IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

| | | |
|---|---|---|
| **UNITED STATES** | ) | |
| | ) | **RULING: GOVERNMENT MOTION TO PRECLUDE MOTIVE EVIDENCE ON MERITS** |
| **MANNING, Bradley E., PFC** | ) | |
| **U.S. Army, xxx-xx-(b)** | ) | |
| **HHC, U.S. Army Garrison** | ) | |
| **Joint Base Myer-Henderson Hall** | ) | DATED: 16 January 2013 |
| **Fort Myer, Virginia 22211** | ) | |

On 16 November 2012, the Government filed a Motion to Exclude Motive Evidence during the merits portion of the trial. On 30 November 2012 the Defense filed a response opposing the motion. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes as follows:

**Findings of Fact:**

1. The accused is charged with one specification of aiding the enemy in violation of Article 104, Uniform Code of Military Justice (UCMJ), one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting in violation of Article 134, UCMJ, eight specifications of violations of 18 U.S.C. § 793(e) and Article 134, UCMJ, five specifications of violations of 18 U.S.C. § 641 and Article 134, UCMJ, two specifications of violations of 18 U.S.C. § 1030(a)(1) and Article 134, UCMJ, and five specifications of violating a lawful general regulation, in violation of Article 92, UCMJ. The time period of the charged offenses is from on or about 1 November 2009 - on or about 27 May 2010.

2. The Government asserts evidence of motive is not relevant to any charged offense or to any cognizable defense.

3. The Defense intends to introduce evidence of the accused's motivation during the period of the charged offenses. Defense intends to introduce the accused's motivation through the testimony of Adrian Lamo and Zachary Antolak.

4. The Defense, in its response, argues that evidence of the accused's motive is relevant for two reasons:

(1) the elements of the charged offenses make the accused's motive relevant; particularly the element of knowledge in the specification of Charge I (Aiding the Enemy) and specifications 4, 6, 8, and 12 of Charge II (Stealing, Purloining, or Knowingly Converting Records), and the element that the accused wantonly published the information at issue in specification 1 of Charge II.

(2) to rebut evidence of the accused's intent presented by the Government via the testimony of SPC Jihrlea Showman.

5. During oral argument, the Defense asserted that evidence of the accused's motive was also relevant to the element of whether the accused had reason to believe that the information he communicated could be used to the injury of the United States or to the advantage of any foreign nation for the offenses charged



APPELLATE EXHIBIT 470
PAGE REFERENCED:
PAGE ___ OF ___ PAGES

as violations of 18 U.S. C. Section 793(e), specifications 2, 3, 5, 7, 9, 11, and 15 of Charge II and the offenses charging a violation of 18 U.S. C. § 1030(a)(1), specifications 13 and 14 of Charge II. The Defense advised the Court of its intent to present evidence that the accused selected information that he knew or believed could not be used to harm the United States and intended to present evidence to raise a mistake of fact defense to this element in that the accused did not believe the information he communicated could be used to the injury of the United States. The Defense further advised the Court of its intent to use the damage assessments to corroborate the reasonableness of the accused's belief.

6. The Government argues that the accused's motivation is not relevant to the elements of "knowledge" or "wanton publication" and that the element "reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation" is an objective element. As such, the accused's subjective knowledge or belief is irrelevant.

**The Law:**

1. MRE 401 defines "Relevant Evidence". Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

2. MRE 402 provides that all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

3. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way in a matter at issue.

4. MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

5. There is a distinction in the law between motive and intent. Intent is a person's immediate goal while motive is a person's ultimate goal. *U.S. v. Huet Vaughn,* 43 M.J. 105 (C.A.A.F. 1995). As an example, a person may steal food from a store to feed his family. His intent is to steal the food. He steals the food to further his motive to feed his family. The fact that he has a noble motive to feed his family does not negate his intent to steal the food. In a prosecution for larceny, the government would have to prove the person's intent to steal. The person's motive to feed his family is relevant only to the extent it provides circumstantial evidence of intent to steal or it presents a viable defense. *See U.S. v. Diaz,* 69 M.J. 127 (C.A.A.F. 2010); *U.S. v. Rockwood,* 52 M.J. 98 (C.A.A.F. 1999); *U.S. v. Huet Vaughn*, 43 M.J. 105 (C.A.A.F. 1995).

