IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

ROBERT B. BERGDAHL Sergeant, U.S. Army, *Appellant*, v. PETER Q. BURKE Lieutenant Colonel, AG U. S. Army, in his official capacity as Commander, Special Troops Battalion, U. S. Army Forces Command, Fort Bragg, NC, and Special Court-Martial Convening Authority, and The UNITED STATES, *Appellees*.	)	BRIEF ON BEHALF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* USCA Dkt. No. 16-0059/AR Crim. App. No. 20150624

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Issue Presented

ONCE AN UNCLASSIFIED DOCUMENT HAS BEEN ACCEPTED IN EVIDENCE IN A PRELIMINARY HEARING THAT IS OPEN TO THE PUBLIC, MAY THE CONVENING AUTHORITY REFUSE TO RELEASE IT OR PERMIT THE ACCUSED TO DO SO?

Statement of Facts

Amicus accepts the facts and case history in Appellant's writ appeal petition filed with this court on 13 October 2105.

Reasons Why the Writ Should Issue

I. Introduction.

Appellant presents a significant issue of public concern about the transparency of all parts of the court-martial process and the fairness of the Article 32 preliminary hearing here. As well, the court must determine if jurisdiction lies. *See Berg-*

dahl v. Burke, Misc. No. 20150624 (Army Ct. Crim. App. 8 October 2015)(unpub.).

Appellant contends that MG Kenneth R. Dahl's AR 15-6 report of 2014 and a 371-page transcript of SGT Bergdahl's statement to MG Dahl's on 6-7 August 2014 should be public. The documents are unclassified and were openly discussed during testimony at which the public and media were present. The preliminary hearing officer said he lacked authority to authorize release. MG Dahl testified he had no objection to the report or the interview transcript being made public. Government counsel has made no explicit claim of privilege under Military Rule of Evidence (M.R.E.) 505 either at the hearing or in the court below.

LTC Burke claims he lacks authority to release the materials, even though he issued a protective order against release or disclosure. *See* Appellant's Brief. The Government contends that only the AR 15-6 Appointing Authority may release the report. *See* Appellee's Brief, at 9-10. The commander conducted an AR 15-6 investigation upon Appellant's return. By doing so, the commander complied with Rule 303, Rules for Courts-Martial (R.C.M.), Manual for Courts-Martial, United States (2012). Thus, the AR 15-6 investigation is now an integral part of this case. The government has not asserted a privilege under M.R.E. 506 which applies at a UCMJ art. 32

hearing: neither in the protective order, nor in the hearing, nor in the court below. If the claim was made it was incumbent on the government to show "detriment[] to the public interest." Having failed to claim the privilege at any stage, the government's argument against disclosure fails. The holder of a privilege must assert it, else it is lost—waived. Furthermore, M.R.E. 506(d) operates as authority to release documents under AR 15-6, para. 3-18(b), as "otherwise authorized by law or regulation."

II. This court has (and the ACCA had) jurisdiction to provide the relief petitioner seeks.

ACCA had potential appellate jurisdiction under Article 66(b)(1), UCMJ, *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966), as does this court. Appellant is accused of offenses which authorize a maximum punishment within the ACCA and this court's jurisdiction. *See* MCM ¶¶ 9e, 23e. The courts of criminal appeal and this court are established by Act of Congress. *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013). Like the Army Court of Criminal Appeals, this Court has authority under the All Writs Act to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction[]." 28 U.S.C. § 1651; *see also United States v. Denedo*, 556 U.S. 904, 911 (2009). ("[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act."). This

Court has repeatedly reminded the CCAs, "In the context of military justice, 'in aid of' includes cases where a petitioner seeks 'to modify an action that was taken within the subject matter jurisdiction of the military justice system.' A writ petition may be 'in aid of' a court's jurisdiction even on interlocutory matters where no finding or sentence has been entered in the court-martial." *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013) (quoting *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008)); *see also Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012) (per curiam).

A petition for extraordinary relief is within the jurisdiction of military appellate courts so long as it seeks a remedy within "the *potential* jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods, Co.*, 384 U.S. 597, 603 (1966) (emphasis added); *see also* Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 Green Bag 2d 191, 193 (2014).[1] Other considerations determine the merits of granting relief: (1) standing, *see, e.g.*, *Ctr. for Const'l Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013)(hereinafter CCR); and (2) can make out its case on the *merits*, *see, e.g.*, *LRM*, 72 M.J. at 372. The court's *power* to issue such relief stems entirely from its appellate jurisdiction

[1] Available at: http://www.greenbag.org/v17n2/v17n2_articles_vladeck.pdf. Last viewed 13 October 2015.

to provide comparable relief at some *different* point in the litigation—earlier, as in cases like *Denedo*, or later, as in cases like *LRM*. The flip side is equally true: where the court never had, and never will have, appellate jurisdiction over the matter in dispute, the All Writs Act does not authorize it to act. *See Clinton v. Goldsmith*, 526 U.S. 529 (1999); *United States v. Arness*, 74 M.J. ___ (C.A.A.F. February 10, 2015).

To that end, both this Court and the CCAs have repeatedly exercised jurisdiction (and issued extraordinary relief) over Article 32 proceedings. UCMJ art. 32 hearings are unique within the context of military justice. The UCMJ art. 32 proceedings implicate the *potential* appellate jurisdiction of both the courts of criminal appeal and this Court, at least in all cases triggering mandatory appellate review under Article 66(b) of the UCMJ, 10 U.S.C. § 866(b). Such relief has *included* writs directed to a convening authority concerning public access to Article 32 proceedings. *See, e.g., ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *see also, e.g., Garcia v. Crowley*, 66 M.J. 377, 377 n.* (C.A.A.F. 2008) (Erdmann, J., concurring in part and dissenting in part).

Notwithstanding these precedents, the Army Court of Criminal Appeals found it lacked jurisdiction to provide the relief Petitioner seeks. ACCA concluded *Goldsmith* forecloses All Writs Act relief in cases such as this, "in which there is

not yet—and may never be—a court-martial." *See Bergdahl v. Burke*, slip op. at 3; *see also id*. at 4 ("[W]e find a protective order issued by a military commander, intended to cover the public release of government information both before and after a preliminary hearing, to be more akin to an executive action."). Such analysis dramatically over-reads *Goldsmith*, in which the Air Force's administrative action to drop the Petitioner from the rolls could not possibly have been the result of the findings or sentence of a court-martial.

Contrary to the ACCA's analysis, nothing in *Goldsmith* remotely calls into question the All Writs Act authority of the CCAs and this Court in cases that *may* eventually fall within their appellate jurisdiction, or this Court's decision in *Powell*. Instead, when this Court distinguished *Powell* in *CCR*, it did so based not on the impact of *Goldsmith* on the scope of the All Writs Act, but rather on the factual distinction that, in *Powell* but not *CCR*, "the accused joined in the proceedings in order to vindicate his right to a public trial." *Ctr. for Const'l Rights*, 72 M.J. at 129. Whatever the merits of that distinction, *see, e.g.*, Vladeck, *supra*, at 199–201, it underscores the conclusion that, where the accused *himself* seeks such relief the jurisdiction recognized in *Powell* necessarily remains available under the All Writs Act.

III. A R.C.M. 405 public hearing requires appropriate access to documentary evidence.

This Court has characterized an accused's right to a public Article 32 preliminary hearing as a Sixth Amendment-protected "substantial pretrial right." *Powell*, 47 M.J. at 365. The President has directed that "preliminary hearings are public proceedings and should remain open to the public whenever possible." R.C.M. 405(i)(4), 80 Fed. Reg. 35,798 (June 22, 2015). How this constitutional right coupled with procedural rule applies to unclassified documents introduced in evidence and frequently referenced in front of spectators during a preliminary hearing is the heart of the issue here. A logical conclusion would be that if the contested exhibits were referred to during the hearing in front of the public, they should be available for public review in some manner, otherwise the very nature of "public" proceedings is undermined, and consequently public confidence in the military justice system.

Although full disclosure is not automatically required because there may be third-party privacy interests at stake or other information contained in the documents that could negatively impact the public interest, these particular exhibits were quoted, used, and otherwise incorporated into witnesses' testimony throughout the open hearing. Under these circumstances, the exhibits in question, or at least significant

portions of them, do not threaten the privacy or other interests of individuals. Failure to release these documents results in a denial of timely public access to significantly incorporated portions of the witnesses' testimony, hence acting to functionally close an otherwise open hearing.

Although the government may claim a privilege to keep such documents from becoming public if "detrimental to public interest," under M.R.E. 506, they have not done so specifically. A claim of privilege would require the government to balance disclosure against detriment to the public interest in writing. M.R.E. 506(d) provides that prior to referral the government take a very narrow approach when invoking such a privilege. Under the Rule, the government must take the least restrictive means necessary to safeguard such privileged information, by redacting specific privileged information, substituting summaries, or submitting a statement admitting relevant facts. Withholding disclosure is allowed only as a last resort if the above mitigating measures cannot be taken without causing "identifiable damage to the public interest." Such an approach is pragmatic, reasonable, and necessary to safeguard petitioner's constitutional right to a public hearing while balancing the need to safeguard sensitive material. In other words, "the scope of closure must be tailored to achieve the stated purpose." *Powell*, 47 M.J. at 365.

There is no evidence here that the government attempted any redaction, nor the intermediate steps provided in M.R.E. 506. Instead, the Government relied on an overly-broad protective order issued by the special court-martial convening authority to withhold disclosure of these documents. Further undermining perceptions of fairness, the SPCMA was also the accuser and, despite issuing the protective order, later claimed he lacked authority to rescind or amend it. The order's overbreadth is highlighted by the content of the exhibits. The contents of the exhibits were extensively referenced and incorporated into public testimony; however, they were not wholly read into the transcript, thus precipitating the need for disclosure. Clearly the disclosure of those portions of the voluminous documents that were referenced during the hearing would not be contrary to the public interest; the lack of full context and effective cherry-picking is. The claimed reasons for the protective order focus almost exclusively on the privacy interests of the accused himself. Appellant's desire to have the full contents public contradicts this government claim. Government Response to Petition for Writ of Mandamus, Exhibits 1 and IV.

Along these same lines, limitations on public access to information during the pre-referral stage should be discrete, targeted, and case-by-case, criteria not met here. Discussion to R.C.M 405(g)(2)(3) mandates particularized, written factual

findings when closing a preliminary hearing. There must be "an overriding interest . . . that outweighs the value of an open preliminary hearing." The SPCMCA's protective order, as well as the government lawyer's later explication of the protective order, fails to show why a less restrictive means could not be used: specifically an explanation why redaction, per M.R.E. 506, was inadequate to protect the public interest. The government's whole-scale withholding of documents admitted into evidence and referenced in testimony is a functional closure of the hearing—without meeting either R.C.M. 405's closure standard or M.R.E. 506's least restrictive means approach. Accordingly, the withholding violated Appellant's and the public's right to a public hearing.

Post-conviction corrections will not wholly remedy the failure to properly balance protection of sensitive information against SGT Bergdahl's and the public's constitutional right to a public hearing. SGT Bergdahl and the public have an immediate interest in knowing the facts; the public needs a current comprehension of the case to oversee the fair administration of military justice. The public includes members of the military. "By the public" we mean not only the civilian population, but also the rank and file of the services. *United States v. Cruz*, 20 M.J. 873, 882 (A.C.M.R. 1985). The information General Abrams is using to decide whether or not to prosecute SGT

Bergdahl should be as transparent to the public as possible and as early as possible. The appropriate procedural steps must be taken to ensure this outcome as they are designed to balance the accused's and people's right to a public pretrial hearing with the government's interest in shielding sensitive information. Hence, petitioner's request for extraordinary relief, in the particularly unusual circumstances of his case - *sui generis* circumstances given Congressional involvement - should be granted in a form that complies with M.R.E. 506(d).

Conclusion

WHEREFORE, counsel for NIMJ respectfully, requests this court grant Appellant's writ-appeal petition for extraordinary relief.

Respectfully submitted,

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Certificate of Compliance with Rule 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 2493 words. In addition, this brief complies with the typeface and type style requirements of Rule 37 because the brief is prepared in monospace typeface using MS Word 2013, in 12 point Courier New type.

Rachel E. VanLandingham
Dated 14 October 2015

CERTIFICATE OF FILING AND SERVICE

I certify that I caused a copy of the foregoing to be delivered upon counsel for Appellant and counsel for Appellee, on 14 October 2015, by email:
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