was used as the means of theft. For credit and debit card larcenies, the legally sufficient alternatives can be categorized based on the theory of larceny upon which they rely. Thus, the first category consists of those alternatives in which the wrongful use of the credit or debit card resulted in an obtaining by false pretenses,[81] and the second consists of those alternatives in which the wrongful use of the credit or debit card resulted in an embezzlement.[82] In both categories, it is important to note the object property, the subject owner, and whether there is an agency relationship between the thief and the account holder.

Presenting charging options for a credit or debit card larceny that are unassailable in every circumstance is difficult, because each case turns on its own facts, and the merits of each alternative theory vary in accordance with those facts. As is the case in many areas of the law, there is no one correct answer, only several wrong answers. For that reason, it is important to understand the rationale underpinning the viable theories in a credit or debit card larceny. Most times, it is the POS-transaction cases that present the most difficult issues; for that reason, Appendix A provides a general reference guide that may be helpful for practitioners.

### A. False Pretenses—The Obtaining Theories

For those offenses categorized as larcenies by false pretenses, there are three alternatives to charging and proving a violation of Article 121: The obtaining is either of goods from the merchant,[83] of money from the bank,[84] or of

[75] 3 AM. JUR. 2D *Agency* § 64 (2014).

[76] 48 M.J. 147, 148 (C.A.A.F. 1998).

[77] *Id.*

[78] *Id.*

[79] This scenario instead presents a wrongful withholding of PFC Clare's money, which is an embezzlement theory. *Id.*; *see also* Part IV.B.1, *infra.*

[80] A charge is legally sufficient where, considering the evidence in the light most favorable to the prosecution, a reasonable trier of fact could find all the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In the larceny context, this means that, not only must the evidence establish the offense, but also that the offense itself must constitute a valid theory of larceny encompassed by Article 121, UCMJ. United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010).

[81] *See infra* Part IV.A.

[82] *See infra* Part IV.B.

[83] *See infra* Part IV.A.1.

[84] *See infra* Part IV.A.2.

money from the account holder.[85] However, the latter theory should rarely be used and generally only when there is an agency relationship between the thief and the account holder.[86] The facts of any particular case will determine whether a charge is legally sufficient under a particular theory of false pretenses, and that theory will in turn drive the focus of the prosecution's evidence and of the accused's defense. This section discusses these theories, paying particular attention to the property alleged to have been obtained, the owner of that property, and the evidentiary focal point of the crime.

*1. Theft of Goods from the Merchant*

In cases where a credit or debit card is used by the thief to purchase goods from a merchant (a POS transaction), then the simplest method of charging the crime is by alleging a theft of goods from the merchant. The explanation to Article 121, in the *Manual for Courts-Martial* (*MCM*) specifically endorses this approach:

> *Credit, Debit, and Electronic Transactions.* Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them.[87]

Following this theory, it is the thief's false representation to the merchant that induces the merchant to provide goods to the thief. As for what is falsely represented to the merchant, it is either the false representation that the thief is the cardholder of the credit or debit account being used to purchase the goods, or that the thief possesses the authority to use the credit or debit card to purchase the goods.[88] In this theory, it is irrelevant whether the card used by the thief is a credit card or a debit card, because the focus is not on the account holder or the bank, but on the merchant and his goods.[89]

In most cases, trial counsel will find that this is the simplest theory for charging a credit or debit card larceny. But even though this is the simplest way to *charge* the larceny, it may not be the simplest way to *prove* the larceny. To prove that the thief obtained goods, it is necessary for the government to produce some evidence of the goods that were obtained. Generally, the primary evidence of a credit or debit card larceny is the statement of purchases issued by the account holder's financial institution and, in most cases, the statement does not list individual items that were acquired, only that a certain amount of money was transferred to a specific merchant. Although it may be legally sufficient to simply rely on the credit or debit card statement itself, failing to provide any evidence of the actual goods obtained may sow seeds of reasonable doubt.[90] Moreover, it may prove difficult to use eye-witness testimony from the merchant to establish which goods were obtained by the thief, as the merchant may not remember the details of a mundane credit or debit card transaction that took place months or years ago.[91]

