IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Sergeant ROBERT B. BERGDAHL U.S. Army, *Appellant*. v. UNITED STATES, *Appellee*.	)))))))))))	APPELLANT'S REPLY TO APPELLEE'S ANSWER TO WRIT-APPEAL PETITION Crim. App. No. 20200588 USCA Dkt. No. 21-0091/AR

TO THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

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Introduction

After the Rose Garden event with Senator McConnell at which President Trump ratified his campaign trail vilification of Sergeant Bergdahl, the defense renewed its motion to dismiss for apparent UCI. Judge Nance denied that motion, as he had two earlier UCI motions (one involving President Trump earlier in 2017 and the other involving Senator McCain in 2016). As support for his ruling, Judge Nance claimed that he was immune to presidential UCI because he was going to retire. He never disclosed that he had applied for a position at the Justice Department. This was contrary to R.C.M. 902(a) and Rule 2.11 of the Army Rules of Judicial Conduct for Trial and Appellate Judges.

Judge Nance's failure to disclose the true state of affairs has serious legal implications. First, it adds a salient fact to the knowledge imputed to a disinterested observer—a member of the general public—in determining whether such an observer would harbor a significant doubt as to the fairness of the proceedings. That question was considered by the Court on direct review and resolved by a 3-2 vote in the government's favor. The new information concerning whether Judge Nance had misled the defense requires not only that the "intolerable strain" bottom line be considered anew, but also that that issue, as to which the government has the burden of proof beyond a reasonable doubt, be resolved in Sergeant Bergdahl's favor.

Judge Nance's lack of candor is also salient because—*UCI aside*—it denied Sergeant Bergdahl a fair trial before an impartial judge. Had Judge Nance disclosed his Justice Department application, Sergeant Bergdahl would have had to be afforded an opportunity to conduct midstream *voir dire*. In light of the information regarding Judge Nance's effort to land a job with the Justice Department—in a part of DOJ that is key to one of President Trump's signature issues—as well as whatever additional information would have been gleaned through *voir dire*, Sergeant Bergdahl would have had to be afforded an opportunity to challenge Judge Nance, revisit forum selection, change pleas, and ask a successor judge to consider afresh the defense motions that Judge Nance had denied.

The net effect was a denial of due process. This issue was not before this Court on direct review but was raised before the Army Court in tandem with the apparent UCI issue when this Court denied reconsideration and leave to supplement the record without prejudice to Sergeant Bergdahl's right to seek a writ of error coram nobis from the appropriate court.

In its answer, the government has advanced a variety of claims that are either without merit, require no response, or, in one respect, are highly improper. Most of it is addressed to the threshold issue of timing rather than either the merits or what relief is warranted. Because the UCI issue was extensively briefed here on direct review and below on coram nobis, there is not much to add on that score. The due

process point is suitably developed in the writ-appeal petition. The government has said almost nothing with respect to relief.

A

Threshold Criteria

The government complains that we have offered no explanation for not having availed ourselves of FOIA at an earlier date, but that is not so. An accused who takes a military judge's personal word in both open court and a written ruling for a matter of fact, and that word is fair on its face, cannot be accused of sleeping on his rights if he fails to investigate the judge's veracity or candor. Even after it became known that Judge Nance had been hired by DOJ, the defense had every reason to continue to take his word for his future employment plans, since, as far as we knew, he could have applied after Sergeant Bergdahl's trial was over.

The military justice system would grind to a halt if the parties had to proceed on the basis that no judge can be trusted to tell the truth, the whole truth, and nothing but the truth—and that accused personnel must avail themselves of external remedies such as the FOIA on pain of being found to have waived their right to the writ of error coram nobis, the purpose of which, after all, is to achieve justice.

The government argues (at 16) that since Al-Nashiri's attorney's sought relief only six days after the Justice Department issued a press release that revealed the hiring of both Judge Spath and Judge Nance, Sergeant Bergdahl should have done

so as well. But Sergeant Bergdahl and his lawyers were unaware of that press release. It was not published in the *Federal Register* and notice of it therefore cannot be imputed to persons without actual knowledge of it. Even if we had known of the press release when it was issued, it did not say when Judge Nance had applied, so it would not have demonstrated that he had misled the defense at trial.

Recognizing this flaw in its argument, the government insists (at 17) that Sergeant Bergdahl "could have raised the issue while his case was pending direct appellate review before this Court" when *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), was decided. *See also id*. at 18. This is incorrect. Sergeant Bergdahl raised the *Al-Nashiri* issue while this case was on direct review: his petition for reconsideration was pending. What is more, the case is *still* pending on direct appellate review, as the period for seeking certiorari has not expired. Finality has not attached. *See* R.C.M. 1209(a)(2)(B)(iii). For this reason, the government's reference (at 11) to the interest in finality of judgments is entirely misplaced.

In contrast to its fixation on when the defense was so clearly on notice that Judge Nance had misled us at trial that we should have invoked the FOIA, the government has remained mute as to when those of its personnel who had an affirmative duty of disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963) and AR 27-10, learned that he had been economical with the truth. We respectfully suggest that this estops it to complain about the timing of our FOIA request.

Our earlier submissions have addressed the unreported lower court cases on which the government relies in response to our showing that finding Sergeant Bergdahl's petition tardy would be an extreme application of the threshold criteria, and unfair because it was being invoked after the fact. The government's position on laches (19-20) is that it need not show prejudice. This flies in the face of the authorities we have cited. Sergeant Bergdahl did not unreasonably delay, but even if he did, the government suffered no prejudice.

Finally, the government argues (at 18 n.9) that the timing of Sergeant Bergdahl's petition for a writ of error coram nobis precluded his ability to file a new trial petition, and that it should therefore be denied. This is fallacious because *Denedo* asks only *whether* some other remedy exists, not why one does *not* exist. *United States v. Denedo*, 66 M.J. 114, 126 (C.A.A.F. 2008), *aff'd & remanded*, 556 U.S. 904 (2009). That factor functions, if anything, as a shield for Sergeant Bergdahl, not as a sword for the government.

B

Merits

Contrary to the government's submission (at 27-28), this is not a case in which a violation of R.C.M. 902(a) and the Rules of Judicial Conduct for Army Trial and Appellate Judges is evaluated for plain error. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011), was a plain error case because defense counsel was aware of

the violation at the time it occurred and did not object. *Id*. at 156. Because Judge Nance's failure to disclose was not known until well after the trial, plain error plays no role. That failure itself prevented Sergeant Bergdahl from raising the matter at trial. The government's analysis of the merits therefore proceeds on a mistaken premise.

The government claims (at 26) that Sergeant Bergdahl's contention that Judge Nance's statements were misleading or "not candid" takes them out of context and is "completely speculative." Neither is true. The statements themselves are a matter of record, both on the verbatim transcript and in Judge Nance's written ruling on Sergeant Bergdahl's renewed UCI motion. He made those statements as to his plans in direct support of his claim that he was impervious to UCI. If there was "context" that needed to be added, the government could have sought to do so below. It never did.[1] Even now, it has not submitted a statement from Judge Nance, nor has it even hinted at what "context" might soften the blow of his misleading statements.

Without ever citing *Tumey v. Ohio*, 273 U.S. 510 (1927), the government cautions this Court (at 24) not to conclude that Judge Nance had a pecuniary interest. Of course he had such an interest: landing a well-paid position as an immigration

[1] The government observed below that the Army Court "may order [it] to obtain an affidavit from the military judge." Gov't Answer at 16 n.10. But the Army Court did not do so, and the government's papers are silent as to what efforts, if any, *it* made to secure an affidavit from Judge Nance without a court order.

judge.[2] Disclosure would have exposed him to uncomfortable midstream *voir dire* on a personal matter in open court, in a case the media were closely covering, and especially on an issue as explosive as apparent UCI committed by the incumbent President. For a competitive position, any breath of controversy could have spoiled his chances. He had a clear interest in keeping Sergeant Bergdahl in the dark about his actual future employment plans. A disinterested member of the general public not only *could*, but *would* so conclude.

The government suggests (25-26) that Sergeant Bergdahl's argument "fails to appreciate" the processes for hiring and supervising immigration judges. Its point seems to be that the President and his alter ego, the Attorney General, play no role. We respectfully refer the Court to Judge Tatel's opinion in *Al-Nashiri*, which observes: "it is enough to decide this case to know that the Attorney General himself is directly involved in selecting and supervising immigration judges." 921 F.3d at 235. The government never addresses the fact that immigration was a signature issue for President Trump. Judge Nance had a clear motive for not coming down too hard on him by dismissing a high-profile case as the defense had asked.

[2] The salary range was $144,042 to $172,100. Gov't App. Ex. A. A disinterested member of the general public would consider that a significant incentive, especially when added to the retired pay of a 30-year colonel.

The government claims (at 23) that we have misconstrued its position regarding whether *United States v. Snyder*, 2020 CCA LEXIS 117 (A.F. Ct. Crim. App. Apr. 15, 2020), *pet. denied*, No. 20-0336/AF, 2020 CAAF LEXIS 628 (C.A.A.F. Nov. 13, 2020), suggests that *Al-Nashiri* is "limited to military commissions." Not so. The government's coram nobis answer below stated (at 11) that in *Snyder* "the AFCCA rejected an appellant's attempt to extend the D.C. Circuit's opinion in *Al-Nashiri* to Judge Spath's service as a military judge in a court-martial." As for whether *Al-Nashiri* is distinguishable on the basis that the Justice Department was involved in the prosecution of that case, the same thing is true here. The prosecution cited its need for training by attorneys from that department as a reason to reschedule the hearing on its unsuccessful Article 62, UCMJ, appeal. *See* Gov't Motion for Extension to File Brief in Support of an Appeal Under Art. 62, UCMJ, *United States v. Bergdahl*, Dkt. No. ARMY M20160118, at 3 (Army Ct. Crim. App. filed Mar. 8, 2016). Opposing appellate counsel told us at the time that they needed to consult with the Justice Department in connection with that appeal. DOJ also assisted trial counsel in the discovery process. *See* Gov't Response to Eighth Defense Motion to Compel (Apparent Unlawful Command Influence), 37 R. (G APP 96, at 2 (filed Aug. 31, 2017)).

In support of its claim that Sergeant Bergdahl was not prejudiced, the government says (at 28) that "the record demonstrates numerous attempts" by him,

even before the preliminary hearing, "to enter into an offer to plead guilty with the convening authority." In addition to being irrelevant, this assertion is improper. *See* MIL. R. EVID. 410(a)(4); *see also* MIL. R. EVID. 408.

Finally, with respect to the apparent UCI issue, as to which there is now more evidence before the Court than there was when the case was decided last August, the government contends (at 30) that the danger that a member of the public would perceive injustice "was non-existent, or at a minimum, considerably diminished" by Sergeant Bergdahl's guilty plea and his acquittal of all but one day of the five-year period of desertion the government charged. Similarly, it contends (at 30-31) that that danger "was considerably diminished because he had requested a dishonorable discharge.

We have previously explained why the plea, sentencing argument, partial acquittal, treatment of President Trump's persistent vilification as (non-UCI) mitigation, and ostensible duration of Judge Nance's deliberations do not help satisfy the evidentiary burden the government must carry beyond a reasonable doubt in order to prevail.[3] Assuming *arguendo* the balance was correctly struck on direct review, it must be struck again—in light of that same exacting test—on the basis of

[3] *E.g.*, Appellant's Petition for Reconsideration at 15-16, *United States v. Bergdahl*, Dkt. No. 19-0406/AR (C.A.A.F. filed Sept. 7, 2020); Reply to Amended Answer to Motion to Supplement the Record at 8-9, *United States v. Bergdahl*, Dkt. No. 19-0406/AR (C.A.A.F. filed Sept. 29, 2020).

what is now the entire record. If "considerably diminished" is a proper characterization, as the government's repeated use of it suggests, it is insufficient and the Court must find that an undue strain has indeed been placed on public confidence.[4]

C

Relief

The government spends almost no time discussing relief because, in its view, Sergeant Bergdahl was not prejudiced by Judge Nance's misleading remarks and because there was no apparent UCI. We disagree for the reasons stated below and in the writ-appeal petition. If Sergeant Bergdahl is entitled to relief on either of his claims, dismissal with prejudice is warranted.

On the government's view (29-30), no relief is warranted on the fair-trial claim because Sergeant Bergdahl pleaded guilty and any judge would have awarded

[4] The government argues (at 32 n.17) that the Court need not look beyond the plea and sentencing phases because Sergeant Bergdahl's claim "does nothing to disrupt this Court's finding of no apparent UCI with respect to the investigative, preferral, referral, convening authority action or appellate review of the case." But UCI is evaluated both phase-by-phase and cumulatively. All phases must be taken into account in the cumulative analysis. In addition, events downstream of the plea and sentencing phases may be influenced by events upstream. This is particularly true with regard to clemency, as to which the convening authority, under the then-applicable terms of the Code, enjoyed unfettered discretion. There were certainly facts that could justify a grant of post-trial clemency. *See United States v. Bergdahl*, 79 M.J. 512, 531, 533 (Army Ct. Crim. App. 2019) (Ewing, J. dissenting in part), *aff'd*, 80 M.J. 230, 233, 242-43 (C.A.A.F. 2020).

a dishonorable discharge. But he had a right to candor from Judge Nance, and did not get it. He had a right to additional *voir dire*, and did not get it either. That he pleaded is no answer to this. Nor was a dishonorable discharge inevitable given the evidence that he suffered from a severe mental disease or defect, the additional compelling mitigating circumstances of his five years in brutal captivity and escape attempts, and his proven value as a "goldmine" of intelligence. It is sheer speculation to assume that any judge (or members) would necessarily have adjudged a dishonorable discharge.

The government claims (at 30) that reversal is unnecessary "to preserve justice in other cases," invoking Chief Judge Stucky's observation that "[t]his case is unique in American military jurisprudence." 80 M.J. at 245. This conveniently omits his *next* sentence: "Let us hope that we shall not see its like again." Moreover, he was not referring to the fact that Judge Nance had misled Sergeant Bergdahl, but to the conduct of President Trump and Senator McCain.

Nor is the uniqueness of the case a reason to deny relief; quite the opposite. Many things have happened in our country that no one would have imagined only a few years ago. Any step that can help draw a bold line under Sergeant Bergdahl's case as a deterrent for the future is worthy of the most prayerful consideration. Events subsequent to the Court's decision on direct review dramatically underscore the importance of coming down hard, decisively, and preferably with one voice, as

the Supreme Court did in *United States v. Nixon*, 418 U.S. 683 (1974), when any President or other senior civilian or military official displays contempt for the rule of law—including, as here, the administration of military justice.

The government's third reason for opposing dismissal—that it is not required to preserve confidence in the military justice system (30)—fares no better. At the remedies stage, the Court exercises broad discretion, addressing such factors as the nature and gravity of the UCI (here, extremely grave), the presence or absence of personal animus (here, plainly present), whether the UCI was generic or person- or case-specific (here, by name), whether remedial action has been taken by the wrongdoer or others (here, none—including the sham statement from the White House Press Office), the seniority of the wrongdoer (here, the commander in chief), and whether the wrongdoer is a recidivist (time and again, in the Rose Garden, the day-of-sentencing "disgrace" tweet, and even during appellate review). Attention must also be paid to the need to deter others in the future. The pertinent factors thus all point in the direction of dismissal with prejudice. The military justice system cannot run the risk of a repetition of what happened in this case. That is why this Court must not only talk the talk of "bulwark," but walk the walk as well.

