In the United States Court of Appeals
FOR THE ARMED FORCES

ABC, INC., *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	Misc. Dkt. No. 97-8023/AR
	)	
COLONEL OWEN C. POWELL, *et al.*,	)	
	)	
Respondents.	)	
SERGEANT MAJOR OF THE ARMY GENE C. MCKINNEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Misc. Dkt. No. 97-8024/AR
	)	
COLONEL ROBERT L. JARVIS, *et al.*,	)	
	)	
Respondents.	)	

MOTION OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AND THE JUDGE ADVOCATES ASSOCIATION FOR LEAVE TO FILE MEMORANDUM AS *AMICI CURIAE* AND MEMORANDUM AS *AMICI CURIAE*

1. *Motion for Leave.* In accordance with Rule 26, the National Institute of Military Justice ("NIMJ") and the Judge Advocates Association ("JAA") respectfully move for leave to file the following Memorandum as *Amici Curiae* in the above-styled case. NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. Among its core goals is improved public understanding of the military justice system. The JAA is a District of Columbia private nonprofit bar association founded in 1943. It represents the interests of military and veterans

attorneys. NIMJ and the JAA take no position with respect to Sergeant Major of the Army McKinney's guilt or innocence, or any other matter except as stated below. The issue presented is an important and timely one, the resolution of which is likely to directly affect the level of public confidence in the administration of military justice. Contributions from groups such as NIMJ and JAA, which are committed to the fair administration of justice within the Armed Forces, are worthwhile and in keeping with the Court's longstanding *amicus* practice.

2. *Memorandum as Amici Curiae.* This is a time of crisis for the military justice system. For a variety of reasons which are all to apparent to any American with a television, radio or newspaper subscription, the Nation's attention has been focused on military justice to an extraordinary degree since last Fall. The entire Nation has been on a steep learning curve trying to understand and make sense of the system. Against this backdrop, the Army's refusal to open the Article 32 investigation into the charges against its senior enlisted member is truly baffling.

There has been no conscription in this country for over a generation. Most Americans will never have worn the Nation's uniform, and will therefore have had no personal familiarity with military service, much less with military justice. The same is true of the media, most members of which have not personally served. The need for public understanding is great, but in these circumstances, the likelihood that that need will be met is materially hampered by needlessly closing the doors to this Article 32 investigation. Unless this investigation is opened, the American people will not be able to have that high level of confidence in the fair administration of military justice that

is so plainly essential in a democracy which relies on the Armed Forces to police themselves.

There is no doubt as to this Court's jurisdiction. The permissible punishment in the proceedings that have been instituted against Sergeant Major of the Army McKinney is sufficient to trigger review here under Article 67, UCMJ, 10 U.S.C. § 867 (1994). Hence, a writ would be authorized under the All Writs Act, 28 U.S.C. § 1651(a) (1994); *see also* U.S.C.A.A.F.R. 4(b)(1).

Similarly, the case handily meets any requirement that the question presented be "important." As one of the Army's most perceptive scholars of military law has observed, "[t]he right of a party to . . . review [on petition for extraordinary writ] seems limited only by the court's assessment of the importance of the question presented." John S. Cooke, *The United States Court of Military Appeals: 1980-84*, 31 Fed. B. News & J. 319, 323 (1984). Given the Court's All Writs Act jurisprudence, it would be deeply surprising if the Court did not view the question presented here as an important one, even if public interest were not as high as it plainly is.

Finally, this is not a case in which it is apparent at the threshold that no relief is warranted in any event. Article 32 investigations may be closed in the discretion of the officer who directed the investigation or the investigating officer. R.C.M. 405(h)(3). The standard of review for such decisions is abuse of discretion. *See MacDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184, 185 (1970) (mem.), *cited in* David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 7-2(C), at 326 & n.74 (4th ed. 1996). The norm is to open the proceedings. R.C.M. 405(h)(3) (Discussion). So

far as we can determine, this case does not involve issues of national security. It also does not involve child victims. We know of no reason the Article 32 investigation should be closed to the public or to representatives of the media. It is rare enough for the media to take any heed of military proceedings; where, as here, there is a demonstrated high level of interest, and nothing on the other side of the scale to offset that interest, a refusal to open the proceedings is an abuse of discretion.

The only aspect of this case, therefore, that gives NIMJ and the JAA pause is whether this is the rare situation, *see* Rule 4(b)(1); R.C.M. 1204(a) (Discussion), in which this Court should entertain an original writ rather than insisting that the petitioners seek relief in the first instance from the Court of Criminal Appeals. While the case is a close one on *this* point, we believe the Army Court should be afforded an opportunity to function on this important matter, especially because the underlying decision is so clearly wrong. We are confident that court would afford the matter expedited consideration, and it would be proper to so indicate in this Court's Order. It is important from an overall institutional perspective that the judicial machinery of the Army be brought into play.

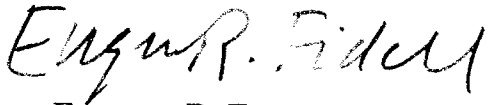
On the other hand, we strongly recommend that, rather than dismissing without prejudice, as it did in *Calhoun v. United States*, 44 M.J. 274 (1996) (mem.), this Court retain jurisdiction to the extent of continuing its stay of the Article 32 investigation during the pendency of proceedings in the Army Court. In the unlikely event that those proceedings bog down, petitioners can return here to demonstrate good cause for dispensing with review by the Court of Criminal Appeals and ask that the petition be

restored to the active docket for expedited consideration.

Conclusion

For the foregoing reasons, the current stay of the Article 32 investigation should remain in effect pending further proceedings. The petition should be referred to the United States Army Court of Criminal Appeals for expedited consideration in the first instance. An opportunity to present oral argument at the hearing scheduled for June 23, 1997 is respectfully requested.

Respectfully submitted,



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June 20, 1997

Certificate of Filing and Service

I certify that an original and seven copies of the foregoing were delivered to the Court and that copies were faxed and mailed to Stuart F. Pierson, Esq., 1155 Connecticut Avenue, N.W., Washington, D.C. 20036; Charles F. Gittins, Jr., Esq., 500 North Washington St., Alexandria, Virginia 22314; and the Chiefs, Government and Defense Appellate Divisions, U.S. Army Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041, on June 20, 1997.

Eugene R. Fidell