In defending against this theory of larceny, defense counsel should not only be aware of the proof issues discussed above, but also of the impact of an agency relationship on the theory and the implications of CAAF's recent decision in *Sharpton*. As discussed in Part III.E, if there is an agency relationship between the accused and the account holder, then it may be possible for the defense to argue that the accused did not make any false representations to the merchant when he or she purchased the goods. Defense counsel should also be prepared to argue that, based on the holding in *Sharpton*, the merchant is not the proper owner of the stolen property. As previously discussed, the Sharpton Court took into account who ultimately bore the loss in a credit card larceny when deciding upon the viability of the charged theory. From this analysis, it is possible to argue from the converse proposition that, if the merchant was compensated by the card-issuing bank, the merchant is not the owner of the property that was stolen because he did not bear the loss.

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[85] *See infra* Part IV.A.3.

[86] *E.g.*, United States v. Sharpton, 73 M.J. 299 (C.A.A.F. 2014).

[87] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(i)(vi) (emphasis in original). Although this provision is only persuasive guidance, it has been cited by CAAF as a correct statement of the law. *Sharpton*, 73 M.J. 299; United States v. Lubasky, 68 M.J. 260 (C.A.A.F. 2010).

[88] *See* authority cited *supra* notes 40, 41, and *infra* note 105.

[89] United States v. Gordon, No. S32008, 2013 WL 3324397 (A.F. Ct. Crim. App. June 26, 2013) (providing an adequate example of this theory of larceny). Airman Basic Gordon stole his roommate's debit card and used it to purchase, among other things, clothes, sneakers, and slippers via the internet. *Id.* at *1. Airman Gordan was charged with and convicted of stealing goods from the merchant that provided him with the clothes, sneakers, and slippers. *Id.* at *2. As this stated a proper theory of larceny by false pretenses, the Air Force Court affirmed without incident. *See also* United States v. Gaskill, 73 M.J. 207 (C.A.A.F. Jan. 27, 2014) (summ. disp.) (holding that "the proper victim in Specifications 2, 3, and 4 of Charge V was the merchant who provided the goods and services upon false pretenses, not the debit cardholder/Soldier").

[90] *Cf.* United States v. Barnes, No. 20110361, 2014 WL 104430, at *3 (A. Ct. Crim. App. Jan. 9, 2014) (mem. op.) (noting that the military judge found the appellant not guilty of the offense of larceny of services, pursuant to Article 134, UCMJ, because of the "government's failure to present any evidence the credit card charges were for services and not for some other purpose, such as the purchase of goods").

[91] For example, consider the case of a thief wrongfully using a credit card to purchase items at a convenience store. The credit card statement will not itemize the hot dogs, candy bars, chips, and coffee that were obtained by the thief, and it is highly unlikely that the convenience store clerk will remember these items.

Ultimately, the factual circumstances of a particular case may make it difficult to prove that a thief obtained goods from a merchant by wrongfully using a credit or debit card. Also, if there is an agency relationship, then the defense may successfully contest that no false representation was made to the merchant. Finally, *Sharpton*'s holding provides a basis for the defense to claim the merchant is not the proper owner because he was compensated by the card-issuing bank. Accordingly, although this charging option may be the simplest in terms of legal theory, it may not be superior to other available options.

*2. Theft of Money from the Bank*

In both a POS transaction and an ATM transaction, it is easier, from an exigency of proof standpoint, to establish that the wrongful use of a credit or debit card resulted in a theft of money from the bank. Unlike in the case of a theft of goods from a merchant, the statement issued by the cardholder's financial institution entirely substantiates the stolen property where a theft of money from a bank is alleged, listing both the amount of money and the bank that owned the money.

