IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

NIDAL M. HASAN Major (O-4) United States Army, Petitioner	) RESPONSE TO BRIEF IN SUPPORT OF) PETITION FOR EXTRAORDINARY) RELIEF)) **DOCKET No. ARMY MISC 20120877**
v.	)
UNITED STATES OF AMERICA	)
and	)
GREGORY GROSS Colonel (O-6) United States Army, Respondent	)

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

COME NOW the undersigned appellate government counsel, pursuant to Rules 20(e), 20.1, and 23 of this Honorable Court's Rules of Practice and Procedure and this Court's 21 September 2012 Order, and respond to Petitioner's Petition for Extraordinary Relief (hereinafter Petition).

Statement of the Case and Facts

Petitioner is charged with thirteen specifications of premeditated murder and thirty-two specifications of attempted premeditated murder, in violation of Articles 80 and 118(1), UCMJ, arising out of a mass-shooting at Fort Hood, Texas, on 5 November 2009. (Charge Sheet). The convening authority referred the charges to a general court-martial authorized to adjudge a

death sentence on 6 July 2011, and petitioner was arraigned on 20 July 2011. The military judge held Article 39(a), UCMJ, sessions on 27 October 2011; 30 November 2011; 2 February 2012; 4 April 2012; 10 April 2012; 8 June 2012; 19 June 2012; 29 June 2012; 6 July 2012; 12 July 2012; 25 July 2012; 3 August 2012; 9 August 2012; 14 August 2012; 15 August 2012; 30 August 2012; and 6 September 2012.

On 7 June 2012, defense counsel informed the military judge via email that the accused had grown a full beard and intended to maintain it while present in the courtroom. (R. at 273). During the next Article 39(a) session on 8 June 2012, the military judge addressed the issue of the accused's beard. The military judge found that "[t]he accused's appearance is a disruption to this trial, and in violation of R.C.M. 804." (R. at 274). The military judge, at a later Article 39(a), UCMJ, session, clarified that the accused's "conduct is disrespectