IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Private First Class (E-3) ANDREW H. HOLMES, United States Army, Petitioner, v. The United States of America, Respondent.	)	**MOTION OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND ATTACHED AMICUS CURIAE BRIEF** Army Misc. Dkt. No. 20100918

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

Pursuant to Rules 15.4(a) and 23(d) of the Army Court of Criminal Appeals' Rules of Practice and Procedure [hereinafter Army Ct. Rules], the National Institute of Military Justice ("NIMJ") respectfully moves for leave to file the attached amicus curiae brief in the above-captioned proceeding. The government's answer was filed on December 9, 2010. This motion and attached amicus curiae brief are being filed within 10 days after the answer was filed, as required by Army Ct. Rule 15.4(a). *See also* Army Ct. Rule 7 (intervening weekend).

NIMJ is a District of Columbia not-for-profit affiliated with the American University Washington College of Law. It was founded in 1991 to promote the fair administration of justice in the military system and to educate the public, press, and Con-

gress about the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom is on active duty in the military, but most of whom have served as military lawyers.

NIMJ appears regularly as an amicus curiae before the United States Supreme Court, the United States Court of Appeals for the Armed Forces, and other courts. It has, for example, filed amicus curiae briefs in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Stevenson v. United States*, 129 S. Ct. 69 (2008) (mem.); *Loving v. Dep't of Defense*, 130 S. Ct. 394 (2009) (mem.); *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010); *United States v. Bagstad*, 68 M.J. 460 (C.A.A.F. 2010); and *United States v. Medina*, No. 10-0262/MC (C.A.A.F. 2010).

Private First Class Holmes's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus presents important and timely issues, the resolution of which will directly affect the level of public confidence in the open and fair administration of military justice. NIMJ takes no position with respect to petitioner's factual guilt or innocence or whether charges should be referred for trial. Rather, NIMJ seeks leave to file an amicus curiae brief to explain how the Limitation Order entered in connection with petitioner's Article 32 proceeding would raise serious constitutional concerns in the civilian context. Because military rulings on constitutional issues must conform to civi-

lian standards unless it is shown that conditions peculiar to military life require a different rule--and there has been no such showing here--these considerations lend potent support to petitioner's request for relief.

WHEREFORE, NIMJ respectfully requests that the Court grant leave, pursuant to Army Ct. Rules 15.4(a) and 23(d), to file the attached amicus curiae brief in the above-captioned proceeding.

Dated: December 20, 2010

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David M. Gossett
Joseph P. Minta[1]
Brian J. Wong
Mayer Brown LLP
1999 K St. N.W.
Washington, DC 20006
Phone: (202) 263-3000
Fax: (202) 263-3300

Eugene R. Fidell
127 Wall St.
New Haven, CT 06511

Michelle M. Lindo McCluer
National Institute of Military Justice
4801 Massachusetts Ave. N.W.
Washington, DC 20016

PANEL No. _____

GRANTED _____

DENIED _____

DATE _____

[1] Not admitted in the District of Columbia. Practicing under the supervision of firm principals.

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Private First Class (E-3) ANDREW H. HOLMES, United States Army, Petitioner, v. The United States of America, Respondent.	)	**AMICUS CURIAE BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE** Army Misc. Dkt. No. 20100918

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Statement of Interest

Amicus curiae the National Institute of Military Justice ("NIMJ") is a not-for-profit organization affiliated with the American University Washington College of Law. It was founded to promote the fair administration of justice in the military system and to educate the public, press, and Congress about the military justice system. NIMJ takes no position with respect to Private First Class (PFC) Holmes's factual guilt or innocence or whether charges should be referred to court-martial. Rather, in this amicus curiae brief, NIMJ explains why the Limitation Order preventing the admission of the photographs at issue fails to satisfy the stringent First and Sixth Amendment standards for closure of judicial proceedings and records and unduly circumscribes PFC Holmes's right to present an effective defense.

