IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

In re	)	**PETITION FOR A WRIT OF ERROR CORAM NOBIS**
	)	
Sergeant	)	
ROBERT B. BERGDAHL	)	Docket No. ARMY MISC _____
U.S. Army,	)	
	)	
Petitioner.	)	

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

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Introduction

Sergeant Robert B. Bergdahl respectfully prays that the Court issue a writ of error coram nobis setting aside his conviction and sentence with prejudice. Relief should be granted both under the doctrine of apparent unlawful command influence (UCI) and because Sergeant Bergdahl was denied his Fifth Amendment right to a fair trial.

History of the Case

In 2017, a military judge sitting as a general court-martial convicted Sergeant Bergdahl, in accordance with his pleas, of one specification of short desertion in violation of Article 85, UCMJ, and one specification of misconduct before the enemy in violation of Article 99(3), UCMJ. The offenses arose from a single unauthorized absence in Afghanistan on June 30, 2009. There was no pretrial agreement. Sergeant Bergdahl was sentenced to a dishonorable discharge, reduction to E-1, and forfeiture of $10,000 pay. The convening authority approved the findings and sentence. This Court affirmed. *United States v. Bergdahl*, 79 M.J. 512 (A. Ct. Crim. App. 2019). Judge Ewing would have granted partial relief based on one aspect of Sergeant Bergdahl's contention that the case came within the doctrine of apparent UCI. *Id*. at 531-34.

On August 27, 2020, the Court of Appeals affirmed by a vote of 3-2. *United States v. Bergdahl*, 80 M.J. __ (C.A.A.F. 2020). The Judges were closely divided as

to whether the government had carried its evidentiary burden of showing by proof beyond a reasonable doubt that a disinterested member of the general public, fully informed of the facts and circumstances, would harbor a significant doubt as to the fairness of the proceedings. *See generally United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). The court noted that the issue was a close one, requiring "long consideration." 80 M.J. at ___, ___ (slip op. at 15-16). Chief Judge Stucky and Judge Sparks dissented. *Id*. at ___, ___.

Sergeant Bergdahl filed a petition for reconsideration and, based on documents obtained under the Freedom of Information Act, 5 U.S.C. § 552, a motion for leave to supplement the record. The Court of Appeals denied both "without prejudice to [his] right to file a writ of error coram nobis with the appropriate court." *United States v. Bergdahl*, No. 19-0406/AR (C.A.A.F. Oct. 14, 2020) (Order).

Statement of the Facts

1. Colonel Jeffery R. Nance was the military judge. On January 12, 2016, in response to *voir dire* questions by the defense, he stated that he had a mandatory retirement date of November 2018 and was unaware of any matter which might be grounds for challenging him. R. at 13-14.

2. On October 16, 2017, Judge Nance accepted Sergeant Bergdahl's guilty pleas. R. at 1676.

3. On October 16, 2017, President Trump made remarks in the Rose Garden

about Sergeant Bergdahl and this court-martial. As the Court of Appeals later found, those remarks ratified the many disparaging comments he had made about Sergeant Bergdahl before the 2017 Inauguration. 80 M.J. at ___ (slip op. at 12).

4. The new documents show that on that same day, October 16, 2017, Judge Nance applied to be a Department of Justice immigration judge. His application highlighted the fact that he was the "presiding judge in U.S. v. SGT Robert Bergdahl . . . [and] [s]uffice it to say, it has received significant national and international media attention and involves many complex issues." The sole writing sample he submitted was his February 24, 2017 ruling denying the defense's January 20, 2017 apparent unlawful command influence motion concerning President Trump. AE 36; D APP 56.

5. The Department of Justice is an executive department. As such, it falls under the President's control and overall supervision. The Executive Office of Immigration Review hires attorneys to serve as immigration judges. These hiring decisions are discretionary and appointments are made personally by the Attorney General. The Attorney General is a member of the Cabinet and advises the President on all matters arising under the laws of the United States, 28 U.S.C. § 511, including matters of military justice such as changes to the *Manual for Courts-Martial*, *see* Exec. Order No. 11,030; 28 C.F.R. § 0.25(b), and clemency matters. *See* Margaret Colgate Love, *War Crimes, Pardons and the Attorney General*, LAWFARE, May 22,

2019. He serves at the pleasure of the President.

6. On October 17, 2017, Sergeant Bergdahl filed a renewed motion to dismiss based on President Trump's ratification of his pre-Inauguration statements vilifying Sergeant Bergdahl. D APP 108.

