

History of the Case and Facts

On or about 14 May 2010, PFC Andrew Holmes was placed under guard in Afghanistan. He has remained in pretrial confinement since. On 15 June 2010, PFC Holmes was charged with one specification of premeditated murder under Article 118, Uniform Code of Military Justice (UCMJ). On 25 June 2010, Major Michael P. Liles was appointed as the Article 32 Investigating Officer.

On 13 August 2010, additional charges were preferred. Among the additional charges was one specification of a violation of Article 92, UCMJ for allegedly violating a US Central Command Order prohibiting the possession of visual images of human casualties. On 21 September 2010, Colonel Barry Huggins, the Special Court-Martial Convening Authority, issued a "Limitation on Storage of Photographic Evidence" order (hereafter limitation order) citing his authority under Rule for Courts-Martial 405(c). The order states that "subject to the discretion of the parties . . . the Investigating Officer may consider such images as evidence in the Investigation, but no such images may leave the offices assigned to CID or the possession and control of CID personnel." The photographs are unclassified and are not subject to any government privilege under Mil. R. Evid. 505.

On 15 November 2010, the Article 32 investigative proceeding in *United States v. PFC Andrew H. Holmes* began.

During the course of the proceeding, the government called a Criminal Investigative Division (CID) agent to testify to the content of the photographs subject to the limitation order. The defense objected on the grounds that this was a de facto closing of the hearing in violation of PFC Holmes's right to a public trial and because without the photographs in evidence, the defense was denied a Sixth Amendment right to confrontation by cross-examination. The Investigating Officer ruled that the order to view the photographs at the offices assigned to CID would cause the hearing to be closed, which he would not allow. He did, however, allow the examination of the CID agent in violation of R.C.M. 405 (g) (5) (A) (i). The defense refused to cross-examine the CID agent on the basis that without the photographs, cross-examination was not possible. In the defense case-in-chief, the defense offered the evidence as exculpatory evidence with respect to the charge of premeditated murder. The defense view is that the photos demonstrate that PFC Holmes did not cause the death of the victim. The Investigating Officer effectively closed the proceedings by denying the public use of the evidence.

Statement of the Issue

WHETHER AN ARTICLE 32 INVESTIGATING OFFICER MAY DE FACTO CLOSE AN ARTICLE 32 INVESTIGATIVE PROCEEDING TO THE PUBLIC BY DENYING THE ADMISSION OF UNCLASSIFIED PHOTOGRAPHS THAT ARE NOT SUBJECT TO ANY GOVERNMENT PRIVILEGE BECAUSE OF A PROTECTIVE ORDER ISSUED BY THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY.

Relief Sought

The petitioner requests that this Honorable Court grant extraordinary relief by ordering the United States to allow photographic evidence held under a protective order by the CID to be placed into evidence in the Article 32 investigative proceeding in this case.

Reasons for Granting the Writ

The defense submits a number of grounds for which the relief sought should be granted. An accused in a criminal trial shall possess a right to a public trial guaranteed under the Sixth Amendment of the U.S. Constitution. See generally *Waller v. Georgia*, 467 U.S. 39, 43 (1984). That right is codified in R.C.M. 806 and 405 (h) (3). Furthermore, under the Sixth Amendment an accused possesses a right to present a defense and confront and cross-examine the accuser. See *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

Firstly, under R.C.M. 405(h) (3), the government has failed to demonstrate an overriding interest that outweighs the value

of an open and public Article 32 investigative proceeding. See R.C.M. 450(h)(3), 806(b)(2). By not allowing relevant photographs that are unclassified and not subject to any government privilege into an open and public Article 32 investigative proceeding, the Investigating Officer effectively denied PFC Holmes of his rights guaranteed under the Sixth Amendment to an open and public hearing, as codified in R.C.M. 806 and 405(h)(3).

The Government has preferred highly detailed and sensationalized charges that have attracted enormous amounts of media attention, and the defense views the photographs subject to the limitation order as exculpatory forensic evidence regarding the allegation of murder.

Secondly, under R.C.M. 806(b)(2), the government failed to satisfy the four-prong test required to overcome the presumption that an accused shall enjoy a Sixth Amendment right to an open and public trial. The United States Supreme Court has recognized that the right to a public trial is one created for the benefit of the defendant. *Waller*, 467 U.S. at 46. The right ensures that the public may see that the defendant is "fairly dealt with and not unjustly condemned" *In re Oliver*, 333 U.S. 257, 270 n.25 (1948). The knowledge that every criminal trial is subject to review in the forum of public

opinion is an effective restraint on possible abuse of judicial power. See *id.* at 270.

Thirdly, by restricting the photographs from the Article 32 investigative proceeding, PFC Holmes's constitutional right to present a defense and confront and cross-examine the accuser is violated. Although an accused's right to present relevant evidence is not unlimited, "[r]elevance is the key to determining when the evidence is constitutionally required to be admitted." *United States v. Jensen*, 25 M.J. 284, 286 (C.M.A. 1987). In this case, the photographs—that are unclassified and not subject to any government privilege—are highly relevant and provide exculpatory forensic evidence regarding the murder specification. The limitation order and subsequent order refusing to admit the photographs clearly abridge PFC Holmes's constitutional right guaranteed under the Sixth Amendment to present relevant evidence and cross-examine the CID officer regarding evidence contained within the photographs.

Finally, prior to referral, there is no other avenue of relief for PFC Holmes to ensure that his Sixth Amendment rights are scrupulously honored. A closed hearing deprives PFC Holmes of the transparency necessary in the military justice system to ensure the fairness and integrity of the system. The result in a highly-visible case is that PFC Holmes is subjected to

secretive proceedings and months of negative public attention prior to his trial where he has no ability to offer the photographic evidence in support of his defense and cross-examine the accuser.

Jurisdictional Statement

This Court has jurisdiction pursuant to the All Writs Act, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). The United States Supreme Court has recognized the authority of the Army Court of Criminal Appeals to exercise jurisdiction under the All Writs Act. See *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969). Furthermore, the All Writs Act "empowers [the Army Court of Criminal Appeals] to issue a writ . . . in aid of [its] jurisdiction over a pending court-martial, even if the case does not fall strictly within the jurisdiction conferred by Articles 62, 66, 69, 73, UCMJ." *United States v. Reinert*, 2008 WL 8105416, at *8 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished opinion); see also *United States v. Redding*, 11 M.J. 100, 104-06 (C.M.A. 1981) (military appellate courts have jurisdiction under the All Writs Act to review interlocutory petitions).

ARGUMENT

The accused in a criminal trial shall possess a right to a public trial guaranteed under the Sixth Amendment of the United States Constitution. See generally, *Waller v. Georgia*, 467 U.S. 39, 43 (1984). That right is codified in R.C.M. 806 and 405(h)(3). Discussion to R.C.M. 405(h)(3) provides that "Article 32 investigations are public hearings and should remain open to the public whenever possible. [Only] [w]hen an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to spectators."

Furthermore, R.C.M. 806(b)(2) provides that "courts-martial shall be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings on the record justifying closure." See also *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (utilizing an identical test when analyzing issues under the Sixth Amendment right to a public trial).

Furthermore, commanders and 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. If a commander or investigating officer determines that closing an Article 32 investigative proceeding is necessary, he must make specific findings of fact in writing that support the closure. R.C.M. 405(h)(3) discussion. Finally, under the Sixth Amendment to the United States Constitution, an accused shall also possess a right to present a defense and confront and cross-examine the accuser. See *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

1. Under R.C.M. 405(h)(3), the Article 32 Investigating Officer improperly limited the Article 32 investigative proceeding by restricting the photographs from the open and public hearing.

The Government has failed to demonstrate an overriding interest that outweighs the value of an open and public Article 32 investigative proceeding in this case. Only when an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to the public. R.C.M. 405(h)(3). "[A]bsent cause shown that outweighs the value of openness, the military accused is . . . entitled to a public Article 32 investigative hearing." *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997).

- A. The value of an open and public Article 32 investigative proceeding is high considering the nature and magnitude of this highly-visible case.

The United States Supreme Court has recognized that the right to a public trial is one created for the benefit of the accused. The right ensures that the public may see that the accused is "fairly dealt with and not unjustly condemned" *In re Oliver*, 333 U.S. 257, 270 n.25 (1948). The presence of interested spectators and the public keeps the "triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46. Furthermore, the knowledge that every criminal trial is subject to review in the forum of public opinion is an effective restraint on possible abuse of judicial power. See *In re Oliver*, 333 U.S. at 270. Public trials and hearings ensure that all parties perform their functions in a responsible manner while encouraging witnesses to come forward. See *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

A closed portion of the Article 32 investigative proceeding deprives PFC Holmes of the transparency necessary in the military justice system to ensure the fairness and integrity of the system. Although the Investigating Officer declined to physically close the Article 32 investigative proceeding to the public, the Investigating Officer effectively restricted the

public hearing through a de facto closure of the photographs in violation of PFC Holmes's right to a public Article 32 investigative hearing. The result in a highly-visible case such as this is that PFC Holmes is subjected to secretive proceedings and months of negative public attention prior to his trial. As the United States Supreme Court has recognized, great regard is placed on the value of an open and public criminal proceeding. Here, the nature and magnitude of this case weighs heavily in favor of an open and public Article 32 investigative proceeding.

B. The Government has failed to demonstrate any compelling or overriding interest to de facto close any portion of the Article 32 investigative proceeding because the photographs are unclassified and not subject to any government privilege.

Only an overriding government interest that outweighs the value of an open and public hearing allows any portion of an Article 32 investigative proceeding to be closed to the public. R.C.M. 405(h)(3). Furthermore, "[t]he simple utilization of the terms 'security' or 'military necessity' cannot be the talisman in whose presence the protections of the Sixth Amendment and its guarantee to the public trial must vanish." *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977) (overruled on other grounds) (citing *United States v. Reynolds*, 345 U.S. 1 (1953)). Utilizing the term "national security" is not proper because "the sole purpose . . . is to protect the accused's right to a

public trial by preventing circumvention of that right by the mere utterance of a conclusion or blanket acceptance of the government's position without a demonstration of a compelling need." *Id.* at 123 (citing *United States v. Nixon*, 418 U.S. 683 (1974)). In *United States v. Hershey*, the Court of Military Appeals held that even when the interest sought to be protected is "national security," the "Government must demonstrate a compelling need to exclude the public" 20 M.J. 433, 436 (C.M.A. 1985) (emphasis added). Without a compelling interest that is not "demonstrated" as overriding the high value placed on an open and public hearing, PFC Holmes shall enjoy a Sixth Amendment right to an open and public Article 32 investigative proceeding.

Here, the Government has failed to demonstrate any compelling or overriding interest for justifying the limitation order in the name of "national security." Firstly, the reasons for justifying the limitation order are unsubstantiated because the photographs are unclassified and not subject to any government privilege. Without the photographs in evidence, a de facto closure of the Article 32 investigative proceeding effectively denies PFC Holmes's constitutional right to confrontation by cross-examination. In fact, the defense views

the photographs subject to the limitation order as exculpatory forensic evidence regarding the charge of murder.

Secondly, the Government's reliance on the mere utterance of "national security," without demonstrating any compelling and overriding basis to restrict unclassified and unprivileged photographs from a public Article 32 investigative proceeding, plainly violates PFC Holmes's Sixth Amendment rights as codified in R.C.M. 405(h)(3). See *id.*; *Grunden*, 2 M.J. at 123.

In sum, the Government has failed to articulate or demonstrate any overriding government interest that outweighs the high value placed by the Supreme Court on an open and public Article 32 investigative proceeding, and specifically here in *United States v. PFC Andrew H. Holmes*. The government has preferred highly detailed and sensationalized charges that have attracted enormous amounts of media attention. Restricting such unclassified and unprivileged photographs from a public proceeding simply undermines the legitimacy of the military justice system in the name of unsubstantiated and unarticulated "national security."

2. Under R.C.M. 806(b)(2), the Article 32 Investigating Officer improperly limited the Article 32 investigative proceeding by restricting the photographs from the public hearing.

Under R.C.M. 806(b)(2), "courts-martial shall be open to the public unless (1) there is a substantial probability that an

overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings on the record justifying closure." See also *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (utilizing the same test when analyzing issue under the Sixth Amendment right to a public trial).

The government failed to satisfy this four-prong test articulated in R.C.M. 806(b)(2). In this case, the government offers a blanket and undemonstrated basis of "national security" as justification for restricting unclassified photographs that are not subject to any government privilege from an otherwise public proceeding. While the limitation order may be narrowly tailored to specifically restrict the photographs from the Article 32 investigative proceeding, the remaining three prongs are nowhere near satisfied.

Firstly, as explained above in Part 1 discussing R.C.M. 405(h)(3), the government failed to articulate or demonstrate any overriding interest that will be prejudiced if the Article 32 investigative proceedings remains public; the photographs are unclassified and not subject to any government privilege, but are in fact exculpatory evidence on the charge of murder. When

relying on reasons of "national security," the government must "demonstrate a compelling need to exclude the public" rather than provide a blanket justification of "national security." *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

Secondly, there was no consideration of any available alternatives to the limitation order completely restricting the photographs from the public Article 32 investigative proceeding. While the Investigating Officer allowed examination of the CID agent without allowing the photographs into evidence, he effectively denied PFC Holmes's of his constitutional rights to an open and public Article 32 investigative proceeding, to present a defense, and to cross-examine the CID agent. And thirdly, no case-specific findings were made on the record justifying closing the Article 32 investigative proceeding due to "national security" reasons. For the foregoing reasons, under R.C.M. 806(b)(2), the Investigating Officer improperly limited the Article 32 investigative proceeding by restricting the photographs from the public hearing.

- 3. Restricting photographic evidence that provides exculpatory forensic evidence to the murder specification abridges PFC Holmes's constitutional right to present a defense guaranteed under the Sixth Amendment.**

By limiting the defense's opportunity to utilize relevant and exculpatory forensic photographic evidence as a defense and

cross-examine the CID agent regarding evidence contained within the photographs, PFC Holmes's Sixth Amendment rights are violated. An accused's right to present relevant evidence is not unlimited. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). "Relevance is the key to determining when the evidence is constitutionally required to be admitted." *United States v. Jensen*, 25 M.J. 284, 286 (C.M.A. 1987). Only "[l]egitimate interests in the criminal trial process" may restrict an accused's right to present a defense. *Id.* (emphasis added). However, rules that restrict an accused's right to present a defense cannot be "arbitrary" or "disproportionate to the purposes they are designed to serve" and infringe the "weighty interest of the accused." *Id.*

In this case, the limitation order and subsequent order from the Investigating Officer restricting the photographic evidence from the open and public Article 32 investigative proceeding are both "arbitrary" and "disproportionate" to the purposes they serve and infringes the PFC Holmes's interest in presenting a defense. *See id.* Certainly, the photographic evidence raises a factual question whether PFC Holmes committed the charged offense of murder. The photographs, which are unclassified and not subject to any government privilege, are highly relevant and provide exculpatory forensic evidence

regarding the murder specification. More specifically, the photos demonstrate the PFC Holmes did not cause the death of the victim.

As explained above, the limitation order also serves no "legitimate" or overriding government interest because the blanket conclusion of "national security" fails to demonstrate the reasons for such a government interest. Therefore, the limitation order and subsequent order from the Article 32 Investigating Officer can only be considered "arbitrary" because it serves no demonstrated government interest. In sum, the limitation order clearly abridges PFC Holmes's weighty constitutional right guaranteed under the Sixth Amendment to present relevant evidence and cross-examine the CID agent regarding forensic, exculpatory evidence contained within the photographs.

4. The relief sought in this extraordinary writ cannot be obtained through the ordinary course of appellate review.

Under Rule 20(a)(7) of this Court's Rules of Practice and Procedure, extraordinary relief can only be ordered if the relief sought cannot be obtained during the ordinary course of appellate review. "The time for correction of an [Article 32 investigation] error is when the military judge can fashion an appropriate remedy under R.C.M. 906(b)(3) *before it infects the*

trial, not after the members, witnesses, and parties have borne the burden of trial proceedings." *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (emphasis added).

In this case, prior to referral, there is no other avenue of relief for PFC Holmes to ensure that his Sixth Amendment rights are scrupulously honored. The Article 32 Investigating Officer effectively allowed a de facto closure of a portion of the Article 32 investigative proceeding from the public. PFC Holmes currently sits in pretrial confinement and is subject to months of media attraction, while the photographs restricted from the Article 32 investigative proceeding are unclassified, unprivileged, and, in fact, provides exculpatory forensic evidence to the murder specification. PFC Holmes will be unfairly prejudiced by restricting the photographs from the highly-visible public hearing and trial, especially when the photographs offer exculpatory evidence. Furthermore, the defense is restricted from presenting a defense in the Article 32 investigative proceeding and subsequent trial by utilizing the photographs and cross-examining the CID agent. Thus, effectively restricting the photographs from an otherwise open and public hearing will certainly deprive PFC Holmes of the transparency necessary in the military justice system to ensure the fairness and integrity of the system. Such an error in the

Article 32 investigative proceeding must be corrected before it infects the later court-martial trial. For the foregoing reasons, the relief sought is immediate, extraordinary, and cannot be obtained in any other form of appellate review.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Court grant the requested relief.

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CERTIFICATE OF SERVICE

UNITED STATES v. Andrew H. Holmes

Army Docket No. _____

Brief on Behalf of _____
Appellant

Motion _____

Other X

I certify that a copy of the foregoing was delivered to the Court and the Government Appellate Division on November 18, 2010.

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