

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

DEFENSE TARGETED BRIEF
ON CLOSURE: *GRUNDEN*,
MRE 505, and RCM 806.

21 MARCH 2013

RELIEF SOUGHT

1. The Defense requests this Court find that the procedures outlined in the Military Rules of Evidence (MRE) 505(i) be followed when making a court closing determination under Rule for Courts Martial (RCM) 806(b)(2).

THE LAW

2. RCM 806(2) establishes that court "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."

3. The discussion for this rule elaborates, "[a] session may be closed over the objection of the accused or the public upon meeting the constitutional standard set forth in this Rule." The discussion further refers practitioners to MRE 505(i).

4. MRE 505(i) sets forth the procedure the Government must follow when requesting court closure. Pursuant to MRE 505(i)(2), "the Government may move for an *in camera* proceeding concerning the use at *any* (emphasis added) proceeding of any classified information." Upon so moving the Government must establish the national security nature of the information by submitting the evidence, and an affidavit to the military judge *ex parte*. MRE 505(i)(3).

5. If the Government is able to meet the burden of MRE 505(i)(3), subparagraph (i)(4)(A) establishes the procedure for the *in camera* proceeding. It states:

Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the military judge shall conduct an *in camera* proceeding. Prior to the *in camera* proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following

briefing and argument by the parties in the *in camera* proceeding the military judge shall determine whether the information may be disclosed at the court-martial proceeding. Where the Government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

ANALYSIS

6. The Government has requested closure of the Court during the testimonies of various witnesses. See Appellate Exhibit 479 and the Supplement to Prosecution Closure Motion dated 15 March 2013. The Defense objects to the Government's request for closure and requests this Court order an *in camera* proceeding, as contemplated by MRE 505(i), be held to provide this Court with the information necessary to make the informed decision and specific ruling required by RCM 806(b)(2). The plain reading of the Rules for Courts-Martial and Military Rules of Evidence supports the Defense position that the procedures set forth in MRE 505(i) should be followed when the Court is considering a Government request for closure.

7. RCM 806(2) establishes that court "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." Thus, when making its specific findings the Court must be able to articulate what reasonable alternatives were considered and why those alternatives were not adequate. The Government must provide more specificity than it has about the classified information it intends to elicit from the 28 identified witnesses in order for this Court to consider all reasonable alternatives to closure.

8. While the main text of the Rule offers no guidance to the Court as to how to go about making a ruling regarding alternatives to closure, the Rule's ensuing discussion does. It states, "[a] session may be closed over the objection of the accused or the public upon meeting the constitutional standard set forth in this Rule. See also Mil. R. Evid. 412(c), 505(i), and 513(e)(2)."¹ It is thus clear from the Rule's discussion that the drafters intended MRE 505(i) to serve as the Court's guiding light when considering a Government court closure request in the context of a classified information case.

9. RCM 806(b)(2) and its discussion codify "military case law that has applied the Supreme Court's constitutional test for closure to court's martial." See Analysis to RCM 806. As such, it is instructive to review the catalyst of this change to the RCM, the ruling in *U.S. v. Grunden*, 2 M.J. 116 (C.M.A. 1977). The court in *Grunden* held that a closed preliminary hearing should be used when applying the constitutional test. *Id.* at 122. The court held, "[t]he prosecution to meet this heavy burden must demonstrate the classified nature, if any, of the materials in question. It must then delineate those portions of its case which will involve these materials." *Id.*

10. It cannot be coincidence that the closed preliminary session contemplated by the *Grunden* court bears a striking resemblance to the process outlined in MRE 505(i). *Grunden* requires the

¹ MREs 412 and 513, which deal with sex offense cases and psychotherapist/patient privilege respectively, are not relevant to the instant discussion.

Government to demonstrate the classified nature of the information. *Id.* Meanwhile, MRE 505(i)(3) requires the Government to "demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification." *Grunden* requires the Government to "delineate those portions of its case which will involve these materials." 2 M.J. at 122. Likewise, MRE 505(i)(4) mandates that the Government "shall provide the accused with notice of the information that will be at issue. The notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case."

11. This interplay between RCM 806 and MRE 505(i) makes logical sense because it gives the Court a process through which to make its RCM 806 ruling. The language of 505(i) does not limit its application only to a Government invocation of the Classified information privilege, nor does it limit the application to discovery. Indeed, MRE 505(i)(2) states that the rule applies to the use of classified information at any proceeding. The Rule further elaborates that it should be employed upon a showing of good cause or a claim of privilege. One way in which the Government can show the good cause contemplated by subsection (i)(2) is by demonstrating the national security nature of the information as described in subsection (i)(3) of the Rule. The requirement in 505(i)(3) mirrors the requirement of RCM 806(b)(2)(1). Thus, satisfaction of RCM 806(b)(2)(1) would qualify as the good cause required to trigger a full MRE 505(i) proceeding.

12. RCM 806(b)(2)(3) requires the Court to consider all reasonable alternatives to closure. MRE 505(i)(4)(A) provides the framework for those considerations. MRE 505(i)(4)(A) establishes, "[p]rior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with the proceeding in the same case." Here, the information in question has either been provided to PFC Manning or the Defense team has had access to the information. Thus, the Government must identify the specific classified information for which they are requesting closure. It is only through this specific identification that all parties can engage in the meaningful consideration of alternatives as required by RCM 806(b)(2)(3). In light of the Government's latest closure filing, the parties should conduct a hearing in accordance with MRE 505(i) to discuss alternatives to the identifications made by the Government. Further, the Defense believes that the Court's previous recommendation of a trial run with a witness is one that would benefit all parties and should be heeded. A trial run would give the Court and the parties the ability to appreciate the practical realities of both closure and the implementation of alternatives.

13. The Government has cited the Navy's "primer" for how to try a classified information case in support of its argument. The Navy's "primer" is simply the Navy Judge Advocate's recommendation on how to try a classified evidence case. Given the lack of case law in this area, the "primer" is no different than this motion; it is an interpretive analysis of the Manual for Courts-Martial. With respect to the interplay between RCM 806 and MRE 505, the Defense believes the Navy "primer" has it wrong. Conspicuous in its absence from the Navy's analysis is reference to the discussion of RCM 806(b)(2), which specifically references MRE 505(i). While the similarities between the requirements of RCM 806 and MRE 505 alone imply RCM 806's

reliance on the procedure outlined in MRE 505(i), the specific reference to 505(i) in RCM 806's analysis makes explicit this reliance. By failing to consider, or even acknowledge, this explicit link between the two Rules, the Navy's "primer" fails in its analysis of RCM 806 and MRE 505(i).

14. The *Grunden* court discussed the need for a preliminary hearing to determine the appropriateness of court closure. The process described by the *Grunden* court is mirrored by the process outlined in MRE 505(i). The drafters of the Rules for Courts-Martial amended RCM 806(b)(2) to codify what has been established by military case law, including *Grunden*. See Analysis to RCM 806. The drafters of RCM 806 also made a direct reference to MRE 505(i) as part of the Rule's discussion. See Discussion to RCM 806. Because the procedure for litigating *Grunden* is mirrored by MRE 505(i), RCM 806(b)(2) codifies the case law established by *Grunden* and its progeny, and because the discussion to RCM 806(b)(2) specifically references MRE 505(i), it is clear the procedures set forth in MRE 505(i) should be employed by the Court in making a closure determination under RCM 806(b)(2).

CONCLUSION

15. As indicated above, the Defense respectfully requests the Court employ the procedures set forth in MRE 505(i) when making a court closure determination under RCM 806(b)(2).



JOSHUA J. TOOMAN
CPT, JA
Defense Counsel

I certify that I served or caused to be served a true copy of the above on MAJ Ashden Fein, via electronic mail, on 21 March 2013.



JOSHUA J. TOOMAN
CPT, JA
Defense Counsel