IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Robert B. Bergdahl, Sergeant (E-5) United States Army, Appellant-Intervenor v. ROBERT B. ABRAMS, General, US Army, In his official capacity as Commander of United States Army Forces Command, Fort Bragg, NC, and General Court-Martial Convening Authority, PETER Q. BURKE, Lieutenant Colonel (O-5), AG US Army, In his official capacity as Commander, Special Troops Battalion, United States Army Forces Command, Fort Bragg, NC, and Special Court-Martial Convening Authority, MARK A. VISGER, Lieutenant Colonel (O-5), JA, US Army, In his official capacity as Preliminary Hearing Officer for Article 32 Proceedings against Robert B. Bergdahl, Sergeant, US Army, UNITED STATES, Appellees	GOVERNMENT RESPONSE TO WRIT-APPEAL FOR REVIEW OF U.S. ARMY COURT OF CRIMINAL APPEALS DECISION ON PETITION FOR WRIT OF MANDAMUS Crim. App. Dkt. No. 20150652 USCA Dkt. No. 16-0119/AR

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

Index

Issue Presented

DOES THE ARMY COURT OF CRIMINAL APPEALS HAVE JURISDICTION TO CONSIDER A PETITION FOR A WRIT OF MANDAMUS REQUIRING PUBLIC ACCESS TO UNCLASSIFIED RECORDS OF AN ARTICLE 32 HEARING, WHEN THE ACCUSED JOINS IN THE REQUEST FOR RELIEF?

Table of Cases, Statutes, and Other Authorities

United States Supreme Court

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Preamble

The United States Army Court of Criminal Appeals (Army Court) denied a petition for an extraordinary writ in the nature of a writ of mandamus,[1] pursuant to the All Writs Act.[2] This Court reviews decisions of a service court on a petition for extraordinary relief as a writ-appeal, under Rules 4(b)(2) and 18(a)(4) of this Court's Rules of Practice and Procedure (Rules).[3] This answer is filed pursuant to Rules 27(b) and 28(b)(2).

Statement of the Case

Appellant-Intervenor has been charged with violations of Articles 85 and 99(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 885, 899 (2012). On 17-18 September 2015, the preliminary hearing officer conducted a preliminary hearing pursuant to Article 32, UCMJ. The preliminary hearing officer

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[1] *Hearst Newspapers, LLC et al v. Abrams*, ARMY MISC 20150652, 2015 CCA LEXIS 442 (Army Ct. Crim. App. 14 Oct. 2015)(summ. disp.). A copy of the Army Court's decision and all unpublished opinions are enclosed in the Appendix for the court's convenience.

[2] 28 U.S.C. § 1651 (1992). The writ of mandamus is a procedure that arises directly from the All Writs Act. *Id.* "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004) (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

[3] *Ellis v. Jacob*, 26 M.J. 90, 91 (C.M.A. 1988).

submitted his report on 5 October 2015. To date, the charges have not been referred to court-martial.

On 21 September 2015, appellant-intervenor sought a writ of mandamus from the Army Court.[4] On 2 October 2015, Hearst Newspapers LLC, et al [hereinafter petitioners] also sought a writ of mandamus from the Army Court.[5] On 5 October 2015, appellant-intervenor filed a motion for leave to intervene as a real party in interest, which the Army Court granted on 13 October 2015.[6] The Army Court denied appellant-intervenor's writ on 8 October 2015[7] and denied petitioners' writ on 14 October 2015.[8] On 13 October 2015, appellant-intervenor filed a writ-appeal to this court in *Bergdahl v. Burke II*.[9] On 3 November 2015, petitioners filed a writ-appeal to this court in *Hearst Newspapers LLC, et al v. Abrams* and appellant-intervenor moved to intervene as a real party in interest in this writ-appeal.[10]

The Government responded to appellant-intervenor's writ-appeal petition in *Bergdahl v. Burke II* on 23 October 2015.[11]

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[4] *Bergdahl v. Burke*, ARMY MISC 20150624, 2015 CCA LEXIS 431 (Army Ct. Crim. App. 8 Oct 2015)(mem. op.)(hereinafter *Bergdahl v. Burke II*).
[5] *Hearst Newspapers, LLC*, 2015 CCA LEXIS 442, at *1.
[6] *Id.*
[7] *Bergdahl v. Burke II*, 2015 CCA LEXIS 431, at *13.
[8] Hearst Newspapers, LLC, 2015 CCA LEXIS 442, at *2-3.
[9] Appellant-Intervenor's Writ-Appeal, *Bergdahl v. Burke II*, Crim. App. Dkt No. 20150624; USCA Dkt. No. 16-0059/AR.
[10] Appellant-Intervenor's Br. 1.
[11] Government Response to Writ-Appeal, *Bergdahl v. Burke II*, Crim. App. Dkt No. 20150624; USCA Dkt. No. 16-0059/AR.

The government also responded to petitioners' writ-appeal petition in *Hearst Newspapers LLC, et al v. Abrams* on 20 November 2015.[12]

Relief Sought

Petitioners seek "an order from this Court reversing the Army Court's dismissal of their Petition for lack of jurisdiction and remanding the Petition for consideration on its merits."[13] At the Army Court, petitioners requested a writ of mandamus for the release of the unclassified exhibits submitted at appellant-intervenor's preliminary hearing under Article 32, UCMJ; the transcripts of the preliminary hearing; and release of future documents in the case.[14]

Appellant-Intervenor also seeks a writ of mandamus directing appellees "(1) to make public forthwith the unclassified exhibits that have been received in evidence in the preliminary hearing and (2) to modify the protective order to permit the accused to make those exhibits public."[15] Among these exhibits, appellant-intervenor seeks to release the Army

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[12] Government Response to Writ-Appeal, *Hearst Newspapers, LLC et al v. Abrams*, Crim. App. Dkt No. 20150624; USCA Dkt. No. 16-0116/AR.
[13] Pet'rs Br. 7.
[14] Pet'rs Br. 2.
[15] Appellant-Intervenor's Writ-Appeal, *Bergdahl v. Burke II*, Crim. App. Dkt No. 20150624; USCA Dkt. No. 16-0059/AR, p. 6.

Regulation (AR) 15-6 report and appellant-intervenor's interview.[16]

Issue Presented

DOES THE ARMY COURT OF CRIMINAL APPEALS HAVE JURISDICTION TO CONSIDER A PETITION FOR A WRIT OF MANDAMUS REQUIRING PUBLIC ACCESS TO UNCLASSIFIED RECORDS OF AN ARTICLE 32 HEARING, WHEN THE ACCUSED JOINS IN THE REQUEST FOR RELIEF?

Statement of Facts

The Government hereby incorporates its statement of facts from its response to the writ-appeal filed in *Bergdahl v. Burke II* and its statement of facts from its response to the writ-appeal filed in *Hearst Newspapers, LLC et al v. Abrams*.

This court should deny this writ-appeal.

The Government hereby incorporates its argument from its response to the writ-appeal filed in *Bergdahl v. Burke II* and its argument from its response to the writ-appeal filed in *Hearst Newspapers, LLC et al v. Abrams*.

Conclusion

This court cannot exercise subject matter jurisdiction unless the alleged harm has the potential to directly affect the findings and sentence. In this case, the alleged harm does not have the potential to directly affect the findings and sentence

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[16] Appellant-Intervenor's Writ-Appeal, *Bergdahl v. Burke II*, Crim. App. Dkt No. 20150624; USCA Dkt. No. 16-0059/AR, p. 4.

because the alleged harm flows from a military commander's executive action, the release of the AR 15-6 documents would play a negative role in the military justice system, and petitioners have not exhausted alternative means of relief.

Moreover, appellant-intervenor fails to meet his burden in establishing any of the requisite determinations under the All Writs Act. Given the convening authority's compliance with governing legal authority, the administrative means available to obtain relief, and the open preliminary hearing that occurred, a writ of mandamus is not necessary or appropriate under the circumstances.

Wherefore, the government respectfully requests this Honorable Court deny the petitioners and appellant-intervenor's requests for a writ of mandamus.

JIHAN WALKER
CPT, JA
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36340

DANIEL D. DERNER
MAJ, JA
Acting Deputy Chief,
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Appendix

Bergdahl v. *Burke*

United States Army Court of Criminal Appeals

October 8, 2015, Decided

ARMY MISC 20150624

Reporter
2015 CCA LEXIS 431

Sergeant ROBERT B. BERGDAHL, Petitioner v. Lieutenant Colonel PETER Q. BURKE, Commander, Respondent & The UNITED STATES, Respondent

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *Bergdahl v. Burke*, 2015 CAAF LEXIS 905 (C.A.A.F., Oct. 15, 2015)

Core Terms

military, preliminary hearing, court-martial, documents, sentence, protective order, convening, exhibits, military justice, amicus curiae, Writs

Case Summary

Overview

HOLDINGS: [1]-Although the court had the power to issue extraordinary writs under the All Writs Act, *28 U.S.C.S. § 1651*, that power had to be exercised in aid of its jurisdiction, and its jurisdiction did not extend to issuing a writ of mandamus requiring a commander who issued a protective order in a case involving a servicemember who was charged with desertion and misbehavior before the enemy, in violation of UCMJ arts. 85 and 99, *10 U.S.C.S. §§ 885* and *899*, to release unclassified documents that were part of the record compiled during a hearing conducted pursuant to UCMJ art. 32, *10 U.S.C.S. § 832*, to the public; [2]-The order in question was a military order issued by a commander with application far beyond the servicemember's Article 32 hearing, and the servicemember had the right to seek the documents that were the subject of his petition by filing a request under FOIA.

Outcome

The court dismissed the servicemember's petition.

LexisNexis® Headnotes

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Authority to Adjudicate

Military & Veterans Law > Military Justice > Jurisdiction > General Overview

HN1 Jurisdiction must be established as a threshold matter without exception.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN2 The United States Army Court of Criminal Appeals ("ACCA") is a court of limited jurisdiction, established by the Judge Advocate General of the Army. Unif. Code Mil. Justice ("UCMJ") art. 66(a), *10 U.S.C.S. § 866(a)*. The mandate to establish the court was made pursuant to the authority of Congress to pass laws regulating the Armed Forces. *U.S. Const. art. I, § 8, cl. 14*. While the ACCA has jurisdiction to issue writs under the All Writs Act, *28 U.S.C.S. § 1651*, it must exercise that authority in strict compliance with the authorizing statutes. The ACCA's jurisdiction to issue a writ of mandamus is limited to its subject matter jurisdiction over a case or controversy. UCMJ art. 66, *10 U.S.C.S. § 866*. To establish subject matter jurisdiction, the harm alleged must have had the potential to directly affect the findings and sentence.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN3 The United States Army Court of Criminal Appeals ("ACCA") does not have jurisdiction to oversee military justice generally. The Judge Advocate General of the Army, staff judge advocates, and convening authorities are among those with significant duties in overseeing military justice. In general, while the jurisdiction of the ACCA over the

findings and sentence of a case referred to it is broad, Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, the court's authority to review pre-referral matters is limited and lacks a firm statutory basis.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN4 In Clinton v. Goldsmith, the United States Supreme Court clearly stated that a military court of criminal appeals' jurisdiction extends to reviewing the findings and sentence of courts-martial. Under the All Writs Act, *28 U.S.C.S. § 1651*, the United States Army Court of Criminal Appeals can issue process ″in aid″ of that jurisdiction.

Civil Procedure > Remedies > Writs > All Writs Act

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN5 In Clinton v. Goldsmith, the United States Supreme Court distinguished between ″executive actions″ (where writ jurisdiction does not exist) and actions effecting a ″finding″ or ″sentence″ (where writ jurisdiction does exist). The United States Army Court of Criminal Appeals finds that 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. A hearing under Unif. Code Mil. Justice art. 32, *10 U.S.C.S. § 832*, is not part of a court-martial. An Article 32 hearing, being a hearing conducted before a decision is made to send a case to trial, is unlikely to have the potential to directly affect the findings and sentence as required for writ jurisdiction.

Administrative Law > ... > Judicial Review > Reviewability > Jurisdiction & Venue

HN6 Assuming a proper request, when an agency fails to comply with the Freedom of Information Act, *5 U.S.C.S. § 552*, a civil action may be brought against the agency in a United States district court. *5 U.S.C.S. § 552(a)(4)(B)*.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN7 In the course of appellate review, in order to receive relief from an error in a preliminary hearing, an accused is required to demonstrate a material prejudice to a substantial right. Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*. If an accused must be prejudiced to receive relief on appeal, at least a similar showing of potential prejudice to the findings or sentence is a threshold requirement for the United States Army Court of Criminal Appeals to issue a writ of mandamus.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN8 To prevail on a petition seeking a writ of mandamus, a petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN9 Public access to trial documents serves important public interests. Public scrutiny does indeed serve as a restraint on government, and openness has a positive effect on the truth-determining function of the proceedings. Hearings held pursuant to Unif. Code Mil. Justice art. 32, *10 U.S.C.S. § 832*, however, are not an apples-to-apples comparison to trials on the merits. As an Article 32 preliminary hearing is conducted before there has been a decision on whether to send a case to trial, comparisons to civilian practice are difficult. As an Article 32 hearing is created by statute, an accused's rights at such a proceeding generally have a statutory basis. Additionally, Article 32 preliminary hearings are not governed by rules of evidence. Evidence that would be excluded or suppressed at trial may be admitted at an Article 32 hearing. R.C.M. 405(h), Manual Courts-Martial. An Article 32 preliminary hearing officer cannot ordinarily screen out documents of dubious reliability, that are of questionable authenticity, or whose probative value is substantially outweighed by dangers of unfair prejudice. While an Article 32 hearing is a public proceeding, it is not clear that the public's interest in obtaining documents at a preliminary hearing is viewed through the same lens as the public's right to admitted documents at trial on the merits.

Counsel: **[*1]** For Petitioner: Lieutenant Colonel Jonathan F. Potter, JA; Captain Alfredo N. Foster, JA; Lieutenant

Colonel Franklin D. Rosenblatt; Eugene R. Fidell (on brief); Lieutenant Colonel Jonathan F. Potter, JA; Captain Alfredo N. Foster, JA; Lieutenant Colonel Franklin D. Rosenblatt; Eugene R. Fidell (on reply brief).

Amicus Curiae: For the Center for Constitutional Rights: Baher Azmy; J. Wells Dixon; Shayana D. Kadidal (on brief).

For Respondent: Colonel Mark H. Sydenham (JA): Major A.G. Courie III, JA; Captain Jihan Walker, JA (on brief).

Judges: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge HAIGHT and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS

WOLFE, Judge:

Petitioner is charged with desertion and misbehavior before the enemy, in violation of Articles 85 and 99, Uniform Code of Military Justice, *10 U.S.C. §§ 885* and *899* [hereinafter UCMJ]. Pursuant to *Article 32, UCMJ*, a preliminary hearing was conducted in petitioner's case on 17-18 September 2015.

On 17 September 2015, Sergeant Robert Bergdahl petitioned this court for extraordinary relief in the nature of a writ of mandamus. Specifically, petitioner asks this court to direct **[*2]** the respondent, the special court-martial convening authority, to: 1) make public forthwith the unclassified exhibits that have been received in evidence in the accused's preliminary hearing; and 2) modify the protective order to permit the accused to make those exhibits public. For the reasons below, the petition is dismissed.

As an initial matter, it is important to note what this petition does not concern. This court has not been asked to review the appropriateness of the protective order issued by the special court-martial convening authority. Neither petitioner nor the United States has submitted to the court (under seal or otherwise) the documents that are subject to the protective order. The record in front of this court consists solely of the filings by the petitioner and the government, attached exhibits, and a brief submitted by the Center for Constitutional Rights as *amicus curiae*. Even if this court were to try to resolve the issue of whether the protective order is overly broad or infringes on the petitioner's right to a public hearing, as *amicus curiae* suggests, we are unable to do so. Instead, the question presented to this court is the narrow one submitted by petitioner: **[*3]** "Once an unclassified document has been accepted in evidence in a preliminary hearing open to the public, must the convening authority release it and permit the accused to do so?"

Before we can address petitioner's question, however, we must first determine whether we have jurisdiction to issue the writ requested. *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* (***HN1*** Jurisdiction must be established as a threshold matter without exception).

HN2 The Army Court of Criminal Appeals is a court of limited jurisdiction, established by The Judge Advocate General. *UCMJ art. 66(a)* ("Each Judge Advocate General shall establish a Court of Criminal Appeals. . . ."). The mandate to establish this court was made pursuant to the authority of Congress to pass laws regulating the Armed Forces. *See U.S. Const. art. I § 8, cl. 14*. While this court has jurisdiction to issue writs under the All Writs Act, *28 U.S.C. § 1651*, we must exercise this authority "in strict compliance with [the] authorizing statutes." *Ctr. For Constitutional Rights (CCR) v. United States, 72 M.J. 126, 128 (C.A.A.F. 2013)*. Our jurisdiction to issue the requested writ is limited to our subject matter jurisdiction over the case or controversy. *See United States v. Denedo, 556 U.S. 904, 911, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009)*; *UCMJ art. 66*. "To establish subject matter jurisdiction, the harm alleged must have had 'the potential to directly affect the findings and sentence.'" *LRM v. Kastenberg, 72 M.J. 364, 368 (2013)* (quoting *CCR, 72 M.J. at 129*).

In determining **[*4]** whether we have jurisdiction, we are cognizant of the role this court plays in the military justice system. ***HN3*** This court does not have jurisdiction to oversee military justice generally. *Clinton v. Goldsmith, 526 U.S. 529, 534, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999)*. The Judge Advocate General, staff judge advocates, and convening authorities are among those with significant duties in overseeing military justice. *See e.g. UCMJ arts. 26(a)*, *27(b)(2)*, *69* and *73* (responsibilities of the Judge Advocate General in designating military judges, certifying the qualifications of counsel, conducting appellate review, and acting on petitions for new trials); *UCMJ arts. 32*, *34*, *60*, *71*, and *138* (responsibilities of convening authorities in appointing preliminary hearings, referring cases to trial,

approving and executing sentences, and hearing complaints against commanding officers). In general, while the jurisdiction of this court over the findings and sentence of a case referred to it is broad, *see* UCMJ art. 66(c); United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991) ("a clearer *carte blanche* to do justice would be difficult to express"), the authority of this court to review pre-referral matters is limited and lacks a firm statutory basis.

Although not phrased as such, the relief petitioner seeks is for this court to countermand **[*5]** an order given by a military commander, in a circumstance where there is not yet—and may never be—a court-martial. This would be a broad view of this court's jurisdiction.

Nonetheless, although it is a broad view, it is not unheard of. In *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), our superior court granted a writ in a case that is somewhat similar to the issue presented here. In *Powell*, the special court-martial convening authority directed that the *entire* Article 32, UCMJ, hearing be closed. The Court of Appeals for the Armed Forces (C.A.A.F.) granted the writ, ordered that the hearing be open to the public, and directed that the hearing may be ordered closed only as necessary on a case-by-case basis. Id. at 365-366. However, since that time, the C.A.A.F has questioned whether *Powell* continues to be good law. In denying a writ seeking media access to court-martial filings, (as opposed to filings at a pretrial hearing such as the present circumstances), the C.A.A.F. in *CCR* rejected Powell as controlling precedent, noting that "(1) *Powell* was decided before *Goldsmith* clarified our understanding of the limits of our authority under the All Writs Act, and (2) we assumed jurisdiction in that case without considering the question." CCR, 72 M.J. at 129.

HN4 In **[*6]** *Goldsmith*, the Supreme Court clearly stated that a Court of Criminal Appeals' jurisdiction extends to reviewing the findings and sentence of courts-martial. 526 U.S. at 535. Under the All Writs Act, this court can issue process "in aid" of that jurisdiction. Thus, for example, the C.A.A.F. had jurisdiction to order the removal of a "biased" military judge as it "had the potential to directly affect the findings and sentence" and was therefore in aid of the court's jurisdiction. CCR, 72 M.J. at 129 (citing Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012)).

Viewing *Powell* in light of Goldsmith, we reject the invitation to extend the jurisdiction of this court under the All Writs Act to the pre-referral matter raised in this writ. Furthermore, the matter petitioner desires us to address is not a judicial order with focused applicability to only the Article 32 preliminary hearing. Rather, the order in question is a military order provided by a commander with application far beyond the Article 32, UCMJ. Specifically, the protection provided the contents of the Army Regulation 15-6 administrative investigation, for example, should and must be sought through administrative channels provided outside the court-martial process, such as the Freedom of Information Act (FOIA) 5 U.S.C. § 552 **[*7]** , Army Reg. 15-6, Procedures for Investigating Officers and Boards of Officers, para. 3-18(b) (2 Oct. 2006), and Article 138, UCMJ (Complaints of wrongs).

HN5 In *Goldsmith*, the Supreme Court distinguished between "executive actions" (where writ jurisdiction did not exist) and actions effecting the "finding" or "sentence" (where writ jurisdiction does exist). Goldsmith, 526 U.S. at 535. Although a closer call than the facts presented in Goldsmith, we 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. An Article 32 hearing is "not part of the court-martial." United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007).[1] An Article 32 hearing, being a hearing conducted before a decision is made to send a case to trial, is unlikely to have "the potential to *directly* affect the findings and sentence" as required for writ jurisdiction. Kastenberg, 72 M.J. at 368 (emphasis added).

This is not to say that as an executive action, the protective order is not subject to judicial review. ***HN6*** Assuming a proper request, when an agency fails to comply with FOIA, a civil action may be brought against the agency in a United States district court. 5 U.S.C. § 552(a)(4)(B).

Setting aside whether this filing is a FOIA request clothed as a writ petition and whether there are other paths more appropriate to address petitioners claim, the structure of the military justice system assigns to others the initial responsibility of addressing the issue presented by the petitioner. While this includes the military commander, most critically it includes the military judge. Were we to assume that the charges will be referred to a general court-martial in order to arguably find jurisdiction over this writ, we must also assume that a military judge will be

[1] The charges may be dismissed prior to referral or referred to a summary or special court-martial, in which case, the requirement for a preliminary hearing disappears. *See* Rule for Courts-Martial [hereinafter R.C.M.] 405(a) ("Failure to comply with this rule shall have no effect on the disposition of the charge(s) **[*8]** if the charge(s) is not referred to a general court-martial.").

detailed to the case. UCMJ art. 26(a) (″A military judge shall be detailed to each general court-martial.″). Not only will the military judge be the structurally appropriate person to consider the questions presented by this writ, the military judge, having a more developed record, will also be far **[*9]** better positioned to consider the matter.

Furthermore, ***HN7*** in the course of appellate review, in order to receive relief from an error in a preliminary hearing an accused would be required to demonstrate a material prejudice to a substantial right. UCMJ art. 59(a); Davis, 64 M.J. at 448. Put differently, if an accused must be prejudiced to receive relief on appeal, at least a similar showing of potential prejudice to the findings or sentence is a threshold requirement for this court to issue the writ.[2] To the extent that petitioner has identified possible prejudice,[3] the petitioner has not demonstrated that the prejudice is incapable of remedy at trial through, for example, the process of liberal voir dire and other available court remedies. *See* R.C.M. 905(b)(1) and 906.

Even assuming we were to find jurisdiction in this case, we would **[*10]** not grant petitioner the relief he seeks. ***HN8*** To prevail on his writ of mandamus, petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459, 481 (2004). We conclude that petitioner has fallen short on all three prongs.

As to the first prong, we again note that the accused retains the full ability to seek relief at trial from any error arising from the Article 32 hearing. If a preliminary hearing did not substantially comply with R.C.M. 405 and Article 32, the military judge may reopen the Article 32 hearing or provide other appropriate relief. R.C.M. 906(b)(3). In this way, this case differs significantly from the issues presented in Powell and CCR. In *Powell*, the news media petitioners were barred access from the hearing itself, and a remedy given after the hearing had concluded would have been too late. 47 M.J. at 365. In *CCR*, the writ addressed access to trial documents, and not documents submitted during the Article 32 hearing.

With regards to the second prong, petitioner's right to the issuance of the writ is not clear or indisputable. Petitioner requests two forms **[*11]** of relief: (1) the immediate release of all exhibits; and (2) permission to release the documents to the public himself.[4] In support of this contention petitioner cites to the public's broad right to access documents admitted at trial. We agree with the brief submitted by *amicus curiae* that ***HN9*** public access to trial documents serves important public interests. ″[P]ublic scrutiny″ does indeed serve as a restraint on government, and openness has a ″positive effect on the truth-determining function of the proceedings.″ Article 32 hearings, however, are not an apples-to-apples comparison to trials on the merits. As an Article 32 preliminary hearing is conducted *before* there has been a decision on whether to send the case to trial, comparisons to civilian practice are difficult. As an Article 32 hearing is created by statute, an accused's rights at such a proceeding generally have a statutory basis. Additionally, Article 32 preliminary hearings are not governed by rules of evidence. Evidence that would be excluded or suppressed at trial may be admitted at an Article 32 hearing. R.C.M. 405(h). An Article 32 preliminary hearing officer cannot ordinarily screen out documents of dubious reliability, that are of questionable authenticity, or whose **[*12]** probative value is substantially outweighed by dangers of unfair prejudice. While an Article 32 hearing is a public proceeding, it is not clear that the public's interest in obtaining documents at a preliminary hearing is viewed through the same lens as the public's right to admitted documents at trial on the merits. Thus, while we find the arguments of *amicus curiae* regarding openness to possess merit, petitioner has not met his burden to establish a ″clear and indisputable″ right to the requested relief.

As to the last prong, we do not find the relief petitioner seeks would be appropriate. A judge-made rule that such matter is automatically public (as petitioner requests) or is presumptively public (as *amicus curiae* argues) would have secondary effects.

With no rules of evidence, and without a judicial officer, such a rule would allow a party to make public the entire case file so long as the information was relevant to **[*13]** the purposes of the preliminary hearing. *See* R.C.M. 405(a)

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[2] Notably, however, an accused who alleges a defect in the Article 32 hearing in a motion to the military judge is *not* required to demonstrate prejudice. *See* Davis, 64 M.J. at 448. Again, the military judge, vis-à-vis this court, is likely to be in a superior position to consider this matter.

[3] Petitioner alleges negative media coverage ″seriously threatens . . . his right to a fair trial if any charge is referred for trial.″

[4] As petitioner seeks the right to release the documents himself without the redaction of sensitive matter (such as social security numbers, graphic photos, or medical records), the relief petitioner seeks goes far beyond the case-by-case evaluation required by Powell.

(purpose of the hearing includes information relevant to disposition). This would allow a party to introduce into the public sphere information that is inadmissible at trial and whose evidentiary value may be minimal. *See* Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Rule. 3.6 (Tribunal Publicity) (1 May 1992). As an accused does not have full access to discovery until after referral, such a rule would result in an uneven power dynamic. *See* R.C.M. 701(a).

Lastly, a rule that provided for the automatic publication of all matter submitted to an Article 32 hearing appears to be contrary to the Military Rules of Evidence and Rules for Courts-Martial. Military Rule of Evidence 506(e)(1)(D) specifically allows the government to provide sensitive information to the accused before referral subject to a protective order. Additionally, the authority of the preliminary hearing officer under R.C.M. 405(i)(9) to seal exhibits is not limited to classified exhibits. Both rules would be undermined by the outcome that petitioner suggests.

CONCLUSION

Therefore, for the reasons stated above, the petition for extraordinary relief in the nature of a writ of mandamus is DISMISSED.

Senior Judge HAIGHT and Judge PENLAND concur. **[*14]**

Hearst Newspapers, LLC v. Abrams

United States Army Court of Criminal Appeals

October 14, 2015, Decided

ARMY MISC 20150652

Reporter
2015 CCA LEXIS 442

HEARST NEWSPAPERS, LLC et al., Petitioner & Sergeant ROBERT B. BERGDAHL, Real Party in Interest v. General ROBERT B. ABRAMS, Commander, Respondent & Lieutenant Colonel PETER Q. BURKE, Commander, Respondent & Lieutenant Colonel MARK A. VISGER, Preliminary Hearing Officer, Respondent & UNITED STATES, Respondent

Notice: NOT FOR PUBLICATION

Core Terms

DOCUMENTS, extraordinary relief, preliminary hearing, military justice, writ of mandamus, sentence, issues

Counsel: **[*1]** For Petitioner: Jennifer D. Bishop; Diego Ibarguen (on brief).

For Real Party in Interest: Lieutenant Colonel Jonathan F. Potter, JA; Captain Alfredo N. Foster, JA; Lieutenant Colonel Franklin D. Rosenblatt; Eugene R. Fidell (on brief).

For Respondent: Pursuant to A.C.C.A. Rule 20(e), no response filed.

Judges: Before HAIGHT, PENLAND, and WOLFE Appellate Military Judges.

Opinion

SUMMARY DISPOSITION AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS

Per Curiam:

Petitioner is charged with desertion and misbehavior before the enemy, in violation of Articles 85 and 99, Uniform Code of Military Justice, *10 U.S.C. §§ 885* and *899* [hereinafter UCMJ]. Pursuant to *Article 32, UCMJ*, a preliminary hearing was conducted in petitioner's case on 17-18 September 2015.

On 2 October 2015, Hearst Newspapers, LLC et al. petitioned this court for extraordinary relief in the nature of a writ of mandamus. On 5 October 2015, Sergeant Robert B. Bergdahl filed a motion for leave to intervene as a real-party-in interest, which was granted by this court on 13 October 2015.

Petitioner presents the following two issues:

> A. WHERE UNCLASSIFIED DOCUMENTS ARE RECEIVED INTO EVIDENCE DURING A PUBLIC ARTICLE 32 [UCMJ] HEARING, MAY THE CONVENING AUTHORITY OR OTHER PRESIDING OFFICER **[*2]** DENY PUBLIC ACCESS TO THOSE DOCUMENTS WITHOUT SPECIFIC, ON-THE-RECORD, FINDINGS THAT SUCH DENIAL—EFFECTIVELY SEALING THE DOCUMENTS—IS NECESSARY TO FURTHER A COMPELLING GOVERNMENT INTEREST THAT OVERRIDES THE *FIRST AMENDMENT* AND IS NARROWLY TAILORED TO FURTHER THAT INTEREST.
>
> B. IS THE GENERAL COURT-MARTIAL CONVENING AUTHORITY, SPECIAL COURT-MARTIAL CONVENING AUTHORITY, AND/OR ARTICLE 32 [UCMJ] PRELIMINARY HEARING OFFICER REQUIRED TO MAKE TRANSCRIPTS OF A PUBLIC ARTICLE 32 HEARING AVAILABLE TO THE PUBLIC IMMEDIATELY FOLLOWING THE HEARING?

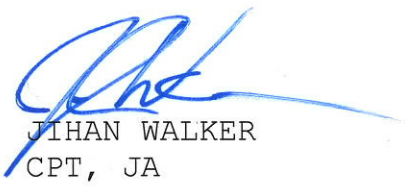
Petitioner asks this court to answer both questions in the affirmative and to issue a writ of mandamus directing the public release of documents.

The jurisdiction of this court to issue process under the All Writs Act is limited to issues having "the potential to directly affect the findings and sentence." *LRM v. Kasten-*

berg, 72 M.J. 364, 368 (2013); *28 U.S.C. § 1651*. This court does not have jurisdiction to oversee the administration of military justice generally. *Clinton v. Goldsmith, 526 U.S. 529, 534, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999)*. Petitioner has not demonstrated that the release of documents to the public, prior to any decision on whether this case should be referred to trial, has the potential to directly affect the findings and sentence. As this court lacks the jurisdiction to consider the **[*3]** matter, the petition is DISMISSED.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing response was electronically filed with the Court to efiling@armfor.uscourts.gov on 20 November 2015 and contemporaneously served electronically on Defense Appellate Division, Mr. Eugene Fidell, and Ms. Jennifer Bishop.



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