

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

**Government Targeted Brief
on Relevance of Expert Testimony
Regarding Potential Damage**

14 May 2013

FACTS

The accused is charged with giving intelligence to the enemy, in violation of Article 104, Uniform Code of Military Justice (hereinafter "Article 104" and "UCMJ," respectively). The accused is also charged with causing intelligence to be "wrongfully and wantonly" published in violation of Article 134, UCMJ, eight specifications alleging misconduct in violation of 18 U.S.C. § 793(e), five specifications alleging misconduct in violation of 18 U.S.C. § 641, two specifications alleging misconduct in violation of 18 U.S.C. § 1030(a)(1), five specifications alleging misconduct in violation of Article 92 of the UCMJ. *See* Charge Sheet.

The accused pleaded guilty by substitutions and exceptions to Specifications 2, 3, 5, 7, 9, 10, 13, 14 and 15 of Charge II. *See* Appellate Exhibit CDLXIV. The accused did not plead guilty *inter alia*, to Specifications 4, 6, 8, 11, 12, and 16 of Charge II. *See id.*

On 8 May 2013, the Court asked the United States to brief the following issues: (1) relevance of expert testimony on context and circumstances surrounding charged documents; (2) relevance of expert testimony on prospective damage; and (3) whether the Defense is entitled to rebut any such expert testimony. The Court requested the United States consider the questions with and without consideration of the guilty plea.

LEGAL AUTHORITY AND ARGUMENT

Evidence offered to prove that the accused had reason to believe that the compromise of the charged information could injure the United States and that the charged information is of a value greater than \$1,000.00 entails specialized knowledge and is therefore appropriate for expert opinion testimony. Evidence that the charged information related to the national defense and that intelligence received by the enemy is true, in part, however, does not require specialized knowledge and thus does not require expert opinion testimony.

I. EFFECT OF PLEA ON GREATER CHARGES

A. Accused's Plea Excepts Elements

The accused has been charged with violations under Article 134, UCMJ, *inter alia*, 18 U.S.C. §§ 641, 793(e) and 1030(a)(1). *See* Charge Sheet. For § 793(e) specifications, the accused has not pleaded guilty, *inter alia*, to "information relating to the national defense" or "with reason to believe such information could be used to the injury of the United States or to the

APPELLATE EXHIBIT 1.544
PAGE REFERENCED _____
PAGE ____ OF ____ PAGES

advantage of any foreign nation” by excepting those phrases. *See* Appellate Exhibit CDLXIV. The defense has also pleaded not guilty to Specification 11 of Charge II in its entirety. For § 1030(a)(1), the accused has not pleaded guilty, *inter alia*, to “reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation” (hereinafter “reason to believe”) by excepting the phrase. *See id.* The “reason to believe” language for the §§ 793(e) and 1030(a)(1) specifications employs the same language for the willful transmission of classified information; however, § 793(e) also charges that the information is national defense information. *See* Charge Sheet. Accordingly, similar types of evidence will prove the “reason to believe” element for both § 793(e) and § 1030(a)(1). *See* Appellate Exhibit CDX.

Here, the accused has pleaded guilty to lesser-included offenses of the greater charged offenses. The proper test for determining whether one offense constitutes a lesser included offense of another is the “elements test” from *Schmuck v. United States*, 489 U.S. 705, 716-17 (1989); *United States v. Jones*, 68 M.J. 465, 469-70 (C.A.A.F. 2010). Under the elements test, “one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense.” *Jones*, 68 M.J. at 469-70. “[T]he elements test does not require that the two offenses at issue employ identical statutory language. Instead, after applying the normal principles of statutory construction, [the Court] asks whether the elements of the alleged [lesser-included offense] are a subset of the elements for the charged offense.” *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011) (citation and internal quotation marks omitted). In the instant case, the accused’s pleaded offenses constitute lesser-included offenses because all elements save the excepted language remain the same.