Introduction and Summary of Argument

The Limitation Order represents a significant and unjustified departure from the traditional norm of open judicial proceedings that has long been established in military and civilian settings alike. It requires certain unclassified, non-contraband photographs, which depict the alleged victim of the crimes that PFC Holmes is charged with committing, to be maintained exclusively in the possession of the Army Criminal Investigation Command (CID). At PFC Holmes's Article 32 hearing, the government was permitted over objection to call a CID agent to describe what the photographs allegedly depicted. Tr. 80-81. The investigating officer "allow[ed] [the CID agent's] testimony" on the topic of "what's in the photos." Tr. 82. Because it was impossible to conduct an effective cross-examination without resort to the photographs--which in accordance with the Limitation Order could not be displayed in open court, or even removed from the CID office--the defense refused to cross-examine the CID agent. Tr. 83. The defense also was barred from offering the photographs into evidence as part of its case-in-chief. Tr. 108-109.

The Limitation Order does not accord with the United States Constitution. The right of public access to judicial proceedings and records, protected by both the First and Sixth Amendments, serves many functions: it promotes the legitimacy of the judiciary, provides a check on the power of the State, and increases

the reliability of the fact-finding process. Given the importance of these constitutional values, courts have rightly demanded that the party seeking to limit access to judicial proceedings and records clear demanding substantive *and* procedural hurdles. The Limitation Order fails on both of these fronts. Moreover, inasmuch as the Limitation Order gives PFC Holmes the Hobson's choice between presenting an effective defense (e.g., being able to cross-examine witnesses with the aid of the photographs) and giving up his public trial rights, it unconstitutionally burdens the exercise of the latter. And even assuming that PFC Holmes could, in principle, give up *his* right to an open trial in exchange for the opportunity to present exculpatory evidence--a rather unlikely possibility--he plainly is not entitled to bargain away *the public*'s right of access. Accordingly, the petition for a writ of mandamus should be granted.

Argument

I. Article 32 Proceedings Must Be Conducted In Accordance With Civilian Constitutional Standards.

The Constitution protects the rights of military personnel charged with crimes just as it protects the rights of civilians, for members of the armed forces "are no less citizens of the United States." *United States v. Dowty*, 48 M.J. 102, 107 (C.A.A.F. 1998). Thus, "military courts, like the state courts, have the same responsibilities as do the federal courts to pro-

tect a person from a violation of his constitutional rights." *Burns v. Wilson*, 346 U.S. 137, 142 (1953). Unless the "military context," *Weiss v. United States*, 510 U.S. 163, 177 (1994), and "a valid military purpose requir[e] a different result," *Dowty*, 48 M.J. at 107, civilian constitutional standards apply. The government bears the burden of establishing that such conditions exist. *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976).

Article 32 proceedings are subject to the Constitution's First and Sixth Amendment public trial guarantees because the military has not made a showing that military concerns call for a contrary result. Indeed, the United States Court of Appeals for the Armed Forces has expressly held that "absent 'cause shown that outweighs the value of openness,' the military accused is ... entitled to a public Article 32 investigative hearing," much as the "the Sixth Amendment right ... appl[ies] to a court-martial" proper. *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) (quoting *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 509 (1984) (*Press-Enterprise I*)). Thus, an Article 32 proceeding cannot be closed on the basis of "unsubstantiated reasons" not supported by the record; there instead must be "articulated and compelling factors" that justify closure. *Id.* at 365-66. Moreover, "when an accused is entitled to a public [Article 32] hearing, the press enjoys the same right and has standing to complain if access is denied." *Id.* at 365 (citing

United States v. Hershey, 20 M.J. 433, 435-36 (C.M.A. 1985)). The latter flows not only from the "[S]ixth[[A]mendment right of an accused to a public trial," but also the public's "constitutional right under the [F]irst [A]mendment to access" trials. *Hershey*, 20 M.J. at 436.

ABC, Inc.'s conclusion that Article 32 proceedings are presumptively open, and that a "determination must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure ... is necessary," 47 M.J. at 365, follows from three strands of reasoning.

First, the Uniform Code of Military Justice makes clear that "[p]retrial ... procedures" should normally "apply the principles of law ... generally recognized in the trial of criminal cases in the United States district courts," which, of course, include the open trial rights protected by the First and Sixth Amendments. 10 U.S.C. § 836(a). Following the model of civilian preliminary hearings, *see Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986) (*Press-Enterprise Co. II*), Article 32 proceedings should also be presumptively open.

