UNITED STATES OF AMERICA	)	
	)	
v.	)	Government Targeted Brief
	)	on Courtroom Closures
Manning, Bradley E.	)	
PFC, U.S. Army,	)	Enclosure 4
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	29 March 2013
Fort Myer, Virginia 22211	)	

Encl 4 to
APPELLATE EXHIBIT 511
PAGE REFERENCED: ____
PAGE ___ OF ___ PAGES

UNITED STATES OF AMERICA	)	
	)	Prosecution Motion To
v.	)	Close Portions of the Court-Martial
	)	For the Receipt of Classified
Anderson, Ryan G.	)	Information
Specialist (E-4), U.S. Army	)	
Headquarters and Headquarters Company	)	6 July 2004
2122d Garrison Troop Support Brigade	)	
Fort Lewis, Washington 98433	)	

RELIEF SOUGHT

The Prosecution in the above case requests that the Court close those portions of the Court-Martial of Specialist Anderson for the receipt of classified information. The Prosecution requests oral argument.

BURDEN OF PROOF AND STANDARD OF PROOF

As the moving party, the Government bears the burden of proof. R.C.M. 905(c)(2). Additionally, the Government bears the burden of establishing a compelling need to close the proceedings that is narrowly tailored (United States v. Grunden, 2 M.J. 166 (CMA 1977) and U.S. v. Hershey, 20 M.J. 433 (CMA 1985)).

FACTS

On 6 October 2003, Specialist Ryan Anderson posted a message to a website called Brave Muslims.com. Brave Muslims.com is a website that caters to anti-American/pro-al Qaida sentiment. In that posting SPC Anderson stated that "Soon, very soon, I will have an opportunity to take my own end of the struggle against those who oppress us, to the next level", SPC Anderson then invited other members of Brave Muslims.com to contact him. Ms. Shannon RossMiller contacted SPC Anderson via electronic mail (email) using a false name. Ms. RossMiller is a member a private organization called Seven Seas which monitors the internet watching for possible terrorist threats. Ms. RossMiller corresponded with SPC Anderson via email between November and December 2003. In the correspondence with Ms. RossMiller, SPC Anderson stated he wished to switch sides or defect from the U.S. Army and join Muslim extremist forces fighting against the United States. Ms. RossMiller contacted the FBI and passed to them the information she had gathered regarding SPC Anderson.

In late 2003, the Federal Bureau of Investigation (FBI) began an investigation into SPC Anderson. As part of its investigation, the FBI contacted the Fort Lewis resident office of the U.S. Army Intelligence and Security Command (INSCOM). In January 2004, Army Counter Intelligence agents, posing as members of al Qaida, began corresponding with SPC Anderson via cell phone test messages. After a lengthy period of text messaging between Army Counter

Intelligence and SPC Anderson, a meeting was arranged. On 9 February 2004, SPC Anderson met with an Army Counter Intelligence agent who claimed to be a member of a terrorist organization. After the first meeting a second meeting was arranged for the following day. The second meeting was conducted in a Government sport utility vehicle (SUV), which had been equipped with video and recording equipment. The second meeting, which lasted approximately an hour, was both recorded and videotaped.

During the text messaging and at the second meeting with Army Counter Intelligence personnel, SPC Anderson provided information regarding specific vulnerabilities of various weapons systems including the M1A1 and M1A2 Abrams Tank. The information provided by SPC Anderson was sent to the United States Army Tank Automotive and Armaments Command (TACOM) for a classification review. Approximately two lines of text messages sent by SPC Anderson and ten minutes of the videotaped meeting contained information which has been classified as secret by Brigadier General Roger A. Nadeau. General Nadeau is the original classification authority (OCA) for TACOM.

On 12 February 2004, the accused was apprehended, ordered into pretrial confinement, and charged. Following apprehension, INSCOM conducted a classification review of its investigative and related files. While the investigative file was declassified, two related files dealing with INSCOM undercover operatives underwent a classification review. As a result of that review, the commander of INSCOM, Major General John F. Kimmons, determined that information concerning the undercover operatives, as well as the means and methods of INSCOM undercover operations were classified secret.

LAW

Executive Order
E.O. 13292

Rules for Court Martial
R.C.M. 806(b)
R.C.M. 905(d)

Military Rule of Evidence
M.R.E. 505(i)
M.R.E. 505(j)

Case Law
U.S. v. Brown, 22 C.M.R. 41 (1956)
U.S. v. Grunden, 2 M.J. 116 (CMA 1977)
U.S. v. Hershey, 20 M.J. 433 (CMA 1985)
Globe Newspaper Co. v. Superior Court of Massachusetts, 457 U.S. 102 (1982)
Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984)

WITNESSES/EVIDENCE

The Prosecution does not request any witnesses. The Prosecution requests that the Court consider the enclosures to this motion.

ARGUMENT

In accordance with the discussion section of R.C.M. 806(b), a court-martial may be closed without the consent of the accused when it is done in accordance with M.R.E. 505(j). M.R.E. 505(j)(5) authorizes a military judge to close a court-martial "during that portion of the presentation of evidence that discloses classified information." The analysis to M.R.E. 505(j) indicates that M.R.E. 505(j) is principally derived from U.S. v. Grunden and U.S. v. Hersey. Grunden and Hersey provide a framework for analyzing when, under the 1st and 6th Amendments, it is appropriate to close a court-martial. The Government's motion will first address the 6th Amendment and then the 1st Amendment.

The 6th Amendment to the United States Constitution states, in part, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Despite the language of the 6th Amendment, courts have long recognized that "the right to a public trial is not absolute." Grunden, at 120, also United States v. Brown, 22 C.M.R. 41 (1956). An accused's right to a public trial can give way in order to protect the identity of an undercover law enforcement officer, to preserve the orderly execution of a trial, and to receive classified information. Grunden, at 121 note 6.

In accordance with United States v. Grunden, before a court-martial can be closed the Government must demonstrate that closing the trial is necessary to prevent the disclosure of classified information. Additionally, the Government must narrowly tailor the closure to ensure public access to as much of the trial as possible without endangering classified information. The court in Grunden suggests that military judges conduct "a preliminary hearing which is closed to the public" to determine whether the Government has met its burden.

As enclosures to this motion the Government has provided a copy of declarations made by Major General John F. Kimmons and Brigadier General Roger A. Nadeau. Both General Kimmons and Nadeau are original classification authorities, authorized to classified information up to the secret level. The Government anticipates introducing the classified information described in General Nadeau's declaration in its case in chief. The classified evidence will include: approximately two lines of text message from SPC Anderson to Army Counter Intelligence agents; approximately ten minutes of a one hour videotape where SPC Anderson discusses classified information; six photos demonstrating damage done to M1A1 Abrams Tanks by a specific weapons system; and part of the testimony of one witness, Mr. John Rowe. Mr. Rowe will testify as to the truthfulness of statements made by SPC Anderson. It will be necessary to close the court-martial when Mr. Rowe testifies regarding the truthfulness of classified statements made by SPC Anderson. Mr. Rowe will also testify regarding the photos of damaged and destroyed M1A1 Abrams Tanks. The Government does not anticipate introducing any evidence regarding General Kimmons' declaration but requests that the court close the court-

martial during any cross examination conducted by defense counsel which delves into the areas described in General Kimmons' declaration.

Through the enclosed declarations, which have been made under penalty of perjury, the Government has established that the information contained in the declarations is classified. According to Executive Order 13292 which further amended Executive Order 12958, as Amended, Classified National Security Information, four prerequisites must be met in order to originally classify information:

(1) An original classification authority is classifying the information;

(2) The information is owned by, produced by or for, or is under the control of the United States Government;

(3) The information falls within one or more of the categories of information listed in section 1.4 of this order; and

(4) The original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Section 1.4 of Executive Order 13292 states:

Information shall not be considered classified unless it concerns:

(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including special activities), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or

(h) weapons of mass destruction.

Each of the four prerequisites for the classification of information is addressed in General Kimmons' and General Nadeau's declarations. As noted in United States v. Grunden, the "initial review by the trial judge is not for the purpose of conducting a de novo review of the propriety of a given classification decision. All that must be determined is that the material in question has been classified by the proper authority in accordance with the appropriate regulation. . . . The sole purpose of the review is to protect the accused right to a public trial by preventing circumvention of that right by the mere utterance of a conclusion or blanket acceptance of the government's position without the demonstration of a compelling need." Grunden at 123. The information contained in General Kimmons' and General Nadeau's declarations were properly classified in accordance with Executive Order 13292 by individuals authorized to classify information.

In addition to establishing that the information in question is classified, the Government must also narrowly tailor the closure of the court-martial to insure the public has access to as much of the proceedings as possible while still protecting national security. The Government intends to introduce all of its classified information in a single closed session. During that closed session witnesses who have already testified regarding unclassified information would then retake the witness stand to provide information regarding classified information. United States v. Grunden recommends this method of bifurcating witness testimony, stating "this bifurcated presentation of a given witness' testimony is the most satisfactory resolution of the competing needs for secrecy by the government, and for a public trial by the accused." Grunden at 123. As previously discussed, at trial the Government will seek to introduce the surveillance video from the second meeting, at least fifty minutes of which are unclassified. The Government has redacted the classified portions of the surveillance video to allow the public access to as much of the proceedings as possible. The Government would seek to close the court-martial for the classified portions of the surveillance video. Similarly, as the vast majority of the text message statements are unclassified, the public would be allowed access to the text messages with the exception of the two classified messages. The Government does not seek the closure of the entire trial against SPC Anderson or even the entire testimony of any of the Government's witnesses, rather the Government only seeks that the trial be closed for the receipt of classified information.

In addition to an accused's right to a public trial, the United States Supreme Court has stated that the public has a 1st Amendment right to be present at criminal trials. Globe Newspaper Co. v. Superior Court of Massachusetts, 457 U.S. 102 (1982) and Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984). In United States v. Hershey, 20 M.J. 433 (1985) the Court of Military Appeals established that the Supreme Court's declaration regarding the public's right to be present at civilian criminal trials also applied to courts-martial. In Hershey the court described a four part test to determine whether the public could be excluded from a court-martial. The test described in Hershey was: (1) the party seeking closure must advance an overriding interest that is likely to be prejudiced (2) the closure must be narrowly tailored to protect that interest (3) the trial court must consider reasonable alternatives to closure, and (4) the court must make adequate findings supporting the closure to aid in review. Hershey at 436.

The first two prongs of the Hershey test are virtually the same as the test under Grunden. Thus, the Government relies on its argument above regarding the first two prongs under Hershey. The third prong under Hershey requires the court to consider reasonable alternatives to closing the court-martial. In the case at bar there are not reasonable alternatives to closing the court-martial. The evidence the Government intends to introduce is classified as secret. In accordance with Executive Order 13292, Sec. 1.2(a)(2) secret information is, by definition, information whose unauthorized disclosure "reasonably could be expected to cause serious damage to national security." The only way to avoid prejudicing an overriding Governmental interest is by closing the court-martial. The final prong requires the trial court to make adequate findings to support the closure to aid in appellate review. The Government suggests that in accordance with R.C.M. 905(d) the court make essential findings that state at a minimum that: the information that is the subject of this motion was properly classified by General Kimmons and General Nadeau; disclosure of the information would be harmful to national security; the court should describe what sessions of the court-martial will be closed; and there is no reasonable alternative to closing the court due to the classified nature of the evidence.

CONCLUSION

For the foregoing reasons, the Prosecution requests that the Court grant its motion to close the court-martial in United States v. Anderson for the receipt of classified information.

TIMOTHY C. MACDONNELL
MAJ, JA
Assistant Trial Counsel

2 ENCLS
1. Declaration of Major General F, Kimmons, dated 6 May 2004. CLASSIFIED
2. Declaration of Brigadier General Roger A. Nadeau, dated 29 June 2004. CLASSIFIED