IN THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, *Appellee,* *-versus-* Lieutenant Commander [O-4] **MATTHEW M. DIAZ,** United States Navy, JAGC, *Appellant.*	USCA Dkt. No. 09-0535/NA Crim.App. No. 200700970

AMICUS CURIAE BRIEF OF

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

In Support of Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONSTITUTION.

CASES.

STATUTES.

UCMJ.

MANUAL FOR COURTS-MARTIAL.

OTHER AUTHORITIES.

ISSUES

I. DID THE MILITARY JUDGE ERR TO THE SUBSTANTIAL PREJUDICE OF THE ACCUSED BY *PRECLUDING* RELEVANT AND MATERIAL EVIDENCE VIOLATING THE ACCUSED'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE?

II. DID THE MILITARY JUDGE COMMIT PLAIN ERROR BY *NOT* DETERMINING AS A MATTER OF LAW THAT THE ALLEGED "SECRET" INFORMATION AT ISSUE WAS LAWFULLY CLASSIFIED?

STATEMENT OF THE CASE

With three *caveats, Amicus* accepts Appellant's "Statement of the Case." *First*, we note that Appellant was *acquitted* of Specification 1, Charge III, alleging a violation of 18 U.S.C. § 793(b) under Article 134, UCMJ. *Second*, the charges as Referred to trial, alleged *four* Specifications under Charge III – the Military Judge as a purported remedy to the Defense's "multiplicity" complaints, *merged* Specifications 2 and 3, into one specification, redesignated as Specification 2.[1] *Third*, with respect to amended Specification 2, of Charge III, which now alleged *in the*

[1]Original Specification 2, alleged a violation of 18 U.S.C. § 793(d), *i.e.*, the Accused, while having ***authorized*** possession of classified information, improperly "communicated" such to an unauthorized person. Original Specification 3, alleged a violation of 18 U.S.C. § 793(e) in that the Accused, while having ***unauthorized*** possession of the same classified information, improperly communicated such to an unauthorized person. Either the Accused had "authorized" possession of the information in question or he did not. However, original Specification 4 [later renumbered as Specification 3], alleged that the Accused "possessed by virtue of his office" [authorized] the classified material at issue. While the Government can charge in the alternative for exigencies of proof, here the Government *knew* the Appellant had authorized access to the JDIMS. As *Amicus*, we point this out because in the end, we urge this Court's attention on the basic issue, did this Accused have a fair trial to include the effective assistance of counsel?

alternative "authorized" ***or*** "unauthorized" possession,[2] as violating "Section 793(d) ***or*** 793(e)" [of Title 18, U.S.C.],[3] the announced Findings [R. 1746-47] are irregular and legally improper as while the Members "excepted" the word "unauthorized," they did not "find" which subsection of § 793 Appellant allegedly violated.[4]

STATEMENT OF FACTS

Amicus accepts Appellant's Statement of Facts, but further note the following.

A.

At issue in every specification was a computer-generated printout from the Guantanamo ["GTMO"] Bay Naval Base's "Joint Detainee Information Management System" ["JDIMS"], which the Government alleged was classified SECRET.[5] Whether it was or not,

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[2]A pleading anomaly which violates the disjunctive pleading prescription. *United States v. Autrey,* 30 C.M.R. 252 (CMA 1961).

[3]*See* footnote 2, *supra.* At a minimum, this "merged" specification could only confuse the members.

[4]This is not a *de minimis* matter considering the misguided merging of the specifications to cure the Defense's "unreasonable multiplication" objections. By combining these two Specifications [aside from violating the rule against *duplicitous* pleading [RCM 307(c)(3), *Discussion* (G)(iv)], the result is an unintelligible allegation of conduct that is legally contradictory on its face. Rather than confine the Members to their proper role of "Finding" whether or not the Government's evidence rose to the Constitutionally mandated level of "proof beyond a reasonable doubt," against a properly *charged* offense, the Military Judge illegally distorted the court-martial process by forcing the *Members* to first determine the underlying crime, *i.e.,* was it a violation of § 793(d) or § 793(e), which they did ***not*** do. This unconstitutionally abrogated the Governments Sixth Amendment *duty* to inform the Accused "of the nature and cause of the accusation." Leaving that decision to the Members was unconstitutional and plain error. *See, United States v. Brown,* 45 M.J. 389, 394 (CAAF 1996)[plurality], and *United States v. Bryant,* 30 M.J. 72, 73 (CMA 1990).

