UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

In re: Grand Jury Subpoena,)) CHELSEA MANNING,)) Subpoenaed Party.) _____)	**MOTION FOR RELEASE PENDING APPEAL** **Misc. 19-1287-cv**

MOTION FOR RELEASE PENDING APPEAL

Comes now, Chelsea Manning, through counsel, and respectfully moves this Court to reverse the decision of the United States District Court for the Eastern District of Virginia and release Ms. Manning pending the disposition of her expedited appeal in this Court. Ms. Manning makes this motion pursuant to 28 U.S.C. §1826(b)[1], Federal Rule of Criminal Procedure 46(c), and 18 U.S.C. §3143(b). As a sanction has been imposed on Ms. Manning as a result of the final contempt finding, this is an appeal as of right. Counsel is available for oral argument upon the Court's request.

BRIEF STATEMENT OF THE CASE

Chelsea Manning is recognized world-wide as a champion of the Free Press and open government. In 2013, Ms. Manning, then an all-source

[1] As part of a stipulation with respect to an extension of time, Ms. Manning has waived her right to base any application of bail on her right to have her appeal decided within thirty days. This motion for bail is not based on that grounds, but the error of the district court in denying the initial application for bail, and the transformation of her confinement, without due process of law, from coercive to punitive.

intelligence analyst for the U.S. military, was convicted at a United States Army court martial for disclosing classified information to the public. She was sentenced to thirty-five years imprisonment and a dishonorable discharge. She was confined under onerous conditions, including but not limited to prolonged solitary confinement. In 2017 her sentence was commuted by then-President Barack Obama.

In March, 2019, she was summoned to appear and give testimony before a grand jury impanelled in the Eastern District of Virginia. She appeared, and filed under seal an Omnibus Motion to Quash on the grounds that the subpoena itself and/or questions to be asked before the grand jury were premised on unlawful electronic surveillance; impermissibly intruded upon constitutionally protected conduct and associations; violated her right against compelled self-incrimination; and were an improper use of grand jury subpoena power. As a secondary issue, Ms. Manning contested the government's insistence that all pleadings and hearings be kept under seal.

Ms. Manning was granted immunity from both domestic and military prosecution. On Tuesday, March 5, after a brief hearing held under seal, all her motions were denied, with the understanding that the same or similar motions would later be appropriately revisited with respect to specific grand jury questions.

The following day, March 6, 2019, Ms. Manning appeared before the grand jury. She was asked a series of questions, and in response invoked her First, Fourth, Sixth, and other statutory rights. The government made an immediate application for a finding of contempt and after a brief conference in a closed courtroom, a contempt hearing was scheduled for Friday, March 8. On that day, the government conceded that some part of the contempt hearing could be held in open court. After hearing arguments in a closed courtroom, Judge Hilton ruled that Ms. Manning lacked just cause for her refusal to testify. He then opened the courtroom, and publicly reiterated that he had found her in civil contempt of his order to cooperate with the grand jury.

Argument then took place about sentencing. Specifically, Ms. Manning raised grave concerns about whether the jail could accommodate her daily post-surgery medical needs. She reminded the government and the Court that the only legitimate purpose of civil confinement is coercion, and that such confinement may not permissibly be transformed into punishment without due process of law. One pointed issue that was discussed in letters submitted to, but not read by the District Court prior to ruling[2], were concerns that the jail should not subject Ms. Manning to prolonged solitary confinement, which UN Special Rapporteur Juan

[2] Counsel for Ms. Manning presented both the government and the Court with documents and letters from Ms. Manning's surgeon, her doctor, a medical expert in transgender health, and two of the world's foremost experts on the risks faced by transgender prisoners. See Exhibit A. Judge Hilton received this packet of letters and set them aside. He did not read them prior to ruling. He did not even flip through them or unfasten them from the binder clip with which they were secured.

Mendez has identified as "cruel, degrading, and inhuman."[3] Such treatment is punitive by definition. See Exhibit A. On the basis of 28 U.S.C. 1826(a) and (c), which clearly contemplate confinement at "a suitable place" *other than* a "facility," Ms. Manning proposed home confinement with an ankle monitor for the duration of the grand jury.

The District Court ordered Ms. Manning remanded to the custody of the Alexandria Detention Center, without any explicit comment or ruling on her motion for bail pending appeal. Ms. Manning has timely filed her notice of appeal, and now requests that this court grant bail pending the resolution of the appeal.

LEGAL ARGUMENT

I. The District Court's Denial of Release Pending Appeal Did Not Comply With F.R.A.P. 9(b).

As a preliminary matter, Ms. Manning believes that the constructive denial of her application to bail pending appeal at the district level occurred in violation of Rule 9 of the Federal Rules of Appellate Procedure, which requires the court to state in writing its reasons for its refusal. This requirement is not a mere procedural

[3] Preface to the 2014 Spanish Edition of Sourcebook on Solitary Confinement by Sharon Shalev *available at* http://solitaryconfinement.org/uploads/JuanMendezPrefaceSourcebookOnSolitaryConfinementTranslation2014.pdf

technicality, and may not be fulfilled by a "mere parroting of the standards set forth in the statute." United States v. Thompson, 452 F.2d 1333 n.7 (D.C. Cir. 1971).

During the hearing, counsel for Ms. Manning requested bail, pointing out that a non-frivolous appeal would be filed forthwith, and that Ms. Manning was clearly not a flight risk nor a danger to the community. The government did not disagree. Judge Hilton did not comment at all. Counsel for Ms. Manning also presented evidence regarding the risks of incarceration faced by Ms. Manning. See Exhibit A. Judge Hilton did not read or comment on this evidence.

Without explicitly ruling on the motion for bail, he ordered Ms. Manning to the custody of the Attorney General. He issued no written denial or justification therefor, nor did he issue any verbal rationale for his denial of bail.

In light of the fact that Judge Hilton's ruling is not meaningfully preserved for appellate review, release pending the determination of this appeal is an appropriate remedy.

II. Ms. Manning Meets All the Criteria for Bail Set Forth in the Constellation of Relevant Statutes.

A. Statutory scheme

Under 28 U.S.C. § 1826(b), "no person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal . . . if it appears that the appeal is frivolous or taken for delay." Thus, if the appeal is

neither frivolous nor taken for the purposes of delay, bail should be granted. In re July 1979 Term Special Grand Jury, 656 F.2d 64, 66 (4th Cir. 1981)("…§1826(b) contemplates a liberal standard for granting bail"); Yates v. United States, 356 U.S. 363, 366, 78 S. Ct. 766, 768, 2 L. Ed. 2d 837 (1958); Tierney v. United States, 409 U.S. 1232, 1233, 93 S. Ct. 17, 18, 34 L. Ed. 2d 37 (1972) (in which the plain language of the statute is straightforwardly applied and bail granted); Rehman v. State of Cal., 85 S. Ct. 8, 9, 13 L. Ed. 2d 17 (1964) (bail pending appeal should be denied 'only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release.', quoting Leigh v. United States, 82 S. Ct. 994, 996, 8 L. Ed. 2d 269 (1962). The "substantial question" inquiry typically made of bail applications in *criminal* proceedings is here replaced by the "non-frivolous" inquiry.

This statute may be read in conjunction with the Federal Rule of Criminal Procedure 46(c), and 18 U.S.C. §§3143(b), all of which militate toward release pending appeal unless one of four conditions exists: 1) it appears the appeal is frivolous, 2) it appears the appeal is taken for delay, 3) the court or the judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee, or 4) the court or the judge has reason to believe that the defendant poses a danger to any other person or to the community. In the absentceof these four conditions, bail is mandatory. Civil contemnors are *not* subject to a heavier burden than any other appellant. Indeed, the Supreme Court

has made clear that in such cases, bail should be denied "only for the strongest of reasons." Sellers v. United States, 89 S. Ct. 36, at 38, 21 L. Ed. 2d 64 (1968).

First, as was noted during the contempt hearing, Ms. Manning is not a flight risk. She appeared at not only the preliminary quash hearing and the grand jury appearance, but also at the contempt hearing two days after the grand jury appearance, which she correctly anticipated would end in her incarceration. Second, she is not a danger to the community, and the government has not contended that she is. Since the commutation of her sentence she has lived a subdued and law abiding life. Third, this appeal is being undertaken as expeditiously as possible, and is on an expedited schedule. It is not in any way being taken for purposes of delay. Finally, the appeal is not frivolous. Arguments regarding the non-frivolous nature of this appeal are explored in detail below.

On the basis that none of the four factors militating against bail are present, let alone "the strongest of reasons" that would rationalize a denial, Ms. Manning must be released on bail pending appeal.

B. Ms. Manning's Appeal Is Not Frivolous

Ms. Manning has raised several substantial grounds for appeal. The Appellate Brief filed with this Court on Friday, March 29, 2019, fully sets forth the non-frivolous grounds for her appeal. They are briefly reiterated below in abridged form for purposes of demonstrating their non-frivolous nature.

i. The argument that the finding of contempt must be vacated because the District Court denied the electronic surveillance motion contrary to and without considering the relevant facts presented or the controlling law is not frivolous.

In her Omnibus Motion to Quash, and at both the March 5 and March 8 hearings, Ms. Manning set forth reasons for her good faith belief that she had been subjected to electronic surveillance pursuant to 18 U.S.C. §§2515 and 3504[4]. A grand jury witness is entitled to refuse to answer questions derived from the illegal interception of communications. The recalcitrant witness statute plainly affords a "just cause" defense to civil contempt charges. Gelbard v. United States, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972); In re Askin, 47 F.3d 100, 102 (4th Cir. 1995). In order to determine whether such just cause exists, a witness must raise an allegation of unlawful government surveillance sufficient to trigger the

[4] In a declaration filed prior to hearing, Ms. Manning provided her phone numbers, addresses, and email addresses, and the time period during which she believes her communications were being intercepted. She described surveillance vans outside her apartment, and suspicious interactions with strangers. She raised a logical claim regarding the probability that any "inconsistent" statements the government believes to have been made by her were more likely intercepted, misunderstood, and misattributed electronic communications.

It is in no way unreasonable for Ms. Manning, a former intelligence analyst publicly reviled by high-ranking members of the U.S. government, to believe that she is under fairly intense electronic surveillance. That Ms. Manning was released after her commutation does not in any way mean that the National Security Agency, Federal Bureau of Investigation, Central Intelligence Agency, and Defense Intelligence Agency, all of which undeniably engage in wide-ranging, often unlawful intrusions into people's privacy, have not continued to make her the subject of intense surveillance. Though she has lived a law-abiding life since 2010, the government has not hidden their belief that Ms. Manning figures heavily in their deeply suspicious narratives about national security. There is no doubt that she is subject to physical surveillance, and it frankly strains credulity to imagine that she is *not* being surveilled electronically. Ms. Manning raised these issues and more in her declaration, and in so doing, made a prima facie showing.

government's obligation to either affirm or deny that such surveillance occurred. In re Grand Jury Subpoena (T-112), 597 F.3d 189, 200 (4th Cir. 2010).

The Fourth Circuit clearly accepts such a motion as a legitimate legal claim, and requires that it be considered and ruled upon. Judge Hilton denied the motion *sub silentio,* without explicitly ruling on it, or commenting on it in any manner so as to justify the denial or allow for meaningful appellate review.

Ms. Manning made a prima facie showing sufficient to trigger the government's obligation to affirm or deny electronic surveillance. Thus, the government should have been required by Judge Hilton to respond to Ms. Manning's allegations. A failure of the government to respond sufficiently in the face of a prima facie allegation of electronic surveillance constitutes ground for an appeal of the issue. A failure to make *any* denials has been viewed as sufficient *in itself* to justify vacatur of a contempt. In re Grand Jury Subpoena (T-112), 597 F.3d 189, 210 (4th Cir. 2010), Traxler, *concurrence.*

Here, rather than the government making insufficient denials, the district court did not even consider Ms. Manning's claim that any denials were required. The government made conclusory statements to the effect that they did not believe their obligations were triggered by her claims, but notably they made absolutely no effort whatsoever to deny that electronic surveillance occurred. On March 5, at the close of the hearing, Judge Hilton denied Ms. Manning's motions to quash. He said

nothing whatsoever as to her request for affirmations or denials of electronic surveillance.

During the contempt hearing held March 8, counsel for Ms. Manning renewed the issue of electronic surveillance, referring to Ms. Manning's declaration and the arguments of March 5. The specific basis for the renewal was that at least one question seemed to contain an assumption about Ms. Manning's motivations that had no basis in fact or any prior statement made by Ms. Manning. Therefore, counsel for Ms. Manning reminded the court that a witness in a contempt hearing is entitled to the information in the possession of the government that would support their claim to having just cause excusing their testimony. The government did not respond at all to the §3504 motion during any part of the contempt hearing.

At the close of an extremely brief hearing in a closed courtroom, Judge Hilton found Ms. Manning lacked just cause for her refusal to answer questions before the grand jury. He held her in contempt. At no point did he mention the electronic surveillance motion, or indeed, any of the arguments that had been put before him.

Judge Hilton did not seem to even consider the possibility that the government might have an obligation to disclose whether or not surveillance occurred, despite clear Fourth Circuit law supporting that proposition. The denial of the §3504 at the district level was an abuse of judicial discretion. The error is

compounded by the failure of the district court to consider the arguments, or even make a clear ruling on them. As Judge Hilton's failure to even consider the argument constitutes reversible error, it was not improper for Ms. Manning to decline to testify before the grand jury.

This issue is not frivolous.

ii. The issue of whether the finding of contempt must be vacated because the District Court failed to demand from the government even minimal assurances of grand jury regularity despite ample evidence of abuse is not frivolous.

At the contempt hearing, Ms. Manning pointed out that while a presumption of regularity does attach to grand jury proceedings, it may be rebutted. Once arguments are raised that call into question the propriety of a subpoena or questions asked before the grand jury, it is incumbent upon the court to order the government to furnish evidence that the purpose of a grand jury, or a particular subpoena, or even a particular question, is not improper. Mullaney v. Wilbur, 421 U.S. 684, 702 ns. 30 and 31 (1975).

Ms. Manning put before the District Court evidence sufficient to justify her concerns. She pointed out in her papers and at the March 5 hearing that both the current President and the Secretary of State (formerly head of the Central Intelligence Agency) have publicly expressed resentment at President Barack Obama's commutation of her sentence. Furthermore, because her testimony before

the grand jury would be identical to her previous testimony, it would be impermissibly redundant.

At the contempt hearing, Ms. Manning specifically identified the ways in which some of the questions asked were intended to undermine her credibility and could not possibly have yielded information relevant to a criminal investigation.

Finally, Ms. Manning pointed out that the government was clearly asking her questions to which they already knew the answers — that is, re-questioning her about the 2010 disclosure about which she had already testified truthfully and exhaustively at her court martial. As her testimony would be identical, it would in fact run contrary to the government's theory of any case involving anyone besides Ms. Manning — who cannot herself be re-prosecuted for any offenses of which she was already convicted. This situation therefore gives rise to an incentive for the government to use the grand jury to prepare for trial by undermining her as a defense witness.

Thus, Ms. Manning effectively raised substantiated concerns that the subpoena was motivated by an improper purpose; that it was intended as a mechanism of exposure and harassment; and that is was being used as a vehicle for trial preparation.

In spite of the evidence presented, no actual inquiry was made of government with respect to Ms. Manning's specific and concrete objections. The court might have been satisfied merely by an in camera recitation of the specific

reasons for calling this witness and for asking the particular questions. But there *is* a minimal expectation that the government will satisfy the court that the sole and dominant purpose of the subpoena is proper, and that the witness in fact is able to add something of value to the grand jury's investigation.

The law is clear:

> "The principles that the powers of the grand jury may be used only to further its investigation, and that a court may quash a subpoena used for some other purpose, are both well recognized." United States v. Moss, 756 F.2d 329, 332 (4th Cir. 1985). Thus, "practices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden. This includes use of the grand jury by the prosecutor to harass witnesses or as a means of civil or criminal discovery."
> United States v. (Under Seal), 714 F.2d 347 (4th Cir. 1983).

Furthermore, "once a criminal defendant has been indicted, the Government is barred from employing the grand jury for the 'sole or dominant purpose' of developing additional evidence against the defendant." United States v. Bros. Constr. Co. of Ohio, 219 F.3d 300 (4th Cir. 2000).

Given that Ms. Manning seems to have been subpoenaed only *after* a charging document issued[5], evidence suggests that it was the government's intent

[5] Based on reporting which, per the editorial standards of the Washington Post, verified with two government sources possessed of personal knowledge, there is already a charging instrument that has issued with respect to this grand jury. See e.g.: Prosecutors Think Chelsea Manning made 'false or mistaken' statements during military trial, her lawyers say, *available at:* https://www.washingtonpost.com/local/legal-issues/prosecutors-think-chelsea-manning-did-not-tell-truth-about-wikileaks-her-lawyers-say/2019/03/21/ded935a2-4be8-11e9-9663-00ac73f49662_story.html?noredirect=on&utm_term=.2365db80e76a *last visited March 28, 2019.*

to impermissibly "use the grand jury to improve its case in an already pending trial by preserving witness statements, locking in a witness's testimony, pressuring potential trial witnesses to testify favorably, or otherwise employing the grand jury for pretrial discovery." United States v. Alvarado, 840 F.3d 184 (4th Cir. 2016). See also United States v. Moss, *supra,* ("it is the universal rule that prosecutors cannot utilize the grand jury solely or even primarily for the purpose of gathering evidence in pending litigation").

At the conclusion of contempt proceedings, Judge Hilton found, without considering the facts, law, arguments, or evidence presented, that Ms. Manning lacked just cause excusing her testimony. He justified his decision based not on any arguments raised, but solely on his contention that, being immunized, Ms. Manning was not entitled to refuse to answer questions. He made no comment whatsoever on the issue of grand jury abuse.

As it was abuse of discretion for the Judge not to have considered these arguments and required the government to satisfy the sole and dominant purpose test, the foregoing constitutes a non-frivolous basis for appeal.

iii. The finding of contempt must be vacated because the District Court held the significant portions of the contempt hearing in a closed courtroom in violation of the Fifth and Sixth amendments to the United

States Constitution and F.R.Crim.P. Rule 6(e)(5). This argument is not frivolous.

The District Court ordered that the hearings on March 5 and 6, and the contempt proceedings held March 8, 2019, be closed to the public, presumably acting pursuant to the grand jury secrecy requirement articulated in Fed. R. Crim. P. 6(e). The Court held the entirety of the three days of proceedings in a closed courtroom over Ms. Manning's objection, only perfunctorily opening the courtroom *after* finding Ms. Manning in contempt. The courtroom was opened, the District Court repeated its finding of contempt, allowed the parties brief argument as to sentencing, and ordered Ms. Manning into confinement. The brief opening of the courtroom for the conclusion of the sanction proceedings was inadequate and violated Ms. Manning's rights to due process and a public trial.

The text of Rule 6(e)(5) recognizes that the fundamental rights implicated by contempt proceedings and sanctions are paramount to grand jury secrecy. A "[c]ourt must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. Rule 6(e)(5), *emphasis added*. This imperative requiring closure of the courtroom is conditional and "subject to any right to an open proceeding." Id. A court's decision to close contempt hearings to the public affects the rights of the alleged contemnor as well

as those of the press and the public because "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public," Waller v. Georgia, 467 U.S. 39, at 46 (1984) (reversing conviction because exclusion of public from multi-day suppression hearing regarding sensitive wiretap information violated defendants' Sixth Amendment right to public trial).

Although secrecy is the defining feature of the grand jury, courts have long recognized that Fifth Amendment due process rights and Sixth Amendment public trial rights apply to proceedings finding and sanctioning a grand jury witness for civil contempt. In re Oliver, 33 U.S. 257 (1948)(reversing finding of civil contempt made and punished in closed proceeding because "it is 'the law of the land' that no [person]'s life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal" and finding further that "Summary trials for alleged misconduct called contempt of court have not been regarded as an exception to this universal rule against secret trials…"). In the matter of In re: Rosahn, the Second Circuit joined the majority of federal circuits to hold that the Fifth Amendment requires that alleged civil and criminal contemnors

both be afforded the same procedural safeguards, including the right to counsel and the right to a public contempt hearing. 671 F.2d 690 (2nd Cir., 1982).

The Government did not assert any compelling governmental interests for closure of the proceedings in the District Court . The District Court incorrectly presumed that the contempt hearing should and must be closed, did not require the government to articulate a compelling interest necessitating closure of the courtroom, and did not narrowly tailor closure of the courtroom to a specific, non-conclusory government interest.

The brief opening of the courtroom for the conclusion of the sanction proceedings was inadequate and violated Ms. Manning's rights to due process and a public trial. This issue is not frivolous in any sense of the word.

C. The Appeal is not Taken for Purposes of Delay

Ms. Manning filed her notice of appeal and ordered transcripts of the proceedings within days of being remanded. Ms. Manning has moved as expeditiously as possible, as this is an expedited appeal. She has already endured irreparable harm as a result of her incarceration, which will only compound with further incarceration. Should she prevail on this appeal, any incarceration endured pending that decision will represent an irremediable injury. She has no incentive to

delay, and every incentive to move as quickly as may happen without compromising the integrity of the appeal papers.

D. Ms. Manning is Not a Flight Risk or A Danger to the Community

Ms. Manning is not a flight risk. She has a stable home, and a community of supportive friends. She has appeared each time the government or the court has summoned her, even when she correctly anticipated that doing so would result in her reincarceration, essentially self-surrendering to custody. She believes in taking a principled stand for what she believes in, and also in taking accountability for her actions. No bond would be necessary to secure her reappearance in court. Furthermore, if deemed necessary, conditions such as monitoring could ensure her reappearance. However, neither the government nor the district court has ever indicated any anxiety about her as a flight risk, because it is manifestly apparent that she is not inclined to flee.

Nor is Ms. Manning a danger to the community. She engaged in a globally publicized criminal offense a decade ago. Since that time she has lived lawfully. She has engaged in her communities and public life, even running for elected office. While she remains to some a controversial figure, she is by no stretch of the imagination anything approaching "a danger to any other person," as contemplated by the provisions of 18 U.S.C. §3143(2)(B).

E. Ms. Manning Ought to Be Immediately Released as The Conditions of Her Confinement Have Already Been Transformed From Coercive to Punitive

The Recalcitrant Witness statute may be enforced for a single lawful purpose: to coerce, through confinement, the testimony of a recalcitrant witness. Conditions and purpose of confinement may not become punitive, because due process protections are lower for the civil contempt hearing that is provided under §1826 than they are for someone upon accused or convicted of a crime, upon whom punishment is to be imposed.

Usually, it is argued that confinement has slipped from coercive to punitive at whatever point a witness can prove that they are never going to cooperate, and that, as they cannot be coerced, their confinement serves no further non-punitive purpose. Ms. Manning has maintained consistently that while she will certainly exhaust her legal avenues in order to legally justify her decision not to cooperate, her continued noncooperation is a foregone conclusion, regardless of the legal outcomes. However, at this early stage, that argument may be premature.

More urgent at this moment are our concerns about the instant use of prolonged solitary confinement. Ms. Manning was kept in solitary confinement for nearly a year during her confinement at Quantico. As a result of studying her case, UN Special Rapporteur on Torture Juan Mendez issued reports defining solitary confinement as tantamount to torture after it becomes "prolonged." On the basis of

scientific research about irrevocable changes in brain chemistry he defined "prolonged" as more than 15 days.[6]

Ms. Manning has now been kept in administrative segregation ("adseg") for 25 days. While the word used for her placement is not "solitary confinement," the description of adseg in the Alexandria Detention Center's ("ADC") inmate handbook is identical in its critical attributes to the definition outlined by the Special Rapporteur. In particular, both definitions involve being kept confined to a single cell for 22 hours per day.[7]

We make no claim that she is being singled out for this treatment. It is evident in fact that being placed in adseg is typical for so-called high profile prisoners, including pre-trial detainees and people already convicted of an offense. While Ms. Manning objects on humanitarian grounds to *anyone* enduring such treatment, she recognizes that it is likely lawful for the jail to segregate people who are being subjected to punishment. However, under §1826, Ms. Manning may not be punished. Adseg, particularly after 15 days, definitionally constitutes punishment, regardless of the motive, policy, or practice surrounding it.

Therefore, Ms. Manning's conditions of confinement must either be modified so as not to constitute punishment, or she must be released. Since the jail

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[6] "Manning's treatment was cruel and inhuman, UN torture chief rules," *The Guardian* (March 12, 2012) *Available at* https://www.theguardian.com/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un *last visited* March 29, 2019

[7] https://ia601507.us.archive.org/0/items/AdministrativeSegregation-Alexandria/Administrative-Segregation.pdf *last visited April 1, 2019*

cannot turn back the clock on punishment that has already occurred, her confinement in adseg in excess of 15 days already constitutes an incurable due process violation. She must therefore be released.

It is clear that while the jail has bent over backwards to accommodate Ms. Manning's health needs, it may simply be impossible for them to confine her in a manner that does not constitute punishment. The concerns about isolated confinement expressed to counsel and admitted into the record at the March 8 hearing have all in fact come to pass. See Exhibit A. The policies of the ADC seem to demand that Ms. Manning be held in adseg for some amount of time. That time has already passed into the range of the definitionally punitive, in the absence of due process. We would argue this has created an incurable due process violation that necessitates her release. We believe in any case that the Court ought to release Ms. Manning pending determination of this appeal.

CONCLUSION

Ms. Manning's appeal is not frivolous and is not interposed for the purpose of delay. She is not a flight risk or a danger. Furthermore, she is being impermissibly punished in the absence of due process. Thus, Ms. Manning's request for bail pending the determination of this appeal should be GRANTED. Counsel respectfully submits that the issue of release can be determined without remand.

For the foregoing reasons, Ms. Manning's request for bail pending appeal should be granted and she should be released on her own recognizance.

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