On a clean slate, the normal remedy would be a rehearing at which Sergeant Bergdahl could make a new forum election and a new decision about how to plead. Having nothing to lose, he could litigate the charges. A rehearing would be costly

and burdensome and would serve no purpose given the fact that no greater sentence could be adjudged. The government has offered no answer to this. Nor has it disputed our contention that the Court can enter such an order in the interests of justice. *E.g.*, *United States v. Hilton*, 33 M.J. 393, 394 (C.M.A. 1991).

Conclusion

Reasonable diligence is all that is required of a coram nobis petitioner, and Sergeant Bergdahl easily meets that test. The government's ability to respond to his petition has in no way been prejudiced. Where, as here, substantial issues of judicial candor and due process are presented, and, above all, the "mortal enemy of military justice" has reared its head, the Court should address them head on in keeping with its time-honored role as a bulwark. Oral argument is fully warranted. The Court should reverse, grant the petition, and dismiss the charges and specifications with prejudice.

Respectfully submitted.

for

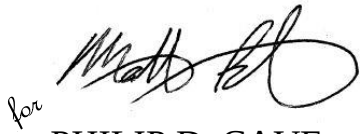
EUGENE R. FIDELL
CAAF Bar No. 13979
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Ste. 400
Washington, DC 20036
(202) 256-8675 (mobile)
efidell@feldesmantucker.com

MATTHEW D. BERNSTEIN
Major, Judge Advocate
CAAF Bar No. 35859
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(202) 838-7894
matthew.d.bernstein9.mil@mail.mil

FRANKLIN D. ROSENBLATT
CAAF Bar No. 36564
Butler Snow LLP
1020 Highland Colony Pkwy. #1400
Ridgeland, MS 39157
(601) 985-4494
franklin.rosenblatt@butlersnow.com

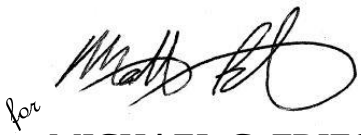
JONATHAN F. POTTER
CAAF Bar No. 26450
Senior Appellate Counsel
Defense Appellate Division

STEPHEN A. SALTZBURG
CAAF Bar No. 26415
2000 H St., N.W.
Washington, DC 20052
(202) 994-7089
ssaltz@law.gwu.edu



PHILIP D. CAVE
CAAF Bar No. 22647
1318 Princess St.
Alexandria, VA 22314
(703) 298-9562
mljucmj@court-martial.com

January 11, 2021



MICHAEL C. FRIESS
CAAF Bar No. 33185
Colonel, Judge Advocate
Chief Defense Appellate Division

ANGELA D. SWILLEY
CAAF Bar No. 36437
Lieutenant Colonel, Judge Advocate
Dep. Chief Defense Appellate Division

SABIN WILLETT
CAAF Bar No. 37214

CHRISTOPHER L. MELENDEZ
CAAF Bar No. 37216

SEAN T. BLIGH
CAAF Bar No. 37215
Morgan, Lewis & Bockius LLP
One Federal St.
Boston, MA 02110-1726
(617) 951-8775
sabin.willett@morganlewis.com

Appellate Defense Counsel

Certificate of Compliance with Rule 24(d)

I certify that the foregoing Appellant's Reply to Appellee's Answer to Writ-Appeal Petition complies with the type-volume limitation of Rule 24(d) because it contains 3226 words. It also complies with the typeface and type style limitations of Rule 37.

Matthew D. Bernstein

Certificate of Filing and Service

I certify that a copy of the foregoing Appellant's Reply to Appellee's Answer to Writ-Appeal Petition was sent via electronic submission to the Clerk of the Court and the Government Appellate Division on January 11, 2021.

Matthew D. Bernstein