UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:23-cr-32-KKM-TGW

ROBERT BIRCHUM

UNITED STATES' SENTENCING MEMORANDUM

For most of his 29 years of active duty in the United States Air Force, the Defendant served as an intelligence officer with a Top Secret clearance, entrusted with some of the nation's most sensitive secrets. Toward the end of his career, he was assigned to work with the United States Special Operations Command and the Office of the Director of National Intelligence at MacDill Air Force Base in Tampa, where he was given access to highly classified information from various intelligence agencies about sensitive military operations and intelligence collection.

The United States placed exceptional trust in the Defendant for a very long time. And for over a decade, the Defendant betrayed that trust. He repeatedly and deliberately engaged in conduct that put the nation's secrets—and the safety of his fellow servicemembers and citizens—at risk by removing more than 300 classified documents and files, including Top Secret information, from secure locations and storing them in his residence, in a storage pod parked in his driveway, and in his overseas quarters. The Defendant's motive for engaging in this illegal, unauthorized, and dangerous behavior remains unclear. What is clear is that his conduct was not a

mistake or accident; the Defendant fully understood the potential damage to which he was exposing his country and its military and intelligence apparatus, yet he selfishly chose to continue mishandling classified information year after year, with no discernable regret until his criminal acts were eventually brought to light.

Because the Defendant committed a serious offense that endangered the national security of the United States, a meaningful sentence of imprisonment is warranted based on a consideration of all the sentencing factors. The United States therefore recommends a low-end guideline sentence of 78 months' imprisonment, a term of supervised release of 3 years, and a fine of $25,000.

PROCEDURAL BACKGROUND

On February 21, 2023, the Defendant pleaded guilty, pursuant to a plea agreement, to an information charging him with one count of unlawful retention of national defense information (NDI), in violation of 18 U.S.C. § 793(e). Docs. 1, 6, 13. In the plea agreement, the parties agreed to jointly recommend that the applicable guidelines included USSG §2M3.3(a)(1), because the Defendant willfully retained NDI classified as Top Secret/Sensitive Compartmented Information (TS/SCI), and USSG §3B1.3, because the Defendant abused a position of public trust and used a special skill in a manner that significantly facilitated the commission and concealment of the offense. Doc. 6 at 3.

The Court accepted the Defendant's guilty plea and adjudicated him guilty of the offense on March 8, 2023. Doc. 19.

The Probation Officer prepared a presentence investigation report (PSR) and determined that, based on a total offense level of 28 and a criminal history category of I, the Defendant's advisory guideline imprisonment range is 78 to 97 months. PSR, Doc. 21 at ¶ 90.

FACTS

The plea agreement sets outs a detailed recitation of the facts in this case, as does the PSR, which the United States hereby incorporates. Doc. 6 at ¶¶ 16-24; PSR, Doc. 21 at ¶¶ 10-31. The Defendant served in the Air Force for a total of 29 years, ultimately retiring at the rank of Lieutenant Colonel in 2018. Doc. 6 at 16. He worked in various jobs in the field of military intelligence, and his duties required him to work with classified information at the Joint Special Operations Command, United States Special Operations Command (USSOCOM), and the Office of the Director of National Intelligence (ODNI). *Id*.

During his career, the Defendant was entrusted with the highest levels of classified information, including Top Secret/Sensitive Compartmented Information (TS/SCI). *Id.* Information is classified as "Top Secret" where unauthorized disclosure of that information could be expected to cause "exceptionally grave damage" to that national security. *Id*. at 17; Executive Order 13526. Because of the especially sensitive positions the Defendant occupied, he was also given access to even more closely held intelligence information safeguarded under "Alternative Compensatory Control Measures," or ACCM. *Id.* at 18. For example, the Defendant was given access to information concerning Department of Defense locations

throughout the world, detailed explanations of the Air Force's capabilities and vulnerabilities, and the methods that the Air Force uses to gather, transmit, and exploit intelligence obtained by various Intelligence, Surveillance, and Reconnaissance (ISR) platforms. Doc. 6 at 20.

The intelligence community—and the military—take certain precautions to protect classified NDI from falling into the wrong hands. One precaution is to require those who are granted access to execute a Non-Disclosure Agreement (NDA). Doc. 6 at 19. The defendant signed several such NDAs during his career. For example, he executed a "Sensitive Compartmented Information Nondisclosure Agreement" in August 2008 when he was assigned to USSOCOM at MacDill AFB in Tampa. *Id.* at 19. In the 2008 NDA, attached hereto as part of Exhibit 1, the Defendant acknowledged that "unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation." Doc. 6 at 19; Exhibit 1 at 1, ¶ 3. At that time, the Defendant had already been promoted to the rank of Major, which is considered a "field-grade" officer in the military. The Defendant also signed a form in August 2008 entitled "Individual Reporting Responsibilities," in which he acknowledged that he was required to report any adverse information, including "unwillingness to comply with rules and regulations or to cooperate with security processing," and "apparent mental or emotional disorders." Doc. 21 at ¶ 15; attached hereto as Exhibit 2.

In addition to signing the NDAs and associated forms, in October 2008, the Defendant signed a document entitled "Special Instructions for Couriers of SCI in

the Local Travel Area" attached as Exhibit 3. That form instructed him on the various measures he was expected to take whenever he transported SCI locally; for example, he was required to ensure that the material was wrapped, with a "locked briefcase or pouch" serving as an outer wrapper, and opaque envelopes or paper serving as inner wrappers, with proper security classifications on both sides of the innermost wrapper. *Id.* at ¶ 2(a). He was also specifically instructed to ensure that the material remained in his personal possession and under constant surveillance at all times. *Id.* at ¶ 2(b). He was not authorized "to carry SCI material to [his] home or office for personal convenience." *Id.* at ¶ 4.

On January 24, 2017, agents from the Air Force's Office of Special Investigations (AFOSI) lawfully searched the Defendant's home after they obtained information indicating that classified information was improperly stored there. Doc. 6 at 21. During that search, agents seized a Thumb Drive, a Dell hard drive, and numerous paper documents containing classified NDI. Doc. 6 at 21, 23. The thumb drive contained 135 files with classified NDI, including 31 Top Secret files, some with ACCM information and 102 Secret files, some with ACCM information. *Id.* Among the Top Secret files were two electronic documents containing presentations from the National Security Agency (NSA) summarizing the NSA's capabilities and methods of collection and identifying targets' vulnerabilities. *Id.* at 22.

About a week later, on January 30, 2017, AFOSI agents lawfully seized a personal Iomega hard drive that the Defendant possessed in his overseas temporary quarters; this space was not a secure facility equipped to store classified NDI. Doc. 6

at 23. The hard drive contained 117 additional files with classified NDI; 12 of those files were marked as Top Secret, some with ACCM, 98 files were marked as Secret, some with ACCM, and 7 were marked as Confidential. *Id.* at 23-24.

Finally, on February 3, 2017, AFOSI agents searched a storage pod located on the Defendant's driveway at his home in Tampa. They seized 28 paper documents that contained information marked as Secret. *Id.* at 24.

ARGUMENT

In sentencing a criminal defendant, the court must consider the advisory guidelines range and the factors set forth in 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S. 38, 49-50 (2007); *United States v. Rosales-Bruno*, 789 F.3d 1249, 1253-54 (11th Cir. 2015). The Section 3553(a) analysis begin with the court's consideration of the nature and circumstances of the offense and the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1). Moreover, the sentence imposed should (1) adequately reflect the seriousness of the offense, (2) promote respect for the law, (3) provide just punishment, (4) afford adequate deterrence, (5) protect the public from future crimes of the defendant, and (6) provide the defendant with any necessary training or treatment. 18 U.S.C. § 3553(a)(2). The court should also consider the kinds of sentences available, any pertinent policy statement, and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *Id.* at (a)(3)-(6).

a. The Nature and Circumstances of the Offense

The first factor in the Court's Section 3553(a) analysis weighs in favor of a guidelines sentence because the Defendant's criminal conduct was especially serious—it put the national security of the United States at great risk over a period of many years. Indeed, the Supreme Court has noted that "[i]t is 'obvious and unarguable' that *no governmental interest is more compelling* than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citations omitted, emphasis added). The risk inherent in the mishandling of classified NDI is one of the reasons why Congress added the crime of willful retention to the Espionage Act in 1950. The Senate Report preceding that statute's enactment noted that the existing law provided no penalty for unauthorized possession of NDI unless a demand was made for it, stating:

> [t]he dangers surrounding the unauthorized possession of items enumerated in this statute are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession *may be unknown to the authorities who would otherwise make the demand.*

S. Rep. No. 80-247, at 7 (1949) (emphasis added); *see also United States v. Ford*, 288 F. App'x 54, 57, 61 (4th Cir. 2008) (rejecting argument that section 793(e) does not criminalize retention, without transmittal, of classified information in case involving former NSA employee who removed classified information from his office without detection by supervisors). Precisely that danger manifested here. USSOCOM, ODNI, JSOC, and the USAF did not know that the Defendant was stashing

classified NDI in his home, storage pod, and overseas quarters until law enforcement discovered it.

What's more, many of the secrets that the Defendant deliberately removed from secure locations were of the greatest sensitivity—classified as Top Secret/Sensitive Compartmented Information (TS/SCI)—as well as items designated as ACCM, especially sensitive information that requires even greater protection than TS/SCI. The sentencing guidelines recognize that the unlawful retention of Top Secret information poses an especially serious threat to the national security, ascribing higher base offense levels to conduct involving Top Secret information. *See* USSG §§2M3.1-2M3.3. The commentary to §2M3.1 defines Top Secret information and emphasizes that "offense level distinctions in this subpart are generally based on the classification level of the information gathered or transmitted. This classification, in turn, reflects the importance of the information to national security." Cmt. n.1, background.

The Defendant is charged in the Information with unlawful retention of two Top Secret electronic documents. Doc. 1; Doc. 6 at 22; Doc. 21 ¶ 23. These documents summarized the NSA's capabilities, detailed methods of collection, and identified targets' vulnerabilities. Doc. 6 at 22. Despite their exceptional sensitivity, the Defendant downloaded and saved them on an unmarked personal thumb drive that agents later found in the Defendant's home and that was accessible to his wife and anyone else who happened to be in his home. *See* Doc. 6 at 22.

In addition to the especially sensitive nature of the information that the Defendant mishandled, the sheer volume of all the classified NDI at issue here is staggering, consisting of over 300 classified items, including both digital files and paper documents. *See* PSR, Doc. 21 at ¶¶ 21, 26, 28, 30. Furthermore, the evidence shows that the Defendant willfully removed and retained these documents over a long period of time. For example, he downloaded classified documents (including 31 Top Secret files) onto the thumb drive between approximately 2002 and 2008.[1] *Id.* at ¶ 22. He also willfully retained classified NDI (including Top Secret information) in his overseas quarters in 2017, where, according to his military orders, he deployed on or about May 31, 2016. The Letter of Reprimand that the Defendant received from an Air Force Brigadier General in January 2018, attached hereto as Exhibit 4, details how the classified NDI seized from the Defendant is dated between 1998 and January 2017.[2] Although the government cannot identify precisely when the Defendant removed these classified documents from his secure workplaces, it is likely that he did so over the course of more than a decade. Equally troubling, the Defendant made no effort to safeguard or limit others' access to this classified

[1] A digital forensic report prepared by the Department of Defense Cyber Crime Center revealed that 1450 files on the thumb drive had last been accessed between December 17, 2016, and January 26, 2017. The other 1267 files had last been accessed between January 25, 2003, and February 2, 2010. The thumb drive contained classified files as well as personal files, such as tax and credit card information. The digital forensic report also noted that the classification markings from certain electronic documents had been removed. *Id.* at 15-16.

[2] The Defendant asked the Probation Officer to note in the final PSR that he had received this letter of reprimand for the same conduct as the instant offense. *See* Doc. 21, Addendum. The Probation Officer inserted that information in paragraph 48. Doc. 21 ¶ 28.

material after having removed it unlawfully—he kept both paper documents and electronic information in unsecured locations and on non-password-protected devices where others could (and did) access it.

The Probation Officer has noted in the PSR that, although USSG §2M3.3 is correctly applied to the Defendant's willful retention of NDI, this Court could consider varying downward from the stated guideline range because §2M3.3 also applies to an arguably (but not certainly) more serious violation of 18 U.S.C. § 793(e) involving the transmission of NDI. *See* Doc. 21 at ¶ 106. The United States responded to that contention in detail in its objections to the PSR. *See* Doc. 21 Addendum. There is, however, no dispute that § 2M3.3 is the appropriate guideline for unlawful retention of NDI, and, as discussed above, the evidence in this case shows that the Defendant's offense conduct in this case is an *egregious* example of willful retention, not one that is borderline or outside the heartland of retention cases. Moreover, this is *not* a case involving the Defendant's mere negligence or innocent human error. The Defendant was a highly trained intelligence officer who, over the course of many years and many assignments, violated his core responsibility to safeguard classified information. He removed highly classified NDI, in paper and electronic format, from secure locations and stored it in wholly unsecure locations, where it potentially could be accessed (either in person or, in the case of the digital media, remotely) by unauthorized persons.

Furthermore, although §2M3.3—which provides for a lower base offense level than §2M3.2 (entitled "Gathering National Defense Information")—does not

explicitly mention the act of willful retention in its title or background commentary, it does specifically list 18 U.S.C. § 793(e) as one of the statutes it covers.[3] The Sentencing Commission explained in the commentary to §2M3.3 that the higher guidelines in §2M3.2 should be applied where the defendant communicated *intangible* NDI with reason to believe that it could be used to hurt the United States or help a foreign nation. USSG §2M3.3, cmt. n.2.; *see United States v. Aquino*, 555 F.3d 1224, 130-31 (3rd Cir. 2009) (discussing USSG §§2M3.3 and 2M3.2 and holding that §2M3.3 applied to defendant's willful retention of two classified documents).[4] Thus, for other violations of § 793(e), including the willful retention of electronic or paper documents, the more lenient guidelines in §2M3.3 should apply.[5] In any event, because the Defendant's conduct here fits squarely into the heartland of willful retention cases, a variance below the agreed-upon guideline based on the generic definition of offense conduct in the guideline would yield a sentencing disparity among defendants convicted of retention.

[3] Section 793(e) sets forth different means by which an individual can violate that statute, including the willful communication or transmission of NDI to any person not entitled to receive it, which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of a foreign nation, as well as the willful retention of that NDI. 18 U.S.C. § 793(e).

[4] *See also, United States v. Harold Martin*, 1:17-cr-00069-RDB (D. Md.), Doc. 204 (plea agreement specifying that, in case involving willful retention of Top Secret/SCI NDI, the parties agreed that USSG § 2M3.3 applied to offense conduct. The district court ultimately imposed a sentence of 108 months. *Id.*, Doc. 219.

[5] The Sentencing Commission has explained that the "hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct *rather than guidelines that track purely statutory language*." USSG Manual, Chapter One, at 6 (Nov. 1, 2021).

For all these reasons, a variance based on the nature and circumstances of the Defendant's criminal conduct is not appropriate or warranted.

b. The History and Characteristics of the Defendant

Despite the Defendant's lengthy service in the military and his lack of criminal history, his "history and characteristics" do not weigh in favor of leniency, for several reasons. First and foremost, the evidence in this case shows that the Defendant repeatedly, and over the course of many years, violated the special trust that the military had bestowed on him. Although he attended and completed "multiple intelligence operations courses," Doc. 21 at ¶ 78, and earned separate master's degrees in National Security Studies and Intelligence Studies, *id.* at 75-76, he willfully violated this trust and put his fellow service members at risk. Even as he was promoted to the lofty rank of Lieutenant Colonel and afforded the privileges and responsibilities of a "field-grade" intelligence officer, he continued to flout basic rules designed to protect the sensitive information about special operations missions and intelligence collection methods.

The General Officer Letter of Reprimand sums up the Defendant's conduct as follows:

> Your actions are disgraceful and have potentially seriously compromised national security. You have also compromised your integrity and character as an officer. As a field grade officer in the U.S. Air Force you are to demonstrate an internalized understanding of core Air Force values. You have engaged in an inexcusable manner that is not only irresponsible, but blatantly disregards our Service values.

Exhibit 4 at 3.

The Defendant's actions following the agents' discovery of classified information in his home and overseas quarters also counsel against leniency. On January 30, 2017, Air Force OSI agents interviewed the Defendant at Bagram Air Force Base in Afghanistan about mishandling classified information. The Defendant responded indignantly in writing, insisting that he had not "willingly" mishandled classified information. Doc. 21 at ¶ 29; Exhibit 5. He claimed that he had undergone "countless training on handling classified information and always applied safeguards necessary to handle it." *Id.* Continuing, he stated that he had participated in "special operations units" where he had been required to travel with classified information, but he had "applied all security safeguards to it." *Id.* He explained that he had worked on "many classified projects and always kept unclassified information separate from the classified." *Id.* Remarkably, the Defendant made these assertions at the very same time that law enforcement was discovering that he had improperly stored classified information—including 12 Top Secret files—on the removable hard drive in his overseas barracks room. Doc. 21 at ¶ 28.

Later, in December 2017—eleven months after the classified NDI was discovered in the Defendant's home and overseas quarters—AFOSI agents discovered that he had brought a loaded firearm in his personal backpack to his duty station at MacDill Air Force Base. PSR, Doc. 21 at ¶¶ 46-48, 53. At the time, the Defendant was assigned to the Public Affairs Office, where he was tasked with organizing historical hard copy documents and photographs—a job that did not require him to access classified material via computer. *Id.* In addition to the loaded

gun, agents also found 100 official Air Force Polaroid photographs inside the rear compartment of the backpack. *Id.* His supervisor reported that he should not have had that Air Force property in his personal backpack. *Id.*

As a result of this conduct, the Defendant was banned from entering MacDill AFB for three years. *Id.* At ¶ 47. In a second Letter of Reprimand that the Defendant received for carrying a concealed weapon and failing to obey a general order, his Commander wrote that he had unlawfully possessed a privately owned firearm with a full magazine and a live round in the chamber at his workplace. Exhibit 6; *see* PSR, Doc. 21 at ¶ 48. The Commander further wrote that the "[a]ccording to statements you made to your supervisor, you routinely possessed a firearm on the installation despite the fact that you were not authorized to do so." *Id.* The Defendant's conduct "violated the trust" placed in him and he was a "threat to the safety and security of the installation." *Id.* Despite knowing that he was under scrutiny due to the pending classified-information investigation, the Defendant flouted Air Force regulations and, again, potentially endangered his fellow service members by bringing a loaded firearm onto base and into his workspace.

Moreover, the Defendant's admission that he abused a position of public trust and used a special skill in a manner that significantly facilitated the commission and the concealment of the offense, *see* Doc. 21 at ¶¶ 6, 34, 39, underscores that this Court should not grant him leniency based on his history and characteristics, and particularly his military service. Indeed, the Eleventh Circuit has stated that "the reasoning behind §3B1.3 is that defendants who abuse a position of trust deserve

more severe punishment, not less." *United States v. Howard*, 28 F. 4th 180, 212 (11th Cir. 2022) (finding that district court had abused its discretion in granting substantial downward variance based, in part, on defendant's loss of medical license after conviction for healthcare fraud); *see also United States v. Steele,* 178 F.3d 1230, 1239 (11th Cir. 1999) (holding that it was an abuse of discretion for district court to grant downward departure based on the loss of a pharmacist license when that departure would negate an enhancement imposed for defendant's abuse of his position as a pharmacist); *see also United States v. Ford*, 288 F. App'x 54, 61 (4th Cir. 2008) (district court did not err in applying abuse-of-trust enhancement because defendant, an NSA employee, would not have been able to remove classified documents from his office without detection if he had not held top secret security clearance).

The PSR notes that the Defendant's military service might warrant a downward departure pursuant to USSG §5H1.11. This section provides that military service may be relevant in determining whether a departure is warranted "if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." *Id.* Although it is undisputed that the Defendant served in the Air Force for 29 years, was promoted to the rank of Lieutenant Colonel, and received numerous awards for his service, he betrayed the military's trust in him again and again. And he did so by mishandling some of the nation's most sensitive secrets. His extensive service, and the training that the Air Force provided him, are

the only reasons he was given access to the classified information that he flagrantly mishandled.

In *United States v. Theunick*, 651 F.3d 578, 592 (6th Cir. 2011), the defendant, a former Chief of Police and Vietnam veteran who had been convicted of firearms offenses, sought a departure under §5H1.11 in light of his public and military service. The district court characterized the defendant's request as "ironic" given that "the essence of the criminal activity in which the defendant was convicted [was] inextricably tied up with the official law enforcement position." *Id.* The court explained that "the crime wouldn't have been able to have been committed in the way in which it was had it not been for the position of public authority and public trust that the defendant occupied as chief of police." *Id.* The Sixth Circuit, in turn, characterized the defendant's request as "without merit." *Id.*

Like the defendant's request in *Theunick*, a downward departure or variance based on Defendant Birchum's military service is unwarranted and would be inappropriate. His military service did nothing to mitigate the consequences of his actions. If anything, the Defendant's criminal conduct demonstrated his willingness to endanger his fellow servicemembers while deployed overseas in combat zones—an aggravating factor, if anything. A within-guidelines sentence is wholly appropriate under these facts.

Nor is a variance or departure from the advisory guideline range warranted based on the Defendant's struggle with several mental health conditions. Doc. 21 at ¶¶ 69-72. The Defendant suffered from PTSD, which was related to his service in

combat zones, and he ultimately received a service-related disability retirement. *Id.* at ¶¶ 70-72. He had experienced the PTSD and other conditions since approximately 2009. *Id*. These conditions, however, do not appear to be directly relevant to the offense conduct. Indeed, in the Defendant's letter January 30, 2017, handwritten letter, he insisted that understood his obligations to safeguard classified information and that he had always "applied a high standard to security." *See* Exhibit 5.

c. General Deterrence

The section 3553(a) factors that the court must consider encompass both specific and general deterrence. *See United States v. Howard*, 28 F.4th 180, 208 (11th Cir. 2022). Because the Defendant will likely never lawfully access classified information again, specific deterrence plays a secondary role in this case. General deterrence, however, is a very serious concern.

Numerous recent cases highlight the importance of deterring the mishandling of classified information. Just last month, the FBI arrested a 21-year-old enlisted Airman in the Massachusetts Air National Guard who was charged with making unauthorized disclosures of classified NDI and unlawfully removing and retaining classified documents. *See United States v. Jack Douglas Texeira*, No. 23-MJ-4293-DHH (D. Mass 2023), Doc. 3-1 (Complaint affidavit); Doc. 19 (Government's detention memo). This case and other incidents involving classified information have received significant media attention, and rightly so. As the Supreme Court has recognized, "no governmental interest is more compelling than the security of the Nation." *Haig*

v. Agee, 453 U.S. at 307. It follows that general deterrence plays a critical role in sentencing in national security cases.

General deterrence is also a particularly compelling factor under the facts of this case because the Defendant was a highly trained professional who abused his professional privileges and special access to commit his crime. *See Howard*, 28 F. 4th at 208. In *Howard*, the Eleventh Circuit pointedly rejected the district court's reasoning that effectively disregarded the consideration of general deterrence for a defendant who was a doctor and had perpetrated a massive healthcare fraud kickback scheme. *Id.* The district court had stated at sentencing that, if the prospect of losing one's medical license and becoming a felon was not enough to deter the defendant from committing such crimes, the threat of a prison sentence could not deter him either. *Id.* Although the applicable guideline range for that defendant was 78 to 97 months, the district court sentenced the defendant to no imprisonment at all, only 36 months of probation, with one year to be served in home detention. *Id.* at 187, 201.

The Eleventh Circuit responded that, if the district court's ruling were approved, it would "tell judges not to consider general deterrence when sentencing any criminals who used their professional license or privilege to commit their crime." *Id.* The court emphasized that "the Congress, the United States Sentencing Commission, and this Court" had all decided that general deterrence is a critical factor in sentencing defendants, including those who "wear white collars and practice a profession." *Id.*, citing *United States v. Martin,* 455 F.3d 1227, 1240 (11th

Cir. 2006) ("[T]he Congress that adopted the § 3553 sentencing factors emphasized the critical deterrent value of imprisoning serious white collar criminals, even where those criminals might themselves be unlikely to commit another offense.").

Admittedly, the Defendant here, unlike most white-collar criminals, did not appear to have a financial motive to remove and hoard the classified NDI. Regardless of motive, however, the special privileges and trust that he violated, and the fact that he endangered the national security of the United States, similarly call for special scrutiny regarding this sentencing factor.

Moreover, because the Defendant was a high-level commissioned military officer assigned to work on the most sensitive military operations, the sentence imposed in this case will very likely reverberate through the ranks of the Department of Defense, particularly the Special Operations and Military Intelligence communities at USSOCOM and CENTCOM. As the Eleventh Circuit opined in *Howard*, when a conviction is obtained in certain kinds of cases, "one of the primary objectives of the sentence is to send a message to others who contemplate such schemes that their crime is a serious one that carries with it a correspondingly serious punishment." 28 F.4th at 209 (quotation marks and citation omitted).

d. The Need to Avoid Unwarranted Sentence Disparities

A guidelines sentence in this case would be consistent with sentences imposed in similar cases. Thankfully, there are a limited number of such cases. But, for example, in *United States v. Harold Martin*, the defendant, a former contractor with the NSA, pleaded guilty to violating § 793(e) for unlawfully retaining Top Secret

information over the course of his long career. No. 1:17-cr-69-RDB, Doc. 204, (D. Md. July 19, 2019). The court sentenced Martin to 108 months' imprisonment—the top of his guidelines range, as stipulated in his plea agreement. *Id.,* Doc. 204 at 5, ¶ 9. In *United States v. Ngia Pho*, the defendant took classified information home from his NSA workplace, claiming that he hoped to make use of the information in the course of his performance evaluation. No. 1: 17-CR-631-GLR, Doc. 9, Doc. 19 at 6, Doc. 30 (D. Md. Sept. 25, 2018).[6] The court sentenced the defendant to 66 months' imprisonment. *Id.*, Doc. 30. Similarly, in *United States v. Kenneth Ford*, the defendant admitted to agents that he had unlawfully retained classified documents on the last day of work at the NSA, claiming that the materials would help him with his new job. No. 8:05-cr-98-PJM (D. Md.), *aff'd* 288 Fed. App'x 54 (4th Cir. 2008).[7] The court sentenced Ford to 72 months' imprisonment. No. 8:05-cr-98, Doc. 57.

Here, in the Middle District of Florida, U.S. District Judge Susan Bucklew recently sentenced Jeremy Brown, a retired Army Special Forces Master Sergeant, to a guidelines sentence of 87 months' imprisonment for offenses including the violation of 18 U.S.C. § 793(e). *United States v. Brown*, 8:21-cr-348-SCB-SPF (M.D. Fl.), Doc. 357. In that case, a jury found Brown guilty of willfully retaining one "Secret" classified document that he had obtained while he was serving in the Army.

[6] Scott Shane, *He Took Home Documents to Catch Up on Work at the N.S.A. He Got 5½ Years in Prison.*, N.Y. TIMES (Sept. 25, 2018), https://www.nytimes.com/2018/09/25/us/politics/nghia-pho-nsa-prison-sentence.html.

[7] Federal Bureau of Investigation (Mar. 31, 2006), https://archives.fbi.gov/archives/news/stories/2006/march/ford033106.

See id., Doc. 344 at 10-11. Brown was also convicted of several other offenses relating to his possession of unregistered firearms and two grenades. *See id*., Doc. 357 at 1. Although the facts of Brown's case differ from the Defendant's, the guidelines for the willful retention of classified information played a significant role in the calculation of the final advisory guideline range of 87 to 108 months' imprisonment. *See id*., Doc.354, 357.

Finally, the "kinds of sentence and sentencing range established for" this offense, 18 U.S.C. § 3553(a)(4), further support a substantial term of imprisonment in this case. The statutory maximum penalty established by Congress for a violation of 18 U.S.C. § 793(e) is ten years. A sentence of 78 months, at the low end of the advisory guidelines range, is well below that potential maximum sentence.

e. The Imposition of a Fine is Required and Warranted

This Court must impose a fine unless the Defendant can demonstrate that he is unable to pay. *See United States v. McGuinness*, 451 F.3d 1302, 1307 (11th Cir. 2006). The relevant statutory maximum fine is $250,000, and the guideline range is $25,000 to $250,000. Doc. 21 at ¶¶ 97, 99; 18 U.S.C. § 3571(b); USSG §5E1.2(c)(3). According to undisputed facts in the PSR, the Defendant has the ability to pay a fine. Doc. 21 at ¶ 89.

The Defendant's income and financial resources support imposition of a fine. His net worth is at least $537,393. *See* 18 U.S.C. § 3572(a)(1); USSG §5E1.2(d)(2). This estimate includes a conservative valuation of the Defendant's real property, using the tax appraiser's taxable value of $666,268. Doc. 21 at p. 16-17. According,

to online real estate marketplace Zillow, however, the fair market value of the property may be closer to $835,000.[8] The Defendant's assets also include $30,000 in a personal savings account and $230,000 between two investment accounts—his Thrift Savings Plan account and an Individual Retirement Account. *Id*. In addition to real property, the Defendant has a vehicle, a motorcycle, and a motorhome; his wife has her own camper vehicle as well. *Id*. The Defendant receives over $12,000 per month in retirement income. *Id*. And private counsel represents him in this case.

In determining whether to impose a fine and the amount of the fine, one factor the Court shall consider is the expected cost to the government of any term of probation or term of imprisonment and term of supervised release imposed. USSG §5E1.2(d)(7) and 18 U.S.C. § 3572(a)(6). The Defendant's guideline range of imprisonment is 78 to 97 months. Doc. 21 at ¶ 91. The cost to the government for imprisonment within this range would be between $287,664 and $357,736. *See* Doc. 21 at ¶ 100.

The facts here also demonstrate that imposing a fine within the guideline range would not unduly burden the Defendants' dependents, based on his assets, net worth, and household income streams. *See* 18 U.S.C. § 3572(a)(2); USSG §5E1.2(d)(3). The Defendant is married and has one minor child. Doc. 21 at ¶ 63.

[8] The United States accessed the Zillow website on April 28, 2003, and the fair market value reflected was $835,600. The link is not included here to protect the location of the Defendant's residence.

His wife is employed and earns significant income of $12,000 per month. *Id.* at ¶¶ 63, 88. [9]

The court shall also consider the need for the combined sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, and to afford adequate deterrence. *See* USSG §5E1.2(d)(1). As set forth above, the relevant sentencing factors warrant a within-guidelines fine.

Because the Defendant has the ability to pay, and considering the factors outlined in 18 U.S.C. § 3572, the Court should impose a fine. The United States requests that this Court order the Defendant pay a fine of at least $25,000. In light of his assets, the fine should be payable within 30 days of entry of the judgment.

[9] Restitution is not a relevant factor in this case. *See* 18 U.S.C. § 3572(a)(4).

CONCLUSION

For all the reasons set forth above, the United States respectfully requests that the Court sentence the Defendant to 78 months of imprisonment, to be followed by 3 years of supervised release. The United States also requests that the Court impose a low-end guidelines-range fine of $25,000.

Respectfully submitted,

ROGER B. HANDBERG
United States Attorney

/s/ Cherie L. Krigsman
Cherie L. Krigsman
Assistant United States Attorney
Florida Bar No. 0048764
400 N. Tampa St., Ste. 3200
Tampa, FL 33602-4798
Telephone: (813) 274-6000
Facsimile: (813) 274-6358
E-mail: Cherie.Krigsman@usdoj.gov

/s/ Evan N. Turgeon
Evan N. Turgeon, Trial Attorney
Counterintelligence and Export
Control Section
National Security Division
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

/s/ Cherie L. Krigsman

Cherie L. Krigsman
Assistant United States Attorney
Florida Bar No. 0048764
400 N. Tampa St., Ste. 3200
Tampa, FL 33602-4798
Telephone: (813) 274-6000
Facsimile: (813) 274-6358
E-mail: Cherie.Krigsman@usdoj.gov