[5]Counsel for *Amicus* is familiar with the GTMO JDIMS, as I was lead defense counsel in *United States v. Al Halabi,* involving similar charges and an *unclassified* "Detainee List." *See, United States v. Al Halabi,* 2007 WL 1245840 (AF CCA)[unpub.], *rev. denied* 65 M.J. 333 (2007).

was a substantial matter in this litigation,[6] compounded by the Government's denial of a defense classification expert. However, the evidence demonstrated that the JDIMS document was not *marked* in any way as being classified [R. 283, 1002, 1031], *contrary* to the governing Executive Order.[7] That omission went to the core of the Accused's *attempted* defenses, *viz.,* lack of intent, mistake of fact, "state of mind"[8] and lack of "motive."[9]

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[6]Renumbered Specification 3, Charge III, alleged a violation of 18 U.S.C. § 1924. Section 1924(c), states:

> [T]he term "classified information of the United States" means information originated, owned, or possessed by the United States Government concerning the national defense ... ***that has been determined pursuant to law or Executive order to require protection against unauthorized disclosure in the interests of national security***. [emphasis added]

That, we suggest, mandates a *proper*, ***lawful*** "classification" to include classification ***markings.***

[7]Executive Order 13292 (March 25, 2003), provides in relevant part:

> **Sec. 1.6.** ***Identification and Markings.*** (a) At the time of original classification, ***the following shall appear on the face of each classified document***, or ***shall be applied to other classified media in an appropriate manner***:
>
> (1) one of the three classification levels defined in section 1.2 of this order; [emphasis added]
>
> * * * * *

[8]*Cf., Manual for Courts-Martial* [MCM], Part IV, ¶ 1(b)(4), which states in relevant part:

> When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind ....

See United States v. Franklin, 35 M.J. 311, 317 (CMA 1992). If the Military Judge must determine the legality of an order [Art. 51(b), UCMJ; *United States v. Deisher,* 61 M.J. 313 (CAAF 2005)], as a matter of ***law*** under § 1924(c), at a minimum, the Military Judge should have conducted a hearing as to whether or not the JDIMS printout was ***lawfully*** classified, *i.e.,* was the legal "process" for classification followed?

[9]The Military Judge granted a Government Motion *in Limine*, precluding that defense evidence. R. 387, 898. *See* Decision below at 6-8.

B.

Multiplicity / Unreasonable Multiplication of Charges: While there was extensive litigation of these issues at trial,[10] the Court's "remedy" of merging original Specifications 2 and 3, Charge III, was no remedy. The Court below did not address this facially obvious and crucial issue. The allegations, trimmed of their "legalese," were relatively simple. The Government alleged that the Accused mailed an allegedly classified JDIMS printout to a civilian attorney handling GTMO *habeas corpus* litigation, who did not have a security clearance. The same JDIMS printout was at issue in each Charge and Specification, to wit:

CHG/Spec	UCMJ Art.	ALLEGATION
I / The	92	Regulatory violation – improper mailing of JDIMS printout to lawyer
II / The	133	"Conduct unbecoming" by transmitting "classified" JDIMS printout to lawyer
III / 1	134	Illegal "making" of JDIMS printout. [Acquitted]
/ 2		[as amended & merged] "communicating" JDIMS *information* to lawyer
/ 3		Knowingly "removed" JDIMS printout with intent to ***retain*** such.[11]

[10] *See* Appellate Exhibits ["AE"] XIII and XIV. *United States v. Baba,* 21 M.J. 76 (CMA 1985), and *United States v. Frelix-Vann,* 55 M.J. 329 (CAAF 2001), regarding "multiplicity" and Article 133, UCMJ, offenses.

[11] The Court below did not address the facial inconsistency between the allegations of "willfully" ***providing*** the JDIMS printout to the lawyer with the allegation that he ***intended*** to "retain" that printout. We also note that the Accused departed GTMO on or about 15 January 2005. Opinion below at 2. Unless the Government alleged that the Accused somehow *returned* to GTMO, that date vice 28 February 2005, would be the "end date" for the Specifications.

C.

The Excluded Defense Evidence: *Amicus* urges the Court to consider the following matters precluded by the Military Judge in granting the Government's Motion *in Limine* [R. 326 *et seq.*]:

1. The testimony of Professor Margulies;

2. Testimony from the Accused (who was both a commissioned officer and lawyer / JAG) as to his intent (or lack of it); his interpretation of the *Rasul* decision;[12] his "motive;" his understanding of his *ethical* obligations as a lawyer in general and as a Navy JAG in particular; and his "state of mind."