Second, the Rules for Courts-Martial (and accompanying discussion) specify that while "[a]ccess by spectators ... may be restricted," "'*[o]rdinarily the proceedings of a pretrial investigation should be open to spectators*.'" *ABC, Inc.*, 47 M.J. at 365 (emphasis in original; quoting then-current Rule for Courts-

Martial [hereinafter R.C.M.] 405(h)(3) & discussion). Indeed, the current rules prescribe a nearly identical test for closing a proceeding as that employed in the civilian context:

> When an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Commanders or investigating officers must conclude that no lesser methods short of closing the Article 32 can be used to protect the overriding interest in the case. Commanders or investigating officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary.

R.C.M. 405(h)(3) discussion.

Third, as a matter of constitutional first principles, the right to public scrutiny inheres in any judicial proceeding where there is a "tradition of accessibility" and "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. II*, 478 U.S. at 8. Under this framework, courts have found that a public-attendance right attaches to *voir dire*, *Press-Enterprise I*, 464 U.S. at 513; suppression hearings, *Waller v. Georgia*, 467 U.S. 39, 46 (1984); and preliminary hearings, *Press-Enterprise II*, 478 U.S. at 13. Given the parallels between Article 32 proceedings and preliminary hearings--e.g., the accused in an Article 32 proceeding has the right to be present throughout the taking of evidence, R.C.M. 405(f)(3); demand the production of reasona-

bly available witnesses and evidence, *id.* 405(f)(9)-(10), (g); cross-examine witnesses, *id.* 405(f)(8), (h)(1)(A); and present rebuttal, exculpatory, or mitigating evidence, *id.* 405(f)(11), (h)(1)(C)--it is unsurprising that the open trial principles that civilian courts employ apply with equal force to Article 32 proceedings, as recognized in *ABC, Inc.*[1]

Both precedent and logic therefore foreclose the government's argument (Answer at 6) that there is no constitutional or statutory basis for the right to an open Article 32 hearing.

II. The Limitation Order Violates The First And Sixth Amendments Because Judicial Proceedings And Records Are Presumptively Public, And The Government Has Not Satisfied Its Burden Of Rebutting This Presumption.

The public generally and the defendant specifically have mutually reinforcing interests in ensuring the open and transparent conduct of judicial proceedings. Public access "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508. The Limitation Order runs roughshod over these rights without advancing any compelling, countervailing interests.

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[1] The government cites Judge Ryan's concurring opinion in *United States v. Davis*, 64 M.J. 445, 450 (C.A.A.F. 2007), for the proposition that the Sixth Amendment public trial right does not apply to an Article 32 proceeding (Answer at 6), but fails to mention that the majority in *Davis* did not decide the issue because, as Judge Ryan noted, it "was neither raised by the Government nor briefed by the parties." 64 M.J. at 450 (Ryan, J., concurring).

A. The Limitation Order Violates The Public's First Amendment Right Of Access To Judicial Records.

The public and press possess a "right to inspect and copy public records and documents, including judicial records and documents," which is grounded in the First Amendment, as well as common law. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597, 599 (1978); *see also Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 605 (1982). Public scrutiny of judicial proceedings and records "ensure[s] that th[e] constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper*, 457 U.S. at 605. "The spectators learn about their government and acquire confidence in their judicial remedies," *In re Oliver*, 333 U.S. 257, 270 n.24 (1948), and "respect for the judicial process." *Globe Newspaper*, 457 U.S. at 606. Finally, the community's interest in accurate fact-finding is bolstered by subjecting witness testimony to public scrutiny. *Waller*, 467 U.S. at 46; *see also In re Oliver*, 333 U.S. at 270 n.24; *United States v. Anderson*, 46 M.J. 728, 729 (Army Ct. Crim. App. 1997) (per curiam) ("[A]n open trial forum ... ensure[s] that testimony is subjected to public scrutiny and is thus more likely to be truthful or to be exposed as fraudulent.").

The American judiciary has a long and vigorous history of protecting the openness of courts against encroachment. Indeed,

"[t]he roots of open trials reach back to the days before the Norman Conquest." *Press-Enterprise I*, 464 U.S. at 505. The strong presumption in favor of public access extends both to judicial proceedings themselves, *Globe Newspaper*, 457 U.S. at 603, as well as to all variety of judicial records, such as "transcripts, evidence, pleadings, and other materials submitted by litigants." *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984). The right of access applies to evidentiary materials in whatever form they take.[2]

Because the "institutional value of the open criminal trial is recognized in both logic and experience," the government's "justification in denying access must be a weighty one." *Globe Newspaper*, 457 U.S. at 606. The Supreme Court has required a careful balancing between the public's right of access to judicial proceedings and records and the interest asserted in favor of excluding the public. It "has at different times held that the interest advanced must be 'compelling,' 'overriding,' or a

[2] *See United States v. Lnu*, 575 F.3d 298 (3d Cir. 2009) (audiotape recordings); *United States v. Criden*, 681 F.2d 919 (3d Cir. 1982) (videotape exhibits); *see also United States v. Kaczynski*, 154 F.3d 930 (9th Cir. 1998) (competency evaluation); *Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (plea agreement); *In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988) (affidavits accompanying search warrants); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (plea agreement); *In re NBC, Inc.*, 828 F.2d 340, 343-44 (6th Cir. 1987) (recusal motions); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (suppression motions and accompanying exhibits); *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985) (bill of particulars).

'higher value[],'" yet it is clear that whatever the "distinctions among the terms," the burden facing the party who seeks to overcome the presumption of openness is a high one indeed. *See United States v. Doe*, 63 F.3d 121, 128 n.3 (2d Cir. 1995).

When, "as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper*, 457 U.S. at 606-07. Moreover, an order closing a judicial proceeding or record to the public cannot be imposed without giving "representatives of the press and general public ... an opportunity to be heard on the question of their exclusion." *Id.* at 609 n.25 (internal quotation marks omitted). The Limitation Order was defective both because its substance did not satisfy the *Globe Newspaper* standard and because the public was not given notice and an opportunity to object.

1. *The Limitation Order is substantively defective.*

Measured against the *Globe Newspaper* standard, the Limitation Order is unconstitutional. There is no question that it deprives the public of access to judicial records: namely the photographs, which constitute "evidence in the Investigation" against PFC Holmes and which the CID agent described at the Article 32 proceeding. Limitation Order ¶ 4; Tr. 80-82. Over the

defense's objection, the Investigating Officer allowed the CID agent to testify regarding "what's in the photos." Tr. 82-83. "The presumption that the public has a right to see and copy judicial records attaches to those documents which properly come before the court in the course of an adjudicatory proceeding and which are relevant to the adjudication." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412-13 (1st Cir. 1987).[3]

Yet the Order makes no mention of the public's interest in accessing judicial records, much less balances this interest against competing concerns. Indeed, at no point was the government tasked with overcoming its burden of showing such a competing interest, or showing that the interest was sufficiently weighty. Instead of identifying an "overriding interest that is

[3] Put another way, any members of the public who were present at PFC Holmes's Article 32 proceeding suffered a "contextual deprivation." *Lnu*, 575 F.3d at 307. Although the *government* and the *defense* have seen the photographs, the *public's* ability to follow the CID agent's testimony was practically nonexistent. They, unlike the hearing participants, had no access to the photographs. Under these circumstances, "the public's capacity to understand its court-room observations is necessarily limited, thus affecting its ability to report what it has observed." *Id.* Although no constitutional violation was found in *Lnu* on the facts of that case, the court emphasized "the limited nature of [its] holding." *Id.* at 308. In particular, "[t]he public was not completely denied access" to the evidence in question, since it was shortly made "available for public inspection." *Id.* "Had the recordings or their contents been unjustifiably withheld from the public for a significant period of time, that might well have constituted a violation of law." *Id. Lnu*'s constitutionally problematic hypothetical is precisely this case, since the photographs have not been admitted as exhibits--and if the Limitation Order is upheld, will *never* be admitted.

likely to be prejudiced," *Hershey*, 20 M.J. at 436, and scrutinizing on a "circumstance-by-circumstance basis" whether restricting the public's right of access to particular photographs was necessary to achieve that interest, *ABC, Inc.*, 47 M.J. at 365, the Limitation Order merely rests on conclusory assertions of "potential prejudice" to PFC Holmes and "negative impact on the reputation of the armed forces." *Id.* ¶ 5. In short, the Order abridges the public's First Amendment right to access judicial records without a showing "that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper*, 457 U.S. at 607.

2. *The Limitation Order is procedurally defective.*

The Limitation Order also cannot withstand First Amendment scrutiny because it was entered in a procedurally improper manner. "[R]epresentatives of the press and general public '*must* be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25 (emphasis added). "Since by its nature the right of public access is shared broadly by those not parties to the litigation, vindication of that right requires some meaningful opportunity for protest by persons other than the initial litigants." *In re Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984).

The public must "be given ... notice that closure may be ordered in a criminal proceeding." *In re Knight Publ'g Co.*, 743

F.2d 231, 234 (4th Cir. 1984). Thus, "closure motions [must] be docketed reasonably in advance of their disposition to give the public and press an opportunity to intervene." *Id.*; *see also United States v. Criden*, 675 F.2d 550, 559 (3d Cir. 1982). This notice requirement applies to requests to close the courtroom altogether, as well as to requests to seal specific court documents or exhibits. *In re Knight Publ'g*, 743 F.2d at 231, 234-35. When adequate advance notice is not provided, "the public and the press" are "effectively preclude[d] ... from seeking to exercise their constitutional right of access." *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993). In addition to giving the public notice of its intent to restrict access to judicial proceedings and records, the court also "must allow the objecting parties a reasonable opportunity to state their objections." *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *see also In re Knight Publ'g*, 743 F.2d at 234 (closure); *id.* at 235 (sealing documents).[4]

In PFC Holmes's case, these procedural protections were ig-

[4] Of course, these procedural protections do not shift the burden of justifying closure away from the party requesting that the public be denied access to judicial proceedings or records. "The burden to overcome a First Amendment right of access rests on"--and always remains with--"the party seeking to restrict access, and that party must present specific reasons in support of its position." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004). A compelling interest still must be asserted and established; the public's opportunity to object simply assures that the countervailing First Amendment interests are fully developed as well.

nored. The record contains no indication that the Convening Authority ever informed the parties, much less the public, that the Limitation Order was being contemplated. If anything, the government's attempt to distinguish *ABC, Inc.* on the ground that the petition for extraordinary relief in that case was filed by "members of the public," not by the accused, makes plain the procedural failings of the process by which the Limitation Order was issued. Answer at 8 n.25. Those failings, after all, deprived the public of notice that the photographs might be maintained in secret and of the opportunity to object to the restrictions by, e.g., seeking extraordinary relief.

The public's interest in accessing the photographs that are the subject of the Limitation Order was never considered. This deficiency was reflected in the fact that the order does not even *mention* the public's First Amendment interests and the important functions that public access serves, including protecting "the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508. These procedural infirmities by themselves would compel that the Limitation Order be vacated, *In re Herald Co.*, 734 F.2d at 102-03; *Criden*, 675 F.2d at 560, 562, so that members of the public be given the opportunity, in accordance with *ABC, Inc.,* to raise their objections to the Order via a petition for extraordinary relief. Indeed, the government essentially *concedes* that the

public is entitled to seek such relief, even as it argues that the PFC Holmes must exhaust his remedies under R.C.M. 906(b)(3). *See* Answer at 8 n.25 (members of the public cannot be subject to an exhaustion requirement because they lack the "opportunity to seek relief from a military judge under R.C.M. 906(b)(3)").