In an ATM transaction, the owner of the money is the bank which owns or operates the ATM.[92] This is a traditional obtaining by false pretenses where the thief falsely represents to the ATM bank that he or she has the authority to use the credit or debit card that is presented, thereby inducing the bank to dispense cash through the ATM terminal.[93] "Wrongfully engaging in a credit, debit, or electronic transaction . . . to obtain money or a negotiable instrument (e.g., withdrawing cash from an automated teller or a cash advance from a bank) is usually a larceny from the entity presenting the money or [ ] negotiable instrument."[94] To be clear, the simplest theory of false pretenses in an ATM transaction is that the ATM bank—which is not necessarily the card-issuing bank[95]—owned the object money.[96]

In a POS transaction, however, the card-issuing bank is the owner of the object money, a distinction which creates a somewhat more complicated legal theory of false pretenses. For a POS transaction, the legal theory supporting a theft of money from the card-issuing bank originates from *dictum* in the case of *United States v. Ragins*.[97] Chief Ragins was a mess management specialist assigned to the commissary where he was authorized to accept delivery of goods.[98] In partnership with Rose, an employee of a bread company, Chief Ragins stole bread that was delivered to the commissary, and Rose later sold the bread, splitting the proceeds with appellant.[99] When this scheme was discovered, Chief Ragins was court-martialed for larceny; however, Chief Ragins was not charged with stealing the *bread* from the government, he was charged with stealing *money* from the government.[100] Ultimately, the Ragins Court concluded that this theory was legally sufficient as an embezzlement, which is discussed at Part IV.B, but before doing so it also considered whether this allegation could be legally sufficient as an obtaining by false pretenses. It did so by changing the focus of the crime away from the money that was acquired by the thief in his subsequent sale of the bread, and instead focusing on the money transferred by the government to the merchant as payment for the stolen bread:

> Whether the payments by the United States to the baking company could be the basis of a larceny prosecution of appellant for those payments is more doubtful. Of course, appellant used a wrongful means whereby money was obtained from the possession of the Government, and this was done with the intent permanently to deprive and defraud the United States of

[92] *E.g.*, United States v. Duncan, 30 M.J. 1284, 1289 (N.M.C.M.R. 1990), *variance analysis abrogated by*, United States v. Lubasky, 68 M.J. 260, 264–65 (C.A.A.F. 2010) (noting that in a case where the appellant wrongfully uses a debit card to withdraw cash in an ATM transaction, "the currency wrongfully taken or obtained by the appellant was the property, not of the cardholder, but most likely of the financial institution that owned and operated the ATM terminal which dispensed the currency to the appellant").

[93] It is important to keep in mind that the service fees charged by an ATM are not a part of the money stolen by the thief in this theory, because a larceny does not capture a theft of services. *See supra.* Part III.B.

[94] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(i)(vi).

[95] In cases where the ATM bank is not the card-issuing bank, defense counsel should keep in mind CAAF's discussion in *Sharpton*, which focused on the entity ultimately suffering the loss. If the ATM bank was compensated by the card-issuing bank, then defense counsel should argue the ATM bank is not the proper owner.

[96] A second, and overly complex, theory of obtaining by false pretenses in an ATM transaction can involve the card-issuing bank as the owner of the money alleged as the object of the theft. This is the *Ragins* theory that is discussed for POS transactions *infra*, i.e., the thief induces the card-issuing bank to pay money to the ATM bank by representing to the card-issuing bank through the ATM terminal that he has the authority to use the debit or credit card issued by the bank. In this case, the focus is not on the money dispensed by the ATM, but on the money transferred from the card-issuing bank to the ATM bank, for example via the ACH network.

[97] 11 M.J. 42 (C.M.A. 1981).

[98] *Id.* at 46.

[99] *Id.* at 43.

[100] *Id.*

> that money. The fact that the money went from the Government into the hands of the baking company, which had no fraudulent intent, to reimburse it for the bread which appellant and Rose had purloined would not seem to preclude treating this conduct as larceny from the Government committed when the contemplated payments to the baking company were made after it ultimately submitted the false invoices. *False 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*.[101]

In a POS transaction, this means that a thief's wrongful use of a credit or debit card, where the card-issuing bank is fraudulently induced to transfer money to the merchant, can be charged as a theft of money from the card-issuing bank. To use the hypothetical from *Ragins*, the thief (A) induces the card-issuing bank (B) to transfer money to the merchant (C).[102]

This theory is explicitly applied in two service court cases, and arguably implicitly applied in the CAAF's recent decision in *Sharpton*. In *United States v. Sierra*[103] and *United States v. Christy*,[104] the Army and Navy appellate courts, respectively, approve of the *Ragins dictum* as a valid statement of the law,[105] with both courts explicitly discussing *Ragins*.[106] The CAAF has yet to be so explicit in its acceptance of this theory. Nevertheless, *Sharpton* provides a strong indication that the *Ragins* theory is good law. In *Sharpton*, Senior Airman Sharpton was charged with stealing money from the government for using her GPC card to purchase items for her personal use.[107] In affirming this theory of larceny, the Sharpton Court specifically stated that the money paid by the government (the account holder) to US Bank (the GPC Program bank) was "obtained" by Senior Airman Sharpton.[108] If the CAAF had relied upon an embezzlement theory, then it would have referred to a "withholding" of money from the government. Therefore, the language used in *Sharpton* supports the position that CAAF applied the *Ragins* theory of false pretenses in *Sharpton*.[109]

In the POS transaction context, it is the thief's false representation to the card-issuing bank, through the merchant's card reader and the merchant's bank,[110] that induces the card-issuing bank to provide money to the merchant's bank, and ultimately the merchant. Applying this theory to the facts of *Lubasky*, it is evident that CW4 Lubasky could have been charged with a theft of money from the card-issuing bank when he wrongfully used Ms. Shirley's credit cards. This theory would also have been legally sufficient for CW4 Lubasky's misuse of Ms. Shirley's debit card,[111] provided he was acting outside the scope of his authority.[112]

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[101] *Id.* at 46.

[102] *See also* People v. Cravens, 180 P.2d 453, 456 (Cal. App. 1947) ("We are not satisfied that proof that the wrongdoer afterwards converted the partnership property to his own use while the victim was still subject to the influence of his false pretenses would not constitute the crime of obtaining money or property by false pretenses. . . . [Otherwise] any confidence man could safely operate through the medium of forming a partnership with his victim and then appropriating the assets of the partnership . . . . That the wrongdoer gets the property in two steps rather than one where a partnership with his victim is formed should not absolve him of the crime of obtaining money or property by false pretenses where the false pretenses continued to operate up to the moment of his wrongful appropriation of the partnership assets contributed by his victim."); Urciolo v. State, 325 A.2d 878, 893 (Md. 1974) ("Although the Court did state that the 'bank was made the 'innocent agent' of the traverser to pay to the parties indicated for the traverser's use and benefit the several sums of money agreed to be paid by the bank for the traverser,' it nonetheless pointed out that '(t)he passage of the title, possession, and control of the money from the bank to the indicated third parties at the traverser's request or in accordance with his written order was an obtaining of the money by the traverser as fully and completely as if the physical delivery had been made to the traverser in person.'" (discussing and quoting Simmons v. State, 167 A. 60, 63 (Md. 1933))).

[103] 62 M.J. 539 (A. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006).

[104] 18 M.J. 688 (N.M.C.M.R. 1983).

[105] Both decisions presume that the digital transfer of information through the merchant's card reader, and the merchant's bank, to the card-issuing bank for approval of the sale, constitutes a false representation—a presupposition that has yet to be challenged. However, it is worth noting that in both *Ragins* and *Christy*, the thief did more than just swipe a government credit card to induce the transfer of money. In *Ragins*, the accused submitted false receipts to the government, and in *Christy* the accused submitted false invoices to the government.

[106] *Sierra*, 62 M.J. at 543 ("[U]nder certain circumstances, an accused may alternatively be charged with theft of the money the government pays for the goods or services obtained. As our superior court has stated, 'false 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.'") *Ragins*, 11 M.J. at 46. Such a situation occurs if the accused fraudulently uses a government credit card to induce the government to pay for property or services he obtains. If the accused intends to deprive the government of that money, he can properly be convicted of larceny of the funds the government actually pays."); *Christy*, 18 M.J. at 690 ("Whether the payments made by the United States to the various oil companies provide the basis for a larceny of those monies by the appellant is more problematic . . . . The fact that the money went to the oil companies to reimburse them for gasoline purchased by the appellant would not seem to preclude treating this conduct as larceny from the Government when the contemplated payments were made after the appellant put the unauthorized credit card invoices into the commercial collection system. *False pretenses used by the appellant to induce another to transfer property to a third party would seem to nicely fit in UCMJ, Article 121*.").

[107] United States v. Sharpton, 73 M.J. 299, 300 (C.A.A.F. 2014).

[108] *Id.* at 301.

[109] *See also supra* Part III.D.

[110] *See supra* notes 40, 41, & 105.

[111] In an unpublished opinion, *United States v. Fields*, No. 201100455, 2012 WL 1229443 (N-M. Ct. Crim. App. Apr. 12, 2012), the Navy Court

Although the *Ragins* theory of false pretenses is not reliant upon the agency relationship, the existence of such a relationship again has the potential to frustrate its applicability. As discussed in Part III.E, *supra*, both trial and defense counsel must be aware of how the scope of the thief's authority limits the applicability of a false pretenses theory. A thief does not commit the crime of false pretenses against the card-issuing bank where the thief uses the debit or credit card to make purchases on the principal's behalf that are within the scope of the thief's authority.[113]

Ultimately, proving a theft of money from the bank may be the simplest theory for the government to pursue. However, in a POS transaction, trial counsel must keep in mind that the focus is on the money paid to the merchant, money that does not reach the thief's pocket. And defense counsel may find it useful to contest the viability of the case-precedent underlying this theory. Finally, both sides of the aisle should be aware of any potential issues created by an agency relationship.

*3. Theft of Money from the Account Holder*

A third alternative for charging false pretenses involves naming the account holder as the owner of the object money. Where there is no agency relationship, practitioners should rarely, if ever, charge the account holder as the owner of money in a credit or debit card larceny.[114] In fact, this is the primary take-away from the *Lubasky* case. In *Lubasky*, CAAF held that Ms. Shirley, the account holder, was not the owner of the money CW4 Lubasky stole through the misuse of her credit cards.[115]

However, where there is a principal–agent relationship then this theory is on solid ground for a credit card transaction. *Sharpton*, *Sierra*, and *Christy*, discussed above, provide good examples of this theory in action.[116] In all of those cases, the thief induced the government, through an abuse of the agency relationship, to pay money to the card-issuing bank; therefore, a proper theory of the larceny was that the object property—the money paid to the card-issuing bank—was owned by the account holder: the government. Do not confuse this with an embezzlement where the cardholder is also the principal—this is an obtaining-type larceny in which the principal is induced to pay money to the card-issuing bank. Also, it is noteworthy that the focal point of the crime is not on the credit card transaction itself, but upon payments later made by the account holder as a result of that transaction. Finally, this theory does not work for a debit card transaction because the account holder does not make payments to compensate the card-issuing bank (the bank is the debtor in that relationship).[117]

B. Embezzlement—The Withholding Theories

In addition to any available options in the false pretenses context, there are also alternatives to charging and proving an embezzlement provided there is some form of agency relationship. Where there is an agency relationship—for example when a Servicemember uses a GPC card—then at least one of two possible charging theories of embezzlement is available: (1) theft of goods from the principal or (2) theft of money from the principal. Again, the determination of whether the object of the crime is money or goods is fact driven.

An important distinction between the embezzlement theories and the false pretenses theories is that the "owner" under an embezzlement theory is always the account holder, i.e., the principal; whereas, this is not always the case under a false pretenses theory. Furthermore, the particular embezzlement theory available depends upon whether the transaction was authorized by the principal and upon what the thief acquired during the transaction, i.e., goods or money. The purpose of identifying the scope of the authority granted to the thief is not necessarily to rule out the applicability of embezzlement as a theory in total, but to determine what property was stolen. In this manner, it overlaps with the second variable, that of what was acquired by the thief, goods or money.

affirmed a case in which the wrongful use of a debit card was charged in this manner. In *Fields*, the appellant wrongfully used a Soldier's debit card in POS transactions and was subsequently charged with stealing money from the card-issuing financial institution (which in this case was a credit union). *Id.* at *1. After citing *Lubasky* and noting the military judge's decision at court-martial that the financial institution was the owner of the money, the Navy Court affirmed the appellant's conviction without discussion or controversy. *Id.* at *2, *5.