7. Judge Nance conducted a hearing on the renewed motion on October 23, 2017. In that hearing, trial counsel was afforded an opportunity to conduct further *voir dire* of the military judge. Judge Nance stated: "I'm what's referred to as a terminal Colonel, which means I'm not going anywhere but the retirement pastures. And that's in almost a year from now." R. at 1724. Regarding his susceptibility to outside influence, he said: "So that's a long way of saying, 'No, no effect on me whatsoever.' I don't expect to go anywhere but back home as soon as the Army is done with me in a year." *Id.* He did not disclose that, only a week before, he had applied for a position with the Department of Justice; that his application had highlighted his role in Sergeant Bergdahl's case; or that he had made his earlier rejection of the January 20, 2017 motion to dismiss based on President Trump's actions the centerpiece of his application.

8. On October 30, 2017, Judge Nance denied the renewed motion to dismiss. AE 65. He found as a fact that while Sergeant Bergdahl had elected trial by judge alone, and that President Trump is the commander in chief over all of the military, including himself, "I have no hope for or ambition for promotion beyond my current

rank. . . . I am completely unaffected by any opinions President Trump may have about SGT Bergdahl. . . . As far as I know, President Trump has never said anything about me as a military judge or otherwise." *Id.* ¶ 2(i). He concluded that the government had met its evidentiary burden of proving beyond a reasonable doubt that President Trump's statements did not create an intolerable strain on public confidence in the military justice system and that an objective, informed observer would not harbor a significant doubt about the fairness of the proceedings. *Id.* ¶ 6(c). In support of this conclusion, Judge Nance wrote: "The evidence establishes beyond a reasonable doubt that I … hold no fear of any repercussions from anyone if they do not agree with my sentence in this case." *Id.*

9. Judge Nance sentenced Sergeant Bergdahl on November 3, 2017, R. at 2704, and authenticated the record on April 28, 2018.

10. Judge Nance never disclosed to the defense that he had applied to become an immigration judge.

11. Sometime between October 16, 2017 and September 28, 2018 the Department of Justice hired Judge Nance. A September 28, 2018 press release listed new hires and stated in part, "Attorney General Jeff Sessions appointed Jeffery R. Nance to begin hearing cases in October 2018."

12. Judge Nance retired from the Army on November 1, 2018.

13. Sergeant Bergdahl's counsel received Judge Nance's application from the

Department of Justice by email on September 15, 2020.

Pertinent Order, Opinion and Parts of the Record

The decision of the Court of Appeals and other pertinent materials are included in the Appendix to the accompanying brief. Judge Nance's job application is attached to the Motion to Submit Extra-Record Factual Matters filed herewith.

Issues Presented

I. WHETHER THE PETITION SATISFIES THE THRESHOLD STANDARD FOR WRITS OF ERROR CORAM NOBIS

II. WHETHER, IN LIGHT OF JUDGE NANCE'S UNDISCLOSED APPLICATION FOR EMPLOYMENT BY THE DEPARTMENT OF JUSTICE, IN ADDITION TO THE MATTERS PREVIOUSLY CONSIDERED BY THE COURT OF APPEALS, THE GOVERNMENT SHOULD BE FOUND NOT TO HAVE CARRIED ITS UCI BURDEN

III. WHETHER JUDGE NANCE'S FAILURE TO DISCLOSE HIS APPLICATION FOR EMPLOYMENT BY THE DEPARTMENT OF JUSTICE DENIED PETITIONER A FAIR TRIAL

Relief Sought

The charges and specifications should be dismissed with prejudice.