D.

The Military Judge's "Classification" Rulings: The Military Judge first held that "the defense has failed to make – to sustain their burden by a preponderance of evidence that the material was not classified...." [R. 326].[13] He then held:

> [T]he factual process of classification remains at issue and a matter to be determined by the members. Whether the information is properly classified or was properly classified by the discretion of the OCA[14] is not for adjudication by – by the court. [R. 385].[15]

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[12]*Rasul v. Bush,* 542 U.S. 466 (2004), "Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus." *Id.,* 481; "What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id.,* 485. *See also, Al Odah v. United States,* 346 F.Supp.2d 1 (D.DC 2004).

[13]Notably, the Defense was denied a "classification expert" at trial, so regardless of who had the burden of proof, the Defense challenge was doomed.

[14]"Original Classification Authority."

[15]*Amicus* submits this is relevant to the fundamental unfairness of Appellant's court-martial. *See, Deisher, supra;* and *United States v. Mack,* 65 M.J. 108, 111 (CAAF 2007). Notably, the Military Judge did *not* instruct the Members on this precise issue.

SUMMARY OF ARGUMENT

Amicus respectfully submits that LCDR Diaz did not receive a fair trial. A "fair" trial is not a perfect trial, we acknowledge that. But, the issue of guilt must be fully and fairly litigated so that the fact-finder can make an *informed* verdict. For a number of reasons, that did not happen. The Accused, a Navy Judge Advocate with an LL.M. degree was ***precluded*** from introducing any evidence of his "intent," "state of mind," "motive," "ethical obligations" as an attorney; and his "ethical obligations" as a commissioned officer in the Navy.

Consistent with granted Issues I and III and in support of reversal and a new trial for Appellant, *Amicus Curiae* submit the following arguments. First, in granting the Government's *Motion in Limine,* precluding defense evidence of intent, state of mind, motive, etc., the Military Judge violated Appellant's Sixth Amendment right to present a defense, especially where each of the Specifications charged had heightened *mens rea* requirements.[16] That preclusion also violated Appellant's Fifth Amendment Due Process right to a fair trial.[17]

Second, whether or not the alleged SECRET information

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[16]CHG I, Specification ("wrongfully"); CHG II, Specification ("wrongfully and dishonorably"); CHG III, Specification 1 ("intent ***or*** reason to believe" and "knowingly and willfully"); Specification 2 ("reason to believe" and "knowingly and willfully"); and Specification 3 ("knowingly" and "intent to retain").

[17]*See, United States v. McAllister,* 64 M.J. 248, 249 (CAAF 2007)[quoting *Washington v. Texas,* 388 U.S. 13, 19 (1967). *See also, Crane v. Kentucky,* 476 U.S. 683, 690 (1986) ["We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard." (citation omitted)]

/material[18] was ***lawfully*** classified, meaning classified in accordance with 18 U.S.C. § 1924(c) and Executive Order 13292, *supra,* was a question of ***law*** for the military judge, not the members, to determine.

ARGUMENT

I.

THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE ACCUSED BY *PRECLUDING* RELEVANT AND MATERIAL EVIDENCE VIOLATING THE ACCUSED'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

A. The Constitutional Right to "Present a Defense."

1. In General.

> A defendant has the right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence altogether.[19]

The Military Judge erred by ignoring *Washington v. Texas:*[20]

> We are thus called upon to decide whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witness on the stand.... [This] is in plain terms the ***right to present the defense***, the right to present the ***defendant's version of the facts*** ... to the jury so it may decide

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[18]As the Charge Sheet reflects, the Government variously refers to the JDIMS printout as information, documents or materials.

[19]Weston, *The Compulsory Process Clause,* 73 Mich.L.Rev. 71, 159 (1974).

[20]388 U.S. 114 (1967).

where the truth lies.[21]

In a unanimous decision in *Crane v. Kentucky,*[22] the Court re-emphasized this principle, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[23] The Government's *Motion in Limine* – to preclude defense evidence – was unconstitutional on its face; a fact seemingly overlooked by the courts below. The nature of the error here was determined in *United States v. Agurs,*[24] "if the omitted evidence creates a reasonable doubt that did not otherwise exist, ***constitutional error*** has been committed." [emphasis added]. The right of the accused to present his defense must thus apply to his defense on the *mens rea* elements.

2. Preclusion of Appellant's Evidence.

In a case remarkably on point, the Court in *United States v. Lankford,*[25] reversed the conviction where the trial judge precluded the defendant's expert from testifying that the defendant's belief that his actions were legal, was a reasonable belief. This Court has held similarly: "We find that excluding the four defense witnesses made it impossible for [defendant] to present his defense...."[26] and reversed the conviction. Again, this was an

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[21] *Id.,* 19 [emphasis added].

[22] 476 U.S. 683 (1986).

[23] *Id.,* 690 [quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)].

[24] 427 U.S. 97, 112 (1976).

[25] 955 F.2d 1545 (11th Cir. 1992).

[26] *United States v. Brewer,* 61 M.J. 425, 432 (CAAF 2005). *Compare, United States v. Garber,* 607 F.2d 92, 96 (5th Cir. 1979)(*en banc*)[trial judge precluded (continued...)

"error of constitutional magnitude."[27]

3. The Accused Was Entitled To Present All of the Circumstances Pertaining to His "Intent."

This principle has been settled for half a century. A criminal jury must determine intent, to include the "defendant's testimony and all of the surrounding circumstances."[28] In *Morissette*, the accused believed that certain government property he was accused of stealing, was "abandoned." But, as herein, he was precluded from testifying about that belief. In reversing the conviction, the Court held that "criminal intent" was not decided upon "all of the circumstances" which included the accused's belief.[29]

4. The Accused's "Beliefs" Were Relevant and Admissible.

The Court's attention is invited to *United States v. Richardson,*[30] an attempted espionage case. There the Accused told investigators that "he believed the information ... was not classified and would not harm the United States...."[31] – information that was provided (unlike herein) to the members. *Richardson* was solely about "intent," and this mandated including "all of the

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[26](...continued)
defendant's expert testimony on "good faith."]

[27]*Gilmore v. Henderson,* 825 F.2d 663, 665 (2nd Cir. 1987)[*habeas corpus* granted where defense witness explaining "flight" was excluded].

[28]*Morissette v. United States,* 342 U.S. 246, 276 (1952).

[29]*Id.,* 273-74.

[30]33 M.J. 127 (CMA 1991).

[31]*Id.,* 129.

circumstances." Likewise, in *Cheek v. United States,*[32] a "tax protester" case, the defendant was allowed to testify that "he sincerely believed ... his actions ... were lawful."[33] The Court's language is instructive herein:

> Knowledge and belief are characteristically questions for the factfinder, in this case the jury. ... it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and ***forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision.***[34]

Compare, United States v. Hale,[35] an Article 133, UCMJ, prosecution[36] for AWOL and Dereliction of Duty, where the Accused was allowed to testify that he "did not believe he was doing anything wrong." The Appellant herein deserved the same right to "Present" *his* defense.

5. The Accused's "State of Mind."

In *United States v. Franklin,*[37] this Court held: "The state of mind of an accused at the time he or she commits the act charged becomes an issue when it is a contested element of an offense." There, the Military Judge allowed evidence of "innocent intent," whereas here, the Military Judge totally precluded it. That was error.

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[32]498 U.S. 192 (1991).

[33]*Id.,* 196.

[34]*Id.,* 203 [emphasis added].

[35]42 C.M.R. 342, 346 (CMA 1970).

[36]*See* Charge II, herein.

[37]35 M.J. 311, 317 (CMA 1992).

An instructive opinion is *United States v. Wade,*[38] where the specific intent to steal *vis-a-vis* the accused's "state of mind" was at issue. The Court first noted that: "the rule is well-settled that ... whenever the intent of the accused is in issue, the accused may testify ***as to his motive or state of mind or intent.***"[39] The Court went on to conclude: "The testimony ... was competent and relevant to show their state of mind in connection with their acts, even though self-serving."[40]

United States v. Simpson,[41] was a bank fraud case, where that Court approved an instruction on the defendant's "motive," which reads in relevant part:

> Intent and motive should never be confused. Motive is what prompts a person to act or fail to act. ... Good motive alone is never a defense where the act done or omitted constitutes a crime. So the motive of the accused is immaterial, ***except*** insofar as evidence of motive may aid in ***determining the state of mind or intent.***[42]

In the context of Appellant's constitutional right to present a defense, the Military Judge erred by precluding any and all evidence of Appellant's "state of mind" at the time of his actions.

B. "Motive" Evidence *Is* Admissible By The Accused.

Both Courts below erred in this regard. The correct rule was

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[38] 28 C.M.R. 704 (CG Bd.Rev. 1959).

[39] *Id.,* 708 [emphasis added].

[40] *Id.,* 709.

[41] 950 F.2d 1519 (10th Cir. 1991).

