IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**RULING and ORDER:**
	)	**INTERPLAY BETWEEN**
	)	**MRE 505, RCM 806, AND**
	)	**U.S. v. GRUNDEN;**
MANNING, Bradley E., PFC	)	**SPECIFICITY OF**
U.S. Army, (b) (6) [redacted]	)	**CLASSIFIED INFORMATION;**
HHC, U.S. Army Garrison	)	**AND JOHN DOE**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	10 April 2013

Motion 1: The Government moves this Court to find that MRE 505 (Classified Information) and RCM 806 operate independently of each other although both rules address the use of classified information during a court-martial trial. The Defense opposes and moves the Court to require the procedures in MRE 505(i) be followed when making closure determinations IAW RCM 806(b)(2).

Motion 2: On 15 March 2013, the Government provided the Court and the Defense with a Supplement to Prosecution Response to Scheduling Order: 39(a) Session on Closure and Motion to Close the Courtroom for Specified Testimony. On 28 March 2013, the Defense moved the Court to order the Government to provide more specificity regarding the classified information it seeks to elicit during closed session. The Defense also moved the Court to order the Government to produce a merits witness and a sentencing witness to go through a "dry run" of the classified testimony in a closed Article 39(a) session to address whether there are reasonable alternatives to closure available.

Motion 3: On 31 January 2013, the Government moved for *in camera* proceeding under MRE 505(i)(2) regarding the witness, John Doe, to demonstrate the necessity for moving the Court to order the following: (1) permit the witness to testify under the pseudonym, John Doe; to testify in civilian clothing in light disguise; and to testify from an alternate location in a closed session; (2) limit discovery and cross-examination regarding information that could reveal the witness's true identity; and (3) limit discovery and cross-examination by precluding the Defense from questioning the witness regarding irrelevant and highly classified information, including: his training for a specific classified mission, preparation for the mission, or details of the mission's execution outside the scope of direct examination.

After considering the filings by the parties and oral argument, the Court finds, rules, and orders as follows:

Findings of Fact and the Law:

1. The accused has a Sixth Amendment right to a public trial. *Waller v. Georgia,* 467 U.S. 39 (1984); *U.S. v. Ortiz,* 66 M.J. 334 (C.A.A.F. 2008). The public has a First Amendment right to attend criminal trials. *Press Enterprise Company v. Superior Court of California, Riverside County,* 464 U.S. 501 (1984); *Powell v. McKinney,* 47 M.J. 363 (C.A.A.F. 1997). Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials, to include considering alternatives to closure even when they are not requested by the parties. *Presley v. Georgia,* 558 U.S. 209 (2010).

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2. The values enhanced by the requirement for a public trial are to: (1) inspire public confidence that an accused is fairly dealt with and not unjustly condemned; (2) impress upon trial participants the importance of their functions and the importance of carrying out their duties responsibly; (3) encourage witnesses to come forward; and (4) discourage perjury. *Waller,* 467 U.S. at 46. Openness enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the criminal justice system. *Press-Enterprise,* 464 U.S. at 506-509.

3. Before the Military Rules of Evidence were enacted in 1980, military case law allowed closure of courts-martial for portions of the trial where classified information was to be disclosed. *U.S. v. Grunden,* 2 M.J. 116 (C.M.A. 1977) established the test for such closures.

4. Under the current rules, MRE 505 governs the use of classified information at trial. MRE 505(i) (*In camera* proceedings for cases involving classified information) authorizes *in camera* proceedings to address the use at any proceeding of any classified information. MRE 505(j) governs the introduction of classified information into evidence at trial. MRE 505(j)(5) (Closed Session) provides that the military judge may exclude the public during that portion of the presentation of evidence that discloses classified information.

5. RCM 806 establishes the standards for closure of trial for any reason, to include protection of classified information.

6. Prior to its amendment in 2004, RCM 806(b) provided in relevant part that "a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual." The discussion to the rule explained that "A session may be closed without the consent of the accused only under MRE 412(c), 505(i) and (j), or 506(i)." This authorization of trial closure failed to apply the Constitutional test set forth in *Waller* and *Press Enterprise* and adopted by the Court of Appeals for the Armed forces in *U.S. v. Hershey,* 20 M.J. 433, 436 (C.M.A. 1985).

7. In 2004, RCM 806(b)(2) was amended to incorporate the Constitutional test for trial closure. The rule provides that trial "shall be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings on the record justifying closure."

8. The Court of Appeals for the Armed Forces (C.A.A.F.) has recognized that the protection of classified information can be an overriding interest that will be prejudiced if the proceedings remain open. *U.S. v. Lonetree,* 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd* 35 M.J. 396 (C.A.A.F. 1992); *U.S. v. Grunden,* 2 M.J. 116 (C.M.A. 1997).

9. Where the identity of a witness is classified or the Government proves that the witness's personal safety would be at risk if his identity is disclosed at trial, the Sixth Amendment allows the Government to withhold the identity of the witness and to allow the witness to testify in light disguise so long as the Defense is able to place the witness in his proper setting. *U.S. v. Lonetree,* 35 M.J. 396 (C.M.A. 1992).

10. In the Government's 15 March 2013 classified filing (Supplement to Prosecution Response to Scheduling Order: 39(a) Session on Closure and Motion to Close the Courtroom for Specified Testimony), the Government describes the classified information it moves to elicit in closed session for the following witnesses:

1. BG (Ret) Robert Carr, DIA
2. COL Julian Chestnut, DIA
3. Classified W (entire)
4. Ms. Elizabeth Dibble, DOS, Principal Deputy Assistant Secretary, Bureau of Near Eastern Affairs
5. John Doe (entire)
6. RADM Kevin Donegan, Naval Warfare Integration, Pentagon
7. Mr. John Feeley, Principal Deputy Assistant Secretary, Bureau of Western Hemisphere Affairs, DOS
8. AMB Patrick F. Kennedy, Under Secretary for Management, DOS
9. Mr. John Kirchhofer, DIA
10. AMB Michael Kozak, DOS
11. Classified W (entire)
12. Mr. Danny Lewis, DIA
13. Mr. Randall MacRobbie, DIA
14. Mr. James McCarl, Joint IED Defeat Organization (JIEDDO)
15. MajGen Kenneth McKenzie, USMC HQ Staff
16. Mr. James Moore, DOS
17. MG Michael Nagata, Joint Staff, Pentagon
18. SSA Alexander Otte, FBI
19. AMB David Pearce, DOS
20. Mr. Adam Pearson, JIEDDO
21. Mr. H. Dean Pittman, DOS
22. Classified W (entire)
23. AMB Stephen Seche, DOS
24. Mr. David Shaver, U.S. Dep't of Treasury
25. Ms. Cathryn Strobl, CIA
26. AMB Don Yamamoto, DOS
27. AMB Marie Yovanovitch, DOS
28. Mr. Joseph Yun, DOS

11. On 4 April 2013, the Court held an RCM 802 conference with the parties to discuss the motions at issue in this case and scheduling issues involved in implementing this order. At that RCM 802 conference, the Defense advised the Court that it did not object to closure for the 3 classified witnesses or for John Doe and did not object to John Doe testifying at an alternate location or in light disguise in civilian clothing so long as the light disguise allows the Defense to observe John Doe's demeanor. The substance of that RCM 802 is documented via email and has been read into the record.

Conclusions of Law:

1. MRE 505(i) authorizes the Government to request an *in camera* proceeding to determine whether classified information may be disclosed either to the accused in discovery or used during the trial.

2. MRE 505(j) governs the introduction of classified information into evidence at trial. MRE 505(j)(5) authorizes military judges to close the trial during that portion of the presentation of evidence that discloses classified information.

3. The First and Sixth Amendment rights to public trial require military judges to employ the Constitutional test for closure IAW RCM 806(b)(2) prior to closing any portion of a trial IAW MRE 505(j)(5).

4. The requirements of MRE 505(i) are not applicable when the Government requests closure of a portion of the trial or an Article 39(a) session IAW RCM 806(b)(2). Where the basis for closure is to protect national security by preventing disclosure of classified information, the Government must identify the particular classified information at issue to the Defense and the Court with sufficient specificity to allow the Defense to propose alternatives and to challenge closure, and, to provide the Court with sufficient information to apply the RCM 806(b)(2) test and determine whether (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure are considered and found inadequate; and (4) to make case-specific findings on the record justifying closure. The Government must also provide the Court with evidence that the information it seeks to qualify as an overriding interest requiring protection by closure is properly classified.

5. The Court has examined the Government's 15 March 2013 classified Supplement to Prosecution Response to Scheduling Order: 39(a) Session on Closure and Motion to Close the Courtroom for Specified Testimony. The description of the classified information the Government seeks to elicit during closed session for each of the identified witnesses is sufficiently specific for the Defense to challenge closure and to propose reasonable alternatives to closure. Although the description of the classified information is sufficiently specific, the Government has not provided the Court with evidence of the classified nature for all of the classified information at issue to allow the Court to properly apply the RCM 806(b)(2) test and make appropriate case-specific findings.

6. One alternative that can mitigate the impact of closure is for the Court to require the Government to transcribe closed sessions first, conduct the appropriate classification reviews on the transcribed record, and to release the redacted unclassified portion of the transcript of the closed session to the public.

7. The Court has examined the Classified Government Motion for *in camera* Proceeding under MRE 505(i)(2) and the enclosures to include enclosures 10, 12, and 13. The Court has held 2 *in camera* Article 39(a) sessions with the Government to address Defense discovery issues. The Government proposes to give the Defense a written copy of the Government's proposed direct examination of John Doe and the anticipated responses (enclosure 10). The Government has also proposed to provide the Defense a summary of relevant discovery (enclosure 9 in relevant part and enclosure 13). The Court finds that these disclosures are sufficient to allow the Defense to place the witness in his proper setting.

RULING: The Defense Motions to require use of the procedures in MRE 505(i) for proceedings addressing closure determinations under RCM 806(b)(2) and for the Government to provide more specificity to the Defense regarding the classified information proposed for closure are **DENIED.** The Defense motion to produce a "dry run" Government merits witness to testify in a closed Article 39(a) session to assist the Court in determining if there are reasonable alternatives to closure is **GRANTED.** The Government motion to permit a classified witness to testify under the pseudonym, John Doe; to testify in civilian clothing in light disguise; and to testify from an alternate location in a closed session is **GRANTED** so long as the light disguise allows the Defense to observe the witness's demeanor, body language, eye movements, and facial reactions. The Government Motion to limit discovery and cross-examination regarding information that could reveal John Doe's true identity and preclude the Defense from questioning John Doe regarding irrelevant and highly classified information, including: his training for a specific classified mission, preparation for the mission, or details of the mission's execution outside the scope of direct examination is **GRANTED.** The Court will set forth its RCM 806(b)(2) closure findings for this witness in a separate ruling.

ORDER:

1. **NLT 7 May 2013** the Government will provide the Court with evidence of the classified nature of each specific piece of classified information the Government seeks to assert as an overriding interest justifying closure and with a draft court order specifying the evidence for the specific classified information.

2. **NLT 12 April 2013** the Government will provide the Court and the Defense a status update on the progress made to identify a merits witness for whom the Government seeks closure based on disclosure of classified information to be produced for a "dry run" of his/her testimony at the closed Article 39(a) session scheduled on **7-8 May 2013**. The parties have identified several witnesses who would testify similarly but disclose different classified information – for example original classification authorities. The witness produced will be one of these "categorical" witnesses. The witness will testify as he/she would at trial in closed session to facilitate the Court's determine whether there are reasonable alternatives to closure. Pursuant to RCM 806(b)(2), the Court finds that closure of the Article 39(a) session is required to prevent disclosure of classified national security information from this witness, is narrowly tailored to closing only the out of court session intended to flush out the classified information involved and to determine whether there are reasonable alternatives to closure of the same classified information at trial. The Court further finds there is no reasonable alternative to closure of this Article 39(a) session.

3. **NLT 6 May 2013** the Government will provide the Court with a plan for expeditious transcription, authentication, classification review, and release of redacted versions of closed sessions to the public.

So **ORDERED** this 10th day of April 2013.

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