Reasons for Granting Relief

I

THE PETITION SATISFIES THE THRESHOLD STANDARD FOR WRITS OF ERROR CORAM NOBIS

The standard for writs of error coram nobis was stated in *United States v. Casa-Garcia*, 71 M.J. 586, 588-89 (A. Ct. Crim. App. 2012):

> (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Sergeant Bergdahl's Petition meets this standard. The errors alleged are of the most fundamental character: apparent UCI and the Fifth Amendment right to a fair trial.

No other remedy is available. The Court of Appeals expressly referred to the writ of error coram nobis when denying Sergeant Bergdahl's motion to supplement the record and petition for reconsideration without prejudice.

Valid reasons exist for not having sought relief earlier. Sergeant Bergdahl's case was still before the Court of Appeals on a petition for reconsideration when he received Judge Nance's job application from the Department of Justice. He brought the matter to that court's attention and has promptly brought it here in response to the Court of Appeals' October 14, 2020 Order.

Sergeant Bergdahl exercised reasonable diligence in relying on Judge Nance's assertions that he was impervious to UCI because he was going to retire. The defense had a right to assume he would comply with the Code of Conduct for Army Trial and Appellate Judges and that his assurances would be accurate. Sergeant Bergdahl

had no way of knowing that when Judge Nance made those representations he had already submitted an application to the Department of Justice.

The Petition does not ask the Court to reevaluate previously considered evidence or any legal issue. Rather, it calls upon the Court to consider the *incremental* effect of the newly obtained information on whether it remains the case, as the Court of Appeals held by a 3-2 vote, that there is proof beyond a reasonable doubt that a disinterested, informed member of the public would not harbor a significant doubt as to the fairness of the proceedings. It also calls upon the Court to address in the first instance whether, in light of the new evidence, Sergeant Bergdahl was denied his Fifth Amendment due process right to a fair trial.

The sixth consideration is inapposite because Sergeant Bergdahl was not sentenced to confinement. In any event, the consequences of his conviction persist since – unless the writ is granted – he will have forfeited $10,000, his pay will have been reduced due to the adjudged reduction, his stigmatizing dishonorable discharge will be executed unless the case is overturned by the Supreme Court, and he will be ineligible for all benefits administered by the Department of Veterans Affairs. 80 M.J. at ___ (slip op. at 22).

Because the Petition satisfies the threshold criteria, we turn to whether Sergeant Bergdahl is entitled to relief on the merits. *See Casa-Garcia*. *See* 71 M.J. at 589.

II

IN LIGHT OF JUDGE NANCE'S FAILURE TO DISCLOSE HIS JOB APPLICATION, TOGETHER WITH THE MATTERS PREVIOUSLY CONSIDERED BY THE COURT OF APPEALS, THE GOVERNMENT DID NOT CARRY ITS UCI BURDEN

This Court is bound by the Court of Appeals' conclusions of law. *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012). Whether apparent UCI has occurred is a conclusion of law. *United States v. Bergdahl*, 80 M.J. at ___ n.7 (slip op. at 9 n.7) (citing *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)). Nonetheless, to the extent that there is additional information that bears on whether a disinterested, objective, and fully informed member of the general public would harbor a significant doubt as to the fairness of the proceedings, this Court may revisit that issue and determine that the record, when supplemented with the new evidence and *taken as a whole*, does not satisfy the requirement of proof beyond a reasonable doubt.

The Court of Appeals plainly struggled with the close question whether the government had carried its burden. 80 M.J. at ___-___ (slip op. at 13-25). The additional facts concerning Judge Nance's undisclosed job application, coupled with his account of his post-retirement plans as an explicit basis for denying the renewed motion to dismiss, are substantial evidence that, taken together with everything that had already made the UCI question such a close one, unquestionably raises a reasonable doubt.

A pivotal portion of the Court of Appeals' decision relied on Judge Nance's apparent independence and immunity from outside influence. The majority wrote:

> Thus, an objective, disinterested observer would conclude that *rather than being swayed by outside forces, the military judge was notably impervious to them*. Indeed, it can be said that this result—whether one agrees with it or not—stands as a testament to the strength and *independence of the military justice system*. Therefore, assertions of an appearance of unlawful command influence are once again unavailing.

80 M.J. at ___ (slip op. at 23) (emphasis added). In light of the documents proffered with this Petition, an objective observer apprised of all of the facts and circumstances would know – as neither counsel nor this Court knew – that in the middle of Sergeant Bergdahl's trial Judge Nance submitted a job application to President Trump's Department of Justice. What is more, he denied the renewed UCI motion based on his assurance that he was immune to improper influence. These facts must be considered in determining whether the government carried its evidentiary burden.

Applying the standard of imputation that the Court of Appeals applied, the disinterested observer would know that a military judge should "disqualify himself or herself in any proceedings in which that military judge's impartiality might reasonably be questioned," R.C.M. 902(a), and that Judge Nance failed to disclose information that could have led to recusal. This imputed knowledge precludes a finding that the government carried its burden.

Mere nondisclosure of the job application and the telling choice of a writing

sample would certainly raise a question. The problem goes deeper. Judge Nance actively buttressed his denial of the renewed motion to dismiss with the claim that as a retiring colonel he was immune to improper influence. "I'm what's referred to as a terminal Colonel, which means I'm not going anywhere but the retirement pastures. And that's in almost a year from now." R. at 1724. Regarding his susceptibility to outside influence, he said: "So that's a long way of saying, 'No, no effect on me whatsoever.' I don't expect to go anywhere but back home as soon as the Army is done with me in a year." *Id.* When he made those statements in open court, the ink was barely dry on the job application he had filed only days before. The reasonable observer would have difficulty reconciling Judge Nance's words and deeds.

The Court should determine that the government has not carried its burden and that the charges and specifications should be dismissed with prejudice. Only such relief will both vindicate the strong interest in fostering public confidence in the administration of military justice and deter similar conduct in the future.

III

JUDGE NANCE'S FAILURE TO DISCLOSE HIS APPLICATION DENIED SERGEANT BERGDAHL A FAIR TRIAL

Judge Nance had a duty to disclose. His pending application to the Department of Justice, the explicit links between that application and this case, his claim of invulnerability, and his pecuniary interest in the Department of Justice job mandated

disclosure under R.C.M. 902(a).[1] A failure to disclose "deprive[s] the parties of an adequate foundation for their decisions on whether or not to request recusal" and makes it harder for the military judge to evaluate "those facts crucial to determining whether there was a conflict or appearance of conflict requiring disqualification." *United States v. Quintanilla*, 56 M.J. 37, 79–80 (C.A.A.F. 2001).

By failing to disclose his job application while claiming that he was impervious to unlawful command influence because he was retiring, Judge Nance deprived Sergeant Bergdahl of the opportunity to conduct additional *voir dire*, seek recusal, revisit his forum selection, and make an informed decision as to how to plead. All of this was prejudicial.

Judge Nance had an undisclosed significant financial interest in going to work for the Department of Justice. In *Tumey v, Ohio*, 273 U.S. 510, 532 (1927), Chief Justice Taft wrote:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.

[1] *See also* Code of Conduct for Army Trial and Appellate Judges R. 2.11 [cmt.] ("[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.")

Judge Nance should have disclosed the pendency of his job application. Failing to do so deprived Sergeant Bergdahl of a fair trial. As explained in the supporting brief, the charges and specifications should be dismissed with prejudice in the interests of justice.

Jurisdictional Basis for the Relief Sought

This Court has power to grant writs of error coram nobis under the All Writs Act, 28 U.S.C. § 1651, and Article 66, UCMJ. *See also* JRAP 19(b)(1). Its "jurisdiction to issue the writ derives from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review." *United States v. Denedo*, 556 U.S. 904, 914 (2009).

Statement Regarding Appellate Counsel

Sergeant Bergdahl is represented by the Defense Appellate Division, Art. 70, UCMJ, and the civilian attorneys listed below.

Conclusion

A writ of error coram nobis should issue dismissing the charges and specifications with prejudice.

Respectfully submitted.

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Certificate of Service

I certify that a copy of the foregoing was sent via electronic submission to the Clerk of Court and the Government Appellate Division on October 23, 2020.

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