[42] *Id.,* 1525 [emphasis added].

stated by the Court in *Gorin v. United States,*[43] also an "espionage" case, that "motive" was a question for the jury.[44] Perhaps the best explanation of "motive" was provided by the Court in *United States v. Lips,*[45] "Motive is that which incites or stimulates a person to act. (citation omitted) As such it is a state of mind tending to show the basis for that individual's behavior." (citation omitted)[46]

Amicus recognizes the distinction between an "intent" *element* and "motive."[47] But, *e.g.,* in cases involving "parental discipline," this Court has long recognized the admissibility of an accused's "motive" in the context of corporeal punishment.[48] Thus, there can be no substantive differentiation for excluding this Appellant's "motive" from the members under military jurisprudence, especially after the Supreme Court in *Gorin* held that it was a question for the fact-finder.

C. Both Courts Below Misapplied the *Mens Rea* Requirements Involved in the Charges and Specifications Herein.

1. Intent - In General.

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[43]312 U.S. 19, 33 (1941).

[44]*See generally, United States v. Kastner,* 17 M.J. 11, 14 n.3 (CMA 1983) ["'motive' may be relevant in certain instances...."].

[45]22 M.J. 679 (AF CMR 1986), *rev. denied* 24 M.J. 45 (CMA 1987).

[46]*Id.,* 682. *See United States v. Huet-Vaughn,* 43 M.J. 105, 113 (CAAF 1995), *cert. denied* 116 S.Ct. 922 (1996)["There are circumstances where evidence of motive or purpose is relevant circumstantial evidence of intent." (citation omitted)], and *United States v. Gonzalez,* 39 M.J. 742, 747 (N-M CMR 1994) [(motive) "may be relevant to the issue of intent." (citations omitted)].

[47]*United States v. Apple,* 10 C.M.R. 90, 92 (CMA 1953)["Our holding here in no sense involves a failure to recognize fully the distinction between 'intent' and 'motive' ...."].

[48]*See, e.g., United States v. Brown,* 26 M.J. 148 (CMA 1988); *United States v. Robertson,* 36 M.J. 190, 192 (CMA 1992); and *United States v. Rivera,* 54 M.J. 489, 491 (CAAF 2001)["proper parental motive"].

As the Court held in *Morissette, supra,* "intent ... is a question of fact which must be submitted to the jury."[49] Applicable herein is this Court's observation in *Richardson, supra:* "the mere fact that one acted without authority does not necessarily equate with the requisite intent required for an espionage conviction."[50]

2. Good Faith.

"Good faith constitutes a complete defense to ... specific intent crimes."[51] The Military Judge not only precluded all evidence of Appellant's "good faith," but compounded the error by not instructing the members on this vital point.[52] The Court in *Cheek, supra,* sanctioned "good faith" evidence.[53] Or as Justice Scalia observed: "our cases have consistently held that a failure to pay a tax in the good-faith belief that it is not legally owed is not 'willful.'"[54] Again, this unconstitutionally deprived Appellant of his right to present *his* defense.

3. Good Faith *Legal* Representation.

As noted above, the Military Judge also precluded any evidence regarding Appellant's ethical responsibilities as a lawyer. Returning to *Casperson, supra,* one of the co-defendants was an

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[49]342 U.S. at 274

[50]33 M.J. at 130. Unfortunately, that was not made clear to the Members during the Court's Instructions.

[51]*United States v. Casperson,* 773 F.2d 216, 223 (8th Cir. 1985). *See also, Steiger v. United States,* 373 F.2d 133, 135 (10th Cir. 1967)["Good faith is a complete defense to [mail fraud]"].

[52]R. 1714 *et seq.*

[53]*E.g.,* "he had a good-faith belief that he was not violating any of the provisions of the tax laws." 498 U.S. at 202.

[54]*Id.,* 207 (Scalia, J., concurring in judgment).

attorney,

> whose ***defense theory was that all his actions were consistent with his duties and obligations as an attorney***, requested an instruction defining the duties of an attorney. [He] argues that the proposed instruction ***was relevant to the issue of specific intent, and that without it, the jury was unable to consider his defense of good faith legal representation.***[55]

While the Court rejected the attorney's proposed instruction, it did hold: "However, some instruction on his defense of good faith legal representation may well be appropriate."[56] The Court cited *United States v. Mardian,*[57] with approval. Indeed, in *Mardian,* two defendants were lawyers and the Court approved a jury instruction on this precise issue which reads in relevant part:

> In weighing and evaluating the evidence relating to the element of intent you should consider whether the actions taken by each of these Defendants were undertaken ***pursuant to good faith legal representation*** or whether they were un(der)taken with a criminal intent....[58]

It would be an anomaly to instruct a jury on an issue where there were no underlying facts in the record. Here however, the problem is more basic – the court precluded any and all such evidence.

4. Bad Faith.

In the context of prosecutions under the Espionage Act as here, the Court in *Gorin, supra,* held: "This requires that those

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[55]773 F.2d at 222-23 [emphasis added].

[56]*Id.,* 224 n. 13.

[57]546 F.2d 973, 981-81 (D.C. Cir. 1976).

[58]*Id.,* 981 n. 13 [emphasis added].

prosecuted to have acted in bad faith."[59] This Court, quoting *Gorin,* noted this "bad faith" requirement in *Richardson.*[60] In a comprehensive opinion examining the Espionage Act, the Court in *United States v. Rosen,*[61] held:

> [T]he "reason to believe" scienter requirement that accompanies disclosures of *information,* requires the government to demonstrate the likelihood of ***defendant's bad faith*** purpose to either harm the United States or to aid a foreign government.[62]

If the prosecution must demonstrate an Accused's "bad faith" in a case such as Appellant's, not being able to rebut or challenge that with evidence of the Accused's "good faith," simply violates his Sixth Amendment right to present a defense. Indeed, the *Rosen* Court reemphasized its point:

> [T]he additional scienter requirement contained in the "reason to believe" clause ... impos[es] on the government ***the burden to prove beyond a reasonable doubt that the defendant acted in bad faith.***[63]

By excluding Appellant's evidence of good faith, the Court unconstitutionally deprived him of any ability to challenge the government's "bad faith" claims by evidence of his "good faith." The effect further deprived Appellant of any chance of "reasonable doubt" in this regard.

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[59] 312 U.S. at 28.

[60] 33 M.J. at 130.

[61] 445 F.Supp.2d 602 (E.D. Va. 2006), *aff'd on other grounds* 557 F.3d 192 (4th Cir. 2009).

[62] *Id.,* 626 [emphasis added].

[63] *Id.,* 641 n.56 [emphasis added].

5. Evil Purpose.

While related to the "bad faith" issue above, the "evil purpose" language permeates the caselaw. In *Morissette, supra,* the Court noted that various terms have been created by the courts "to denote guilty knowledge or 'mens rea' to signify an ***evil purpose*** or mental culpability."[64] Or, as the Court held in *Bryan v. United States,*[65] "As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'" One need only look at the Charge Sheet herein to see that the Appellant was accused of "willful" misconduct, and thus was precluded from presenting a *bona fide* defense.

6. Willfully.

This *mens rea* is intertwined with the "evil purpose" noted above. As the *Bryan* decision notes in the context of ascertaining if an accused acted willfully, "The jury must find that the defendant acted with an evil-meaning mind...."[66] Or as the Court described "willfulness" in *Ratzlaf v. United States,*[67] "the government must prove that the defendant acted with knowledge that his conduct was unlawful."[68] The *Rosen* Court perhaps defines it best: "the statute [§ 793(d)] permits conviction only of those who

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[64]342 U.S. at 252 [emphasis added].
[65]524 U.S. 184, 191 (1998).
[66]*Id.*, 193.
[67]510 U.S. 135, 137 (1994).
[68]*See also, Cheek, supra* at 194.

'willfully' commit the prohibited acts ***and do so with bad faith.***"[69]

How were the members herein to know what, if any, evil purpose, bad or good faith the Accused possessed at the time of his conduct, when the Military Judge precluded all defense evidence on this issue? They could not because Appellant's right to present a defense was improperly and unconstitutionally limited.

7. Ignorance of the Law.

While this issue does not appear to have been squarely litigated at trial, it falls within the parameters of the Appellant's right to present a defense. Specifically, the Military Judge's denial of any evidence from Law Professor Margulies and evidence concerning Appellant's ethical obligations as both a lawyer and commissioned officer raise a novel issue. If "ignorance of the law" is generally no defense,[70] the question here becomes, where the Accused is an attorney with an advanced legal degree, *viz.,* a LL.M., is *specialized* knowledge of the law,[71] *e.g.,* his interpretation of *Rasul* decision, relevant to the *mens rea* issues? *Morissette* answers that question in the affirmative as "all of the surrounding circumstances" relating to Appellant's intent must be provided to the fact-finder.[72]

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[69]445 F.Supp.2d at 627 [emphasis added].

[70]*United States v. Grier,* 19 C.M.R. 344, 348 (CMA 1955).

[71]*E.g., see Nadarajah v. Holder,* 569 F.3d 906, 912 (9th Cir. 2009); and *Martin v. Secretary of the Army,* 463 F.Supp.2d 287, 293 (N.D. NY 2006)["military law"].

[72]342 U.S. at 276.

II.

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY *NOT* DETERMINING AS A MATTER OF LAW THAT THE ALLEGED "SECRET" INFORMATION AT ISSUE WAS LAWFULLY CLASSIFIED.

The entire thrust of the prosecution's overcharged case boils down to this – LCDR Diaz sent a photocopy of a document that the Government claimed was "classified" [but was not ***marked*** as such, nor was there any *indicia* on the computer screen stating that it was classified in any way] to a civilian attorney actively involved in the GTMO prisoner *habeas corpus* litigation in U.S. District Courts, who, ***if*** the information on that document was ***lawfully*** classified, was not entitled to possess or receive such.[73]

This is not a new nor novel concept in military jurisprudence. In *United States v. New,*[74] this Court held that in the context of determining whether or not an order was "lawful," "that 'lawfulness' is a legal question for the judge."[75] The Court's rationale was this:

> Adjudicating the issue of lawfulness as a question of law for the military judge ensures that the validity of the regulation or order will be resolved in a manner that provides for consistency of interpretation through appellate review. By contrast, ***if the issue of lawfulness were treated as an element that must be proved in each case beyond a reasonable doubt, the validity of regulations***

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[73] *Amicus* takes no position on the discretionary *propriety* of classifying the information at issue, only whether or not the original determination that such information was classified in a ***lawful*** manner.

[74] 55 M.J. 95 (CAAF 2001).

[75] *Id.,* 105.

> ***and orders of critical import to the national security would be subject to unreviewable and potentially inconsistent treatment by different court-martial panels.***[76]

Furthermore, the process used at trial by submitting the issue to the members as to whether the information was lawfully classified, flies in the face of Congress's language in 18 U.S.C. § 1924(c), that "classified information" means information "***that has been determined pursuant to law or Executive order to require protection against unauthorized disclosure in the interests of national security***". [emphasis added][77] If this Court's rationale in *New* is correct, the issue of "lawfulness" of the *process* used to purportedly classify the information herein, must also be a ***legal*** decision made by the Military Judge.[78]

This Court revisited the issue again in *United States v. Deisher, supra.* There the Accused challenged the lawfulness of an order, prompting this Court to state: "the military judge must determine whether there is an adequate factual basis for the allegation that the order was lawful."[79] This Court rejected the Government's suggestion that there was a "presumption of lawfulness,"[80] and reversed the conviction because as herein, the military judge submitted the issue to the members for resolution.

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[76] *Id.*, emphasis added.

[77] The Military Judge *instructed* the members using *that* definition. R.1717, and 1725,

[78] Indeed, the Military Judge did so in the context of the Article 92, UCMJ, offense, Charge I, Specification. R. 1716.

[79] 61 M.J. at 318.

[80] *Id.*

Finally, in *United States v. Mack,*[81] the Court again found error where the military judge submitted the legality of an order to the members for resolution. But, under the factual circumstances in *Mack*, the Court held the error to be harmless.[82]

Under the specific circumstances of this *contested* case, the error herein in the failure of the Military Judge to determine as a matter of law that the material at issue was ***lawfully classified***, respectfully cannot be harmless. First of all, a federal statute requires that any classification must be "determined pursuant to law or Executive order...."[83] Second, there is a specific ***procedure*** mandated by Executive Order,[84] which *inter alia*, sets forth "Classification Standards," "Classification Authority," "Identification and Markings," and most applicable herein, "Classification Prohibitions and Limitations," and "Derivative Classification."

The evidence precluded by the Military Judge below included Appellant's interpretation of the Supreme Court's *Rasul* decision,[85] and the Appellant's belief *as an attorney*, that the Government was in violation of the spirit of that decision by stone-walling and other questionable roadblocks thrown at the GTMO *habeas* counsel.

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[81]65 M.J. 108, 112 (CAAF 2007).

[82]*Id.,* 113.

[83]18 U.S.C. § 1924(c).

[84]E.O. No. 13292; at 68 Fed.Reg. 15315 (2003), available on-line at: http://www.archives.gov/isoo/policy-documents/eo-12958-amendment.pdf [last accessed, 24 October 2009].

[85]*See* footnote 12, *supra.*

Section 1.7, of the E.O. provides in pertinent part:

> (a) In no case shall information be classified in order to:
>
> (1) conceal violations of law, inefficiency, or administrative error;
>
> (2) prevent embarrassment to a person, organization, or agency;
>
> *** * * * *** or
>
> (4) prevent or delay the release of information that does not require protection in the interest of the national security.[86]

Those are certainly factors that a military judge should use in determining the "lawfulness" of the alleged classification procedure.

Likewise, § 2.1(a) of the E.O., states in pertinent part:

> ***Use of Derivative Classification.*** (a) Persons who only reproduce ... need not possess original classification authority.

So, LCDR Diaz did not need to be an "original classification authority." But, § 2.1(b), goes on to provide:

> (b) Persons who apply derivative classification markings shall:
>
> (1) observe and respect original classification decisions; and
>
> (2) ***carry forward to any newly created documents the pertinent classification markings.*** [emphasis added]

Amicus respectfully submit that this is where the Appellant was specifically prejudiced and suffered from the legal error of

[86]The Record also reflects that approximately one year after the alleged offenses, and before trial, most of the information at issue, was in fact "declassified."

the Military Judge. There was considerable evidence and testimony at trial that (a) the computer screen that Appellant first viewed the data on, displayed no "banner" or other *indicia* that the generated data was somehow classified; and (b) that when the Accused *printed* that data, *i.e.,* "reproduced" it, again there was no *indicia* to him (or anyone else) that the document and the information contained thereon was in any way classified. So, there was no way for this Accused or anyone else to "observe and respect original classification decisions," since there were no classification ***markings*** whatsoever on the computer screen or printout and therefore, he could *not* "carry forward to any newly created documents the pertinent classification markings" because ***there were none.***

Just as a military judge must, consistent with *New* and its progeny, make a preliminary decision as a matter of law on the "lawfulness" of an order, so should the Military Judge have made a preliminary assessment of the "lawfulness" of the alleged classification ***process*** used herein before submitting the issue to the members. Again, *Amicus* is not disputing the discretion involved to classify something, only that the lawful classification *process* was not applied correctly herein. That failure, coupled with the preclusion of the defense evidence noted above, crippled the Defense before trial on the merits ever began.[87]

[87]The fact that the JDIMS information was determined ***after-the-fact*** to (continued...)

CONCLUSION

This Court should respectfully reverse the Court of Criminal Appeals below and remand this case for a new trial. Constitutional error permeated the court-martial denying Appellant his fundamental, Sixth Amendment right to present a defense.[88] This case was not a "slam dunk" for the prosecution as the acquittal in Specification 1, Charge III, demonstrates. But, the unique factor of the Accused being a military lawyer with an LL.M. Degree was *not* irrelevant in the context of the *mens rea* elements and the members were entitled, if not required, to have heard all of the "surrounding circumstances" of Appellant's motives, good-faith, "state of mind," etc., not just the Government's version, *before* they voted on Findings, not after.

Relief is warranted herein, not as an act of judicial charity, but because justice and fundamental fairness – both to Appellant and the military justice system – requires such under the circumstances of the case. [6002]

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[87](...continued)
contain SECRET information, and so marked *after-the-fact*, lends credence to the fact that Appellant did not know the classification status of the information and that the *process* did not provide "markings" (and thus, "notice") as mandated, going to the "lawfulness" of the classification procedure at the time the document was printed – not months after the fact.

[88]*Amicus* recognizes that the issue of ineffective assistance of counsel is not specifically before the Court. But, we would be remiss as *Amicus Curiae* if we did not urge the Court to take a serious look at this issue in the context of, did the Accused have a fair trial – one where there can be judicial confidence in the verdict? *See, e.g., Brown v. Crowe,* 963 F.2d 895, 897-98 (6th Cir. 1992) ["a federal appellate court is always empowered to resolve any issue not considered below 'where ... injustice ... might otherwise result.'" (citation omitted)]; and *Dickinson v. Zurko,* 527 U.S. 150, 163 (1999)["judicial confidence in the fairness of the factfinding process."]

DATED: 28 October 2009 Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, DONALD G. REHKOPF, JR., Esq., hereby certify that an Original and seven [7] copies of the foregoing pleading was sent to the Clerk of Court, 450 E Street, Northwest, Washington, DC 20442-0001 via FedEx, and email[89] to:

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[89]Counsel has consent from both Appellant's and Appellee's counsel to serve them electronically.

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