Furthermore, the accused excepted phrases that change the gravamen of the offense, thereby making it qualitatively distinct from the greater charged offense. *See United States v. Diaz*, 69 M.J. 127, 135 (C.A.A.F. 2010) (upholding the ruling that substituting the phrase “government information not for release” for “classified documents” made the plea irregular). The “reason to believe” language excepted from both the § 793(e) and § 1030(a)(1) specifications represents a heightened *scienter* requirement. Appellate Exhibit DXV (citing *United States v. Rosen*, 445 F. Supp.2d 602, 625-26 (E.D. Va. 2006)). Striking the excepted language also removes the element of “information relating to the national defense.” This excepted element also heightens the severity of the charged offense and transforms the nature of the information at issue. The lack of the “reason to believe” element decreases the maximum punishment from 10 years to 2 years per offense. *See* Appellate Exhibit CDLXIV. Therefore, the accused’s pleas are lesser forms of the charged offenses.

B. Accused’s Statements During Providence Inquiry Cannot Be Used to Prove Excepted Elements Because Excepted Elements Are not Common to Pleded Offenses and Charged Offenses

Upon pleading guilty, the accused relinquished his right, *inter alia*, against self-incrimination only with respect to the lesser-included offenses to which he pleaded guilty. *See* Appellate Exhibit CDXCV (a) (“By your plea of guilty, you give up three important rights, but you give up these rights solely with respect to the offenses to which you have pled guilty.”); Appellate Exhibit CDXCV(b). Where the accused has not waived his right to self-incrimination,

the statements from the providence inquiry may not be used to prove greater offenses. *See United States v. Resch*, 65 M.J. 233, 237 (C.A.A.F. 2007) (holding that it was materially prejudicial error to use accused's statements from providence inquiry for greater offense in contravention of express waiver); *United States v. Flores*, 69 M.J. 366, 369-70 (C.A.A.F. 2011) ("A military judge who advises an accused that she is waiving her right against self-incrimination only to the offenses to which she is pleading guilty must not later rely on those statements as proof of a separate offense."). Although the accused pleaded to lesser-included offenses, the excepted elements are not common between the lesser-included offenses and the charged greater offenses. During the accused's providence inquiry, the accused stated that the documents he compromised were classified. The accused proffered this fact with respect to the elements to which he pleaded, not "reason to believe" or national defense information elements. Accordingly, the United States must prove the excepted elements without relying on the accused's statements regarding classification during the providence inquiry to establish the greater offenses. *See United States v. Cazatt*, 29 C.M.R. 521, 522-23 (C.M.A. 160). Specifically, the United States cannot rely on any statement made by the accused with respect to classification and must prove the related facts independently and completely apart from the accused's statements during the providence inquiry.

C. Requirements of Proof for Greater Elements

To prove "reason to believe," the United States must demonstrate that the accused was aware or should have been aware of the potential for the information to be used to the injury of the United States. *See United States v. Diaz*, 69 M.J. 127, 133-34 & n. 4 (C.A.A.F. 2010). By itself, classification is insufficient to prove "reason to believe;" however, classification is a factor in proving "reason to believe." *See id.* at 133 ("[C]lassification alone does not satisfy the *mens rea* requirement of § 793(e)."). Moreover, classification is not the only means by which information can be shown to be the kind that could be used to the injury of the United States. *See id.*

Factors demonstrating "reason to believe" include, *inter alia*, classification, testimony describing what injury might ensue from compromise of the information, accused's training, accused's acknowledgement of a non-disclosure agreement, accused's compromising the information in a clandestine manner. *See id.* Additionally, the fact finder may consider the nature of the information in deciding "reason to believe." *See* Appellate Exhibit CDX. Moreover, classified markings fail to prove that the information could be used to the injury of the United States; the information marked classified must also properly qualify for classification. *See id.* Consequently, testimony by a director of an intelligence group demonstrating the potential injury that might ensue from public disclosure of classified information may establish that the information could be used to the injury of the United States. *Id.* at 133 n. 4.¹ Thus, "reason to believe" requires evidence both that the information could be used to the injury of the United States and that the accused was aware of the potential for the information to be used to injury of the United States.

¹ The witness was a civilian employee of the Defense Intelligence Agency, serving as the Director of the Joint Intelligence Group, Joint Task Force GTMO.

Information that relates to the national defense “includes all matters that directly or may reasonably be connected with the defense of the United States, against any of its enemy.” See *United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988); Appellate Exhibit CDX. The term “national defense” is broad and refers to the United States military and naval establishments and to all related activities of national preparedness. See *Morison*, 844 F.2d at 1071; Appellate Exhibit CDX; see also *United States v. Gorin*, 312 U.S. 19, 24-25 (analyzing the legislative history of the Espionage Act). Factors for the fact finder to determine national defense information include, *inter alia*, the accused’s experience and expertise, position and MOS, any instructions and training received, classification markings on the information, and the basis for classification. See *Morison*, 844 F.2d at 1073-74 (holding “relating to the national defense” not to be constitutionally vague). Therefore, to prove that information relates to the national defense, the United States must prove (1) that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States; and (2) that the documents are closely held because they have not been made public. See *Morison*, 844 F.2d at 1071-72; Appellate Exhibit CDX.

II. “REASON TO BELIEVE” EVIDENCE APPROPRIATE FOR EXPERT TESTIMONY BASED ON SPECIALIZED KNOWLEDGE

Relevant evidence is 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. Military Rule of Evidence (hereinafter “MRE”) 401. 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. The military judge has the initial responsibility to determine whether evidence is relevant under MRE 401. *United States v. White*, 69 M.J. 236 (C.A.A.F. 2010). Elements of charged offenses are relevant and defined by the specification. See Rule for Courts-Martial 307(c)(3) (defining a specification as a plain, concise, and definite statement of the essential facts constituting the offense charged).

A. Expert Opinion Appropriate for Specialized Knowledge

Relevant evidence may be provided by an expert witness. See MRE 702. A witness may testify as an expert if he has scientific, technical, or other specialized knowledge that will assist the fact finder, and the witness is qualified as an expert by virtue of knowledge, skill, experience, training, or education. *United States v. Harris*, 46 M.J. 221, 224 (C.A.A.F. 1997) (citing *United States v. Stark*, 30 M.J. 328, 330 (C.M.A. 1990)). An expert witness has substantive knowledge “beyond the ken of the average court member” and need not be “an outstanding practitioner, but only someone who can help the [fact finder].” *Id.* (citations and internal quotation marks omitted). Accordingly, the test for admissibility of expert testimony is whether the fact finder is qualified without the expert testimony to determine the particular issue intelligently and to the best possible degree without enlightenment of the expert with specialized understanding of the subject. *United States v. Billings*, 61 M.J. 163, 167 (C.A.A.F. 2005) (citing *United States v. Houser*, 36 M.J. 392, 398 (C.M.A. 1993)). The test is not whether a fact finder “could reach any conclusion without expert help.” *Id.* (emphasis in original). To make a determination regarding admission of expert testimony, the military judge considers (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal

relevance of the evidence; (5) the reliability of the evidence; and (6) that the probative value of the expert's testimony outweighs the other considerations outlined in MRE 403. *Billings*, 61 M.J. at 166 (citing *Houser*, 36 M.J. at 397).

In the instant case, the United States will prove the accused's awareness of the potential for the information to be used to the injury of the United States, *inter alia*, by demonstrating his training regarding classified information, his voluntary consent to a non-disclosure agreement, classified markings on the classified information, and the secretive manner in which he compromised classified information. Additionally, the United States will prove that the information could be used to the injury of the United States and was therefore properly classified, *inter alia*, by showing the bases for classification of the information via testimony regarding the contents of the document and the manner in which the contents could be used to the injury of the United States via opinion testimony.

B. Classification Determinations Require Specialized Knowledge

Classification authority, including the authority to declassify information, belongs only to an original classification authority (OCA) and his successors. *See* Exec. Order No. 13526 § 3.1(b). The decision, bases, and propriety of a decision to classify information are "not within the realm of an ordinary lay witness" because classification decisions are based on information unknown to a lay witness. *Cf. United States v. El-Mezain*, 664 F.3d 467, 512 (5th Cir. 2011) (deciding that testimony about the Treasury Department's practice in designating terrorist organizations is specialized knowledge). Any determination of classification by an OCA requires an opinion regarding potential injury from unauthorized disclosure of the information that is relevant to the elements of "reason to believe" and national defense information. *See United States v. Dedeyan*, 584 F.2d 36, 41 (4th Cir. 1978) (discussing the necessity of classifying information as it currently bears on the national defense).

Classification decisions contemplate the data known to the OCA. These data do not entirely fall within the four corners of a classified document. An OCA relies on experience and context, which includes surrounding circumstances, history, and other classified information to form the ultimate opinion that release of specified information could reasonably be expected to cause injury to the United States. The specialized knowledge relied upon to make classification determinations necessarily falls outside the realm of a lay witness and fact finder. The contents and classification determinations of Department of State cables require specialized diplomatic expertise and are affected by information not included in the cable. Additionally, classification determinations about the potential harm from unauthorized compromise of significant activity reports of the Combined Information Data Network Exchange Afghanistan (hereinafter "CIDNE-A") require specialized knowledge and executive authority.

For instance and in contrast, the contents of significant activity reports of CIDNE-A would be readily understood by any member of the armed forces with the knowledge that the reports were produced during wartime in Afghanistan, a widely-known fact appropriate for judicial notice. *See Guerrero v. Marsh*, 819 F.2d 238, 239 (9th Cir. 1987) (taking judicial notice importance of Filipino guerrillas in the liberation of the Philippines as military history). Still, contextual evidence is relevant to a determination of national defense information because the

number of details increase sensitivity. For example, a grid location becomes more sensitive when associated with troop movements at a specific time.

Likewise, subject matter expert testimony will be based on firsthand knowledge and personal experience. Department of State subject matter witnesses will testify regarding their personal knowledge in their area of expertise. United States Central Command (hereinafter "CENTCOM") subject matter witnesses will testify regarding their personal observations of the contents of documents. CENTCOM subject matter experts will additionally testify about their findings regarding the content's apparent classification in accordance with experience and classification guides. However, the testimony of a subject matter expert does not conclusively establish the proper basis for a classification determination because that decision is within the authority of an OCA. The OCA relies on subject matter experts, who have specific knowledge, to make classification determinations. Therefore, an OCA's testimony is not cumulative with a subject matter expert's testimony. Moreover, the context surrounding a subject matter expert's testimony presents a more accurate picture for the bases of classification and should thus be presented to the fact finder. Importantly, the title "subject matter expert" applies to individuals who will not necessarily be qualified as experts under MRE 702. Instead, the title of "subject matter expert" applies to witnesses focusing on a specific area of charged information and could be qualified as experts under MRE 702.

Indeed, courts recognize the specialized knowledge and grant great deference to classification determinations. *See, e.g., El-Mezain*, 664 F.3d. at 523 (declining to "second guess" the Government's determination of what is properly classified). Where a witness will testify about the details of information or the contents of a document, a lay opinion is appropriate; however, although not required, expert testimony is a proper method to establish the ultimate conclusion of a classification decision because that decision requires specialized authorization and knowledge. *See id.* at 514 (stating that opinion testimony for a lay witness is improper where the opinion is not based on first-hand observations).

C. Valuation Evidence Also Requires Specialized Knowledge

Similarly, valuation evidence also requires specialized knowledge appropriate for expert testimony. The United States will demonstrate valuation by presenting evidence of the information's value in a thieves' market. This opinion is based on unique, specialized knowledge and experience of an intelligence professional and is unknown to the average fact finder. The thieves' market requires demonstration of what types of information are valuable to foreign adversaries. The evidence is further strengthened by an explanation of why the information is valuable. Moreover, any type of evidence supporting valuation necessarily requires discussion of content and context. The thieves' market involves the motives and resources of foreign adversaries. Furthermore, the United States will present evidence about the systems required to create, maintain, and protect the information. This technical and financial information is also beyond the ken of an average fact finder. Thus, an expert is appropriate for presentation of valuation evidence and discussion of its context.

D. Evidence Not Dependent on Expert Testimony

Contrastingly, an expert is not required, but could be used for evidence of whether intelligence is true, in part to prove Article 104. Here, the contents of CIDNE-A and a Department of State Net-Centric Database (hereinafter "NCD") cable constitute intelligence. Identifying the contents of the NCD cable and CIDNE-A documents requires testimony about firsthand knowledge of how the information in the documents is collected and used. Evidence of firsthand knowledge does not require specialized knowledge and is appropriate for a lay witness. The creation of information in documents and validation of that information is a normal government and military activity. In addition, expert testimony is not required to prove that the accused's acts were prejudicial to good order and discipline. Accordingly, evidence of whether intelligence received by the enemy is true, in part, or whether any of the accused's acts were prejudicial to good order and discipline does not require, but could include, expert opinion testimony.

III. NO ACCRUAL OF PREJUDICE FROM RELEVANT EXPERT TESTIMONY

Otherwise admissible expert testimony may be barred where the danger of unfair prejudice from the testimony outweighs its probative value. *See United States v. Ellis*, 68 M.J. 341, 347 (C.A.A.F. 2010) (citing *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992)). Evidence that entices the fact finder to declare guilt "on a ground different from proof specific to the offense charged" risks creating unfair prejudice. *See United States v. Gaddis*, 70 M.J. 248, 254 (C.A.A.F. 2011) (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)) (analyzing the intent Federal Rule of Evidence 403).

Here, OCA expert testimony describing the potential injury stemming from compromise of classified and national defense information is not prejudicial because it is specialized knowledge directly relevant to the greater offense. The accused has not pleaded guilty to the elements of reason to believe or national defense information for any specification. Although the accused is free to offer an alternative plea, the alternative plea does not foreclose the presentation of relevant evidence. *Cf. Diaz*, 69 M.J. at 135 (noting that while the accused is free to offer an alternative plea, he is not entitled to design his own offense). Because an OCA's opinion creates a basis for classification and the OCA relies on specialized knowledge in making that determination, an OCA should testify as an expert. The risk that the fact finder will overestimate or emotionally react to the expert testimony is minimized where the fact finder is a military judge. Additionally, context will contribute only to the probative force of expert testimony because the context presented will be the type of context used to make classification decisions. *See United States v. Cameron*, 21 M.J. 59, 64 (C.M.A. 1985) (stating that the fact finder may rely on reliable evidence of credibility).

IV. DEFENSE ALSO ENTITLED TO RELEVANT EXPERT TESTIMONY

Finally, given the foregoing, the Defense is entitled to present relevant evidence regarding the excepted elements. As discussed *supra*, classification and valuation testimony depends on specialized knowledge. Accordingly, the Defense is also entitled to present its own expert witnesses on the issues of "reason to believe," national defense information, and

valuation. In this case, the Defense has already demonstrated its intent to present evidence through expert testimony, such as Ambassador Galbraith, Colonel (Retired) Davis, Mr. Ganiel, Mr. Hall, among others. *See* Appellate Exhibit CCCXLIV.

A handwritten signature in black ink, appearing to read 'A S von Elten' in a stylized, cursive script.

ALEXANDER S. VON ELTEN
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 14 May 2013.

A handwritten signature in black ink, appearing to read 'A S von Elten' in a stylized, cursive script.

ALEXANDER S. VON ELTEN
CPT, JA
Assistant Trial Counsel