[112] *See supra* Part III.E.

[113] *See supra* Part III.E.

[114] Where there is no agency relationship, it is theoretically possible, though very risky, to charge a thief with falsely inducing the owner of a credit card to make payments to his or her financial institution in order to satisfy the debts falsely incurred by the thief. In this situation, the focus is on the money paid by the account holder to the card-issuing bank. Of course, for this theory to work, the thief must be wrongfully using a credit card, not a debit card, because the payments by the account holder must be induced by the fraudulent use of the card. However, defense counsel should vigorously contest the viability of this charge, as it is unlikely the thief made any representations to the card holder. *See* United States v. Lubasky, 68 M.J. 260 (C.A.A.F. 2010). *See also* discussion, *infra*, note 117.

[115] *Lubasky*, 68 M.J. at 263.

[116] *See supra* Part IV.A.2.

[117] Although the Lubasky Court affirmed a theft of money from the account holder, Ms. Shirley, for CW4 Lubasky's misuse of her debit card, that holding was based on a unique situation—CW4 Lubasky fraudulently induced Ms. Shirley to make him a joint owner of her debit account. Therefore, the false pretenses enabled him to gain ownership in her account, and the crime was completed upon the use of the money via a debit card transaction. That unique situation notwithstanding, the charging theory discussed above is not viable for a debit card transaction.

The scope of the agent's authority is of primary importance to the embezzlement theories. Part III.E provides an introduction to the issue of agency, and Part IV.A discusses how the agent's authority can prevent an obtaining by false pretenses. In this subpart, the existence of an agency relationship is presupposed—it is *sine qua non* to the withholding theories. For that reason, practitioners must pay particular attention to the facts establishing the agency relationship, to include the scope of the thief's authority to act on behalf of the principal. Where a thief's use of a credit or debit card is authorized by the principal, then the thief's misuse can result in embezzlement. But where a thief uses a credit or debit card outside the scope of his authority, the law is unclear as to whether embezzlement has occurred.

*1. Theft of Goods from the Principal*

In a POS transaction where the principal's credit or debit card is used by the thief to purchase goods, the thief may be properly charged with embezzling those goods from the principal. If the thief acted within the scope of his authority in purchasing the goods, then his or her later withholding of those goods from the principal, with the requisite intent, completes a classic embezzlement:

> A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully.[118]

For example, if a Servicemember uses a GPC card to purchase authorized equipment, but then keeps that equipment, then the Servicemember commits embezzlement by withholding goods from his or her principal, the government. This theory is not available in an ATM transaction because it is money not goods that is acquired.

If a thief acts outside of his authority in using a credit or debit card, then the thief has not acquired the purchased goods lawfully and, therefore, embezzlement has not occurred.[119] However, the *MCM*, in the passage quoted above, expresses the view that embezzlement can also occur when the thief acquires goods unlawfully. This statement is dubious, and such a theory is risky at best. The early embezzlement statutes were designed to punish only the unlawful withholding of goods that came lawfully into the possession of a thief.[120] Furthermore, Article 121 only captures those offenses recognized at common-law or early statute.[121] Therefore, defense counsel should be prepared to argue the *MCM*'s suggestion that a thief can be prosecuted for embezzling goods that did not come into his or her lawful possession is incorrect.

This provides a good segue to the next section, as there may be an alternative embezzlement theory available where a thief acts outside the scope of his or her authority when using the principal's credit or debit account—withholding money as opposed to goods. However, there is significant uncertainty surrounding this theory as well.

*2. Theft of Money from the Principal*

A second option in an embezzlement case is to allege a withholding of money, as opposed to goods, from the principal (the account holder). There are several factual situations that may support this theory of embezzlement.

Automated teller machine transactions are the simplest factual scenario to which this theory is applicable. The *Willard* case, discussed in Part III.E, is a good example of this.[122] Specialist Willard was authorized by PFC Clare to withdraw cash from his account. When SPC Willard used this cash for his personal expenses, he was convicted of withholding money from PFC Clare, his principal. Thus, the proper embezzlement theory was a theft of money from the principal. In a GPC card context, a Servicemember who is authorized to withdraw money from an ATM, to use for an authorized purpose, but who later converts that money to his or her own personal use, may be charged with embezzlement of that money from the government, the principal.

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[118] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(b).

[119] Instead, the thief has committed a larceny by false pretenses. *See* Part IV.A., *supra*.

[120] *E.g.*, Moore v. United States, 160 U.S. 268, 269 (1895) (defining embezzlement as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come"); United States v. Sayklay, 542 F.2d 942 (5th Cir. 1976); State v. Gillespie, 705 P.2d 808 (Wash. App. 1985) ("Embezzlement occurs where property that comes lawfully into the taker's possession is fraudulently or unlawfully appropriated by him"). *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 562–63 (2001) ("Because of the statutory nature of the offense, and the piecemeal manner in which embezzlement laws were enacted, no single definition of the crime exists. At a minimum, however, embezzlement involves two basic ingredients: (1) that *D* came into possession of the personal property of another in a lawful manner; and (2) that *D* thereafter fraudulently converted the property . . . . Most embezzlement statutes include a third element: that *D* came into possession of the property as the result of entrustment by or for the owner of the property.").

[121] *See* authority cited *supra* note 36.

[122] United States v. Willard, 48 M.J. 147, 148 (C.A.A.F. 1998).

In the case of a POS transaction, the simplest permutation of this theory occurs where the thief subsequently sells property that he or she has lawfully acquired and then retains the proceeds. The *Ragins* case is a good example of this theory of embezzlement. As discussed in Part IV.A.2, Chief Ragins worked in concert with a bread delivery man to steal from the commissary. The Ragins Court summarized the government's theory of the crime as follows:

> [U]nder the government's theory, appellant received the bread for the government's benefit and held it in trust for the Government. [ ] When the bread was sold, the proceeds in turn were held in trust. [ ] Then, in turn, when he and Rose split up these proceeds, there was a "withholding" of money which belonged to the Government, this money being the amount of the proceeds from the private bread sales. Thus, appellant is ultimately responsible for an embezzlement of these proceeds.[123]

Thus, a thief's later sale of goods purchased using his or her principal's credit or debit card may be properly charged as an embezzlement of the proceeds gained from the sale, i.e., a withholding of money from the principal.

The final, and potentially most complex and precarious variation of this embezzlement theory, also occurs in the POS transaction context. In the case of a POS transaction, an embezzlement of the principal's money occurs when the thief devotes "property to a use not authorized by its owner."[124] Therefore, in general, a thief may be charged with embezzlement by misapplying the principal's money when using that money for the thief's own benefit, for example by purchasing goods. What is noteworthy in this situation, is that the thief is acting outside the scope of his or her authorization. Unlike the previous embezzlement situations, where the thief acquired property lawfully by acting within the scope of his or her authorization, in this situation the thief is acquiring a benefit by depriving the principal of the possession of the money by devoting it to an unauthorized use. However, due to the creditor–debtor relationship, the viability of this theory is uncertain in a credit or debit card case.

When a thief uses the principal's credit or debit card, the money that is misapplied originates from the card-issuing bank. It is that money which is being misapplied, and due to the creditor–debtor relationship, the account holder is not the owner of that money.[125] Moreover, in *Lubasky*, CAAF rejected a theory of larceny where the account holder, Ms. Shirley, was the owner of the money misapplied by her agent, CW4 Lubasky. Civilian jurisdictions that have considered this issue are split, and those that find an embezzlement in this situation, do so using a constrained theory of segregation: The principal becomes the owner of money paid by the bank because that money is segregated from the bank's general account seconds before payment to the merchant.[126] However, in its recent decision, *Sharpton*, CAAF held that the account holder, the government, was the owner of money stolen by its agent. As discussed above, in Parts III.E and IV.A, this holding can be interpreted as authority that the processing chain of a credit card transaction reaches back to include payments contractually required to be made by the account holder. If that is true, then trial counsel may be able to sustain a prosecution for this type of embezzlement theory. But defense counsel would be well-advised to contest this interpretation of *Sharpton* based on CAAF's use of the term of art "obtaining," and its holding in *Lubasky*.

In any event, it is currently unclear whether an embezzlement of money from the principal is supportable in a POS transaction where there is a creditor–debtor relationship between the principal and the card-issuing bank. This uncertainty should be taken into account when pursuing this specific theory.

## V. Conclusion

*United States v. Lubasky* provides an important lesson for the military practitioner because it illustrates the difficulty of determining the proper owner, property, and means of larceny committed through the wrongful use of credit card and debit card transactions. When a credit or debit card is used by a thief, his or her conduct implicates not only the various, technical forms of larceny, but also the legal relationship between a cardholder and his or her bank, all of which takes place against the backdrop of a complex financial processing framework. When prosecuting a credit or debit card larceny it is important to take into account the

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[123] United States v. Ragins, 11 M.J. 42, 47 (C.M.A. 1981).

[124] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(b).

[125] *See supra* Part III.C.

[126] E.g., People v. Keller, 250 P. 585, 585–86 (Cal. App. 1926) ("It, of course, is conceded by the Attorney General, as indeed it must be, that the money of the Finance Corporation, which appellant placed on general deposit with the Santa Ana Bank, was, while on deposit, the property of that bank, and that during its deposit the relation between the bank and the depositor, appellant's principal, was that of debtor and creditor. When, however, the money was paid on the check to the forwarding bank, it became, for an instant of time at least, however short, the property of the depositor—the Finance Corporation."). *Contra* State v. Tauscher, 360 P.2d 764, 770–771 (Or. 1961) ("Even if we were to accept (which we do not) the fiction that the bank segregates a part of its funds upon the presentment of a check, and further accepting (as we do not) the fiction that the possession constructively vests in the depositor, we cannot bring ourselves to take the next step and, by fiction, put the defendant in possession of the money. Under our embezzlement statute the defendant must have possession of the property embezzled.").

creditor-debtor relationship in order to avoid the result in *Lubasky*. And it is also important to consider whether there is an agency relationship that somehow affects the theory of the crime. In most cases, there are a variety of factors to consider, and several theories of larceny available.

Practitioners who approach these cases with diligent forethought in their pretrial preparation have the best chance of success when the case ultimately reaches trial. "Dude."[127]

[127] THE BIG LEBOWSKI, *supra* note 1.

## Appendix

## Point-of-Sale (POS) Transaction Figure

| | | | Owner and Property | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | Merchant | | Card-Issuing Bank | | Principal | |
| | | | Goods | Money | Goods | Money | Goods | Money |
| Agency Relationship and Larceny Theory | No Agency | False Pretenses | YES (Part IV.A.1) | NO | NO | YES (Part IV.A.2) | NO | NO |
| | | Embezzle-ment | NO | NO | NO | NO | NO | NO |
| | Agency But No Authority | False Pretenses | YES (Part IV.A.1) | NO | NO | YES (Part IV.A.2) | NO | YES (Part IV.A.3) |
| | | Embezzle-ment | NO | NO | NO | NO | NO | YES (Part IV.B.2) |
| | Actual Authority | False Pretenses | NO | NO | NO | NO | NO | NO |
| | | Embezzle-ment | NO | NO | NO | NO | YES (Part IV.B.1) | YES (Part IV.B.2) |

This figure is a general reference guide for determining a viable theory of larceny under Article 121, UCMJ, in a POS transaction. To use this Figure:

1. Locate the two rows that describe the agency relationship of the case;
   a. "No Agency" refers to a case where there is no agency relationship between the thief and the account holder.
   b. "Agency But No Authority" refers to a case where there is an agency relationship between the thief and the account holder, but the thief acted outside the scope of his authority when engaging in the POS transaction.
   c. "Actual Authority" refers to a case where there is an agency relationship between the thief and the account holder, and the thief possessed the authority to engage in the POS transaction.
2. Next, locate the "YES" blocks within these set of rows;
   a. Shaded "YES" blocks indicate theories with significant uncertainty.
   b. Cross-references for discussions of the theory are also indicated.
3. The row in which the "YES" block is located will indicate the theory of larceny; and
4. The column in which the "YES" block is located will indicate both the character of the property, and the owner of that property that should be alleged. A shaded "YES" block means that there is some uncertainty about the viability of the indicated theory.