6. Similarly, in this case, the accused's motive is relevant only to the extent it provides circumstantial evidence of the accused's intent or it presents a viable defense to any of the charged offenses.

7. The *mens rea* requirement for 18 U.S.C. § 793(e) does not require that the accused act in bad faith or with ill intent. *U.S. v. Diaz,* 69 M.J. 127 (C.A.A.F. 2010); *U.S. v. Kiriakou,* 2012 WL 4903319 (E.D. Va. Oct. 16). Under the same rationale, the *mens rea* requirement for 18 U.S.C. § 1030(a)(1) also does not require that the accused act in bad faith or with ill intent.

8. RCM 916(j) governs the defense of Ignorance or Mistake of Fact. The rule provides that it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true nature of the circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

**Conclusions of Law:**

1. The accused's motive during the period of the charged offenses, on or about 1 November 2009 – on or about 27 April 2010:

a. is relevant to the element of knowledge, particularly whether the accused knew he was dealing with the enemy, for the specification of Charge I (Aiding the Enemy). This case is distinguished from prior Article 104 cases declining to allow evidence of noble motive or good faith of the accused because the accused's bad faith is not an element of Article 104 and because Article 104 is a general intent offense not requiring a specific intent by the accused to aid the enemy. *See U.S. v. Batchelor,* 22 C.M.R. 144 (C.M.A. 1956). The Court agrees, however, in this case, evidence of the accused's motive is relevant to prove whether the accused knew or didn't know he was dealing with the enemy.

b. is not relevant to whether the accused knew he was stealing, purloining, or knowingly converting property belonging to the United States, for specifications 2, 4 , 6 , 8, and 12 of Charge II.

c. is not relevant to whether the accused "wantonly" published information for specification 1 of Charge II.

d. is not relevant to whether the accused had reason to believe information he communicated could be used to the injury of the United States or to the advantage of any foreign nation for specifications 2, 3, 5, 7, 9, 11, 13, 14, and 15 of Charge II.

2. If the Government offers statements made by the accused to SPC Jihrlea Showman to prove his state of mind, the accused's motive or state of mind during the period of the charged offenses is relevant to rebut that evidence.

3. In the Court's 19 October 2012 Ruling: Government Motion to Preclude Reference to Actual Harm or Damage on the Merits, the Court deferred ruling on whether lack of actual harm or damage assists in presenting a viable defense. The Ruling stated "In order for the Court to appropriately rule on whether actual damage corroborates the reasonableness of the accused's belief, there must be some evidence the accused knew the information could not be used to the injury of the United States or to the advantage or any foreign nation." The Court now has a sufficient foundation to rule on this issue and believes it would benefit the parties to have clarity on what evidence is relevant and potentially admissible.

4. For the specifications charging violations of 18 U.S.C. §§ 793(e) and 1030(a)(1) the element that the accused had "reason to believe the information he communicated could be used to the injury of the United States or to the advantage of any foreign nation" is an objective element evaluated on facts

actually known by the accused. It does not require the Government to prove the accused *knew* the information he communicated could be used to the injury of the United States or to the advantage of any foreign nation. The Government must prove that the accused had *reason to believe* that the information he communicated could be used to the injury of the United States or to the advantage of any foreign nation. Either the accused had reason to believe or he didn't. A subjective conclusion by the accused that he did not have reason to believe the information he communicated could be used to the injury of the United States or to the advantage or any foreign nation is immaterial to this element. It is also a mistaken conclusion not a mistake of fact. The accused may certainly present evidence of factors he knew regarding the information communicated as evidence that he did not have reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation.