B. The Limitation Order Also Infringes On PFC Holmes's Sixth Amendment Public Trial Rights.

In addition to violating the First Amendment right of public access, the Limitation Order is also problematic under the Sixth Amendment, which explicitly guarantees defendants the right to a "speedy and *public* trial." U.S. Const. amend. VI (emphasis added). The Sixth Amendment public trial requirement inures "for the benefit of the accused." *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). Open judicial proceedings act as a potent "safeguard against any attempt to employ [the] courts as instruments of persecution," *In re Oliver*, 333 U.S. at 270, and ensure that the accused "is fairly dealt with and not unjustly condemned." *Waller*, 467 U.S. at 46. Public access also bolsters the reliability of the trial process, since "a public trial encourages witnesses to come forward and discourages perjury" and "keep[s] [the] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.*

The Sixth Amendment creates a strong presumption of public openness in the conduct of judicial proceedings, *Press-*

Enterprise II, 478 U.S. at 8-9, such as the Article 32 hearing at issue here. *ABC, Inc.*, 47 M.J. at 365. Although the defendant's right to a public trial is not absolute, closure may be justified only if it "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. Such situations "will be rare ... and the balance of interests must be struck with special care." *Presley v. Georgia*, 130 S. Ct. 721, 724 (2010) (per curiam). Courts employ a rigorous four-part test in deciding when a defendant's Sixth Amendment right must yield. Thus,

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. (quoting *Waller*, 467 U.S. at 48). Military courts apply a virtually identical standard. *See ABC, Inc.*, 47 M.J. at 365; *Hershey*, 20 M.J. at 436; *see also* R.C.M. 405(h)(3) discussion.

The Limitation Order rests solely on two asserted interests: the "potential prejudice" to PFC Holmes and the "negative impact on the reputation of the armed forces." *Id.* ¶ 5. The former may be brushed aside without much ado, as PFC Holmes *himself* objects to the restrictions imposed by the Limitation Order. "'One of the reasons often advanced for closing a trial--avoiding tainting of the jury by pretrial publicity--is largely

absent when a defendant makes an informed decision to object to the closing of the proceeding.'" *Doe*, 62 F.3d at 128 (quoting *Waller*, 467 U.S. at 47 n.6). And as for the asserted "negative impact" on the "reputation" of the "armed forces," the government has set forth no reason to believe that this is a genuine concern. In any event, any interest in "professional reputation" cannot by itself justify "forbidd[ing] public access" to a judicial document. *United States v. Foster*, 564 F.3d 852, 855 (7th Cir. 2009) (Easterbrook, J., in chambers); *see also In re Neal*, 461 F.3d 1048, 1053-54 (8th Cir. 2006). The argument proves too much: if the risk of harm to the armed forces' reputation sufficed, practically every court-martial would be closed.

Even if any belatedly asserted national security concerns could properly be considered--and it is doubtful that they could be, since the purpose of the adequate and "articulated ... findings" requirement, *ABC, Inc.*, 47 M.J. at 365, is "to aid in [appellate] review," *Hershey*, 20 M.J. at 436; *see generally SEC v. Chenery Corp.*, 332 U.S. 194 (1947)--those concerns would provide no basis for the Limitation Order. When a threat of harm is asserted as the basis for restricting the public trial right, "the record must support an inference of a *substantial probability* of danger." *Doe*, 63 F.3d at 130 (emphasis added). A "[c]onclusory ... allegation of danger," such as the one asserted here, is flatly insufficient. *Id.* As with all assertions of overriding

interests, “the burden of establishing a substantial probability of danger rests squarely on the shoulders of the movant.” *Id.* “[E]ven when the interest sought to be protected is national security, ... the mere utterance by trial counsel of a conclusion is not sufficient.” *Hershey*, 20 M.J. at 436. There is no record evidence that would enable the government to meet this burden here.

In sum, the Limitation Order is not justified by any articulated overriding interest, and therefore violates PFC Holmes’s right to a public trial.

III. The Limitation Order Substantially Impaired PFC Holmes’s Rights To Cross-Examination And To Present A Defense.

The Limitation Order also interfered with PFC Holmes’s right to cross-examine the CID agent who testified regarding the photographs’ contents, Tr. 80-82, and to present material evidence during his case-in-chief, Tr. 108.

The right to cross-examination forms the core of the Confrontation Clause, *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986), and is the “greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158 (1970). It is one aspect of the defendant’s broader right to present a defense. “[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). A

defendant's constitutional right to present a defense "is violated when the evidence excluded is material." *United States v. Hurn*, 368 F.3d 1359, 1363 (11th Cir. 2004) (internal quotation marks omitted). In particular, the Constitution forbids rules that are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998). Only when "other legitimate interests in the criminal trial process" exist can courts constitutionally restrict a defendant's presentation of evidence. *Rock v. Arkansas*, 483 U.S. 44, 55 (1987).

The Limitation Order made it all but impossible for the defense to challenge the CID agent's characterization of the photographs through cross-examination. Without having the photographs in hand, the defense would have been limited to a dry series of questions and answers regarding the contents of the photographs. But that hardly is an adequate substitute for the pictures themselves. "[A] cold stipulation can deprive a party 'of the legitimate moral force of his evidence,' ... and can never fully substitute for tangible, physical evidence." *United States v. Swiatek*, 819 F.2d 721, 731 n.4 (7th Cir. 1987) (quoting 9 Wigmore on Evidence § 2591).

Furthermore, the Limitation Order denied the defense's ability to introduce into evidence the photographs, which the defense contended were "exculpatory in nature as they disclose

wounds inconsistent with the allegation of murder." Tr. 108. The Investigating Officer's ruling that the photographs could not be used because of the Limitation Order was quintessentially "arbitrary." *Cf. Scheffer*, 523 U.S. at 308. Not even the government claims that the photographs are "only marginally relevant." *Holmes*, 547 U.S. at 326. To the contrary, PFC Holmes argues--without rebuttal from the government--that they "raise[] a factual question whether PFC Holmes committed the charged offense of murder." Pet. at 16. In the absence of "other legitimate interests," the Constitution demands that PFC Holmes be permitted to introduce the photographs as evidence. *Rock*, 483 U.S. at 55.

It is correct that the Investigating Officer observed that the defense had "already objected to closing" the Article 32 hearing, Tr. 109, which made it impossible for the participants to "go to CID" to view the photographs, since "it would become a de-facto closed hearing," Tr. 82. But the abridgment of PFC Holmes's constitutional rights to cross-examination and to present a complete defense cannot be justified on the ground that he *also* has asserted his Sixth Amendment right to an open trial. The Limitation Order put PFC Holmes to a choice that the government lacked the power to impose. *See generally Sherbert v. Verner*, 374 U.S. 398, 406 (1963). In any event, even if he could be compelled to give up *his* open trial right in exchange for the opportunity to put on a defense, "[t]he *public* has a right to be

present whether or not any party has asserted the right." *Presley*, 130 S. Ct. at 724-25 (emphasis added; citing *Press-Enterprise I*). The public's open trial right was coin that PFC Holmes could not spend. The Limitation Order is invalid.

CONCLUSION

If the Court does not act now to correct the error below, and a new Article 32 proceeding later is required, the cost to the public's confidence in the open and fair administration of military justice will be considerable. The petition should be granted and the writ should issue.

Respectfully submitted.

Dated: December 20, 2010

David M. Gossett
Joseph P. Minta[5]
Brian J. Wong
Mayer Brown LLP
1999 K St. N.W.
Washington, DC 20006
Phone: (202) 263-3000
Fax: (202) 263-3300

Eugene R. Fidell
127 Wall St.
New Haven, CT 06511

Michelle M. Lindo McCluer
National Institute of Military Justice
4801 Massachusetts Ave. N.W.
Washington, DC 20016

[5] Not admitted in the District of Columbia. Practicing under the supervision of firm principals.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MOTION OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND ATTACHED AMICUS CURIAE BRIEF was delivered by hand to:

(1) Clerk of Court, Army Court of Criminal Appeals

(2) Army Defense Appellate Division

(3) Army Government Appellate Division

and transmitted by facsimile to:

(4) Daniel Conway, Esq.
Civilian Defense Counsel
78 Clark Mill Road
Weare, NH 0381
Fax: (603) 529-3009

on the 20th day of December 2010.

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Brian J. Wong
Mayer Brown LLP
1999 K St. N.W.
Washington, DC 20006
Phone: (202) 263-3000
Fax: (202) 263-3300