5. Upon request of the Defense, the Court has considered *U.S. v. Miller*, 874 F.2d 1255 (9th Cir. 1989). *Miller* is distinguishable from this case in that the defendant in *Miller* was charged with violating 18 U.S.C. § 793(b) with a *mens rea* that the accused acted with intent or reason to believe the information is to be used to the injury of the United States. It is also distinguishable because the case does not involve the affirmative defense of mistake of fact as defined in RCM 916(j). The District Court in *Miller* gave the following instruction to the jury "You may consider whether the defendant acted in good faith and reasonably believed that communication or delivery of the document specified in Count Two was within the scope of his authorized duties as an FBI Agent and actually intended to communicate and deliver that classified document to Svetlana Ogorodnikova as part of his official duties as an FBI agent to the extent that it may bear on whether he had reason to believe the document was to be used to the injury of the United States or the advantage or a foreign nation." The Ninth Circuit opined that this instruction reflected a misunderstanding of the nature of the accused's defense. The appellate court opined it would have been more appropriate to "instruct the jury to the effect that Miller's reasonable belief, if any, that his actions would have met with subsequent approval from his FBI superiors could be taken into account in deciding whether he had reason to believe that his actions would harm the United States or help the Soviets." *Miller* is consistent with the reasoning of this Court. Any mistaken belief the accused had about the nature of the information communicated is relevant to whether he did or did not have reason to believe the information could be used to the injury of the United States or the advantage of any foreign nation. The Ninth Circuit in *Miller* further held that Miller was not entitled to an instruction that he could not be convicted if his actions were intended to benefit the United States even if he acted with a mistaken, but reasonable belief as to the extent of his authority. This is also consistent with the reasoning of this Court.

6. Evidence that the accused selected only particular information to communicate and factors he knew about that information to select certain information over other information is relevant to the element whether the accused had reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation for the specifications charging violations of 18 U.S.C. §§ 793(e) and 1030(a)(1). The accused's subjective conclusion that the information he selected could not be used to the injury of the United States or to the advantage of any foreign nation is not a mistake of fact and does not raise a mistake of fact defense.

7. Even if the accused's mistaken conclusion that he did not have reason to believe that the communicated information could be used to the injury of the United States or to the advantage of any foreign nation raised a viable mistake of fact defense for the element of whether the accused had reason to believe the evidence he communicated could be used to the injury of the United States or to the advantage of any foreign nation, the damage assessments would not be relevant to corroborate the reasonableness of the accused's belief. The relevant inquiry would be facts known by the accused at or before the charged offenses. The damage assessments were created or compiled after the alleged offenses were committed.

What, if any, future damage occurred after disclosure was not knowable by the accused during the time period of the charged offenses. Moreover, mitigation measures were implemented by affected agencies to prevent or minimize actual damage. The accused could not have known what, if any, mitigation measures would be taken by United States government agencies and what, if any, impact those measures had on actual damage caused. Thus, the damage assessments would not be relevant to corroborate the reasonableness of the accused's belief under MRE 401. Even if relevant, the probative value of the damage assessments is substantially outweighed by the danger of confusion of the issues under MRE 403.

**RULING:** The Government Motion to Exclude Motive Evidence on the Merits is **GRANTED IN PART** as set forth above. Evidence of the accused's motive is relevant to the knowledge element of the specification of Charge I (Aiding the Enemy). It is also relevant to rebut evidence of the accused's state of mind if offered by the Government through the testimony of SPC Jihrlea Showman. The accused's motive is not relevant for any other purpose. Evidence of the accused's selection of particular information to communicate and factors considered by the accused in making such selections is not motive evidence and is not excluded by this Ruling. The accused's subjective conclusion that he did not have reason to believe the information communicated could be used to the injury of the United States or the advantage or any foreign nation does not raise a mistake of fact defense under RCM 916(j). To the extent any language in the Court's 19 October 2012 ruling is inconsistent with this ruling, this ruling is controlling.

So **ORDERED** this 16th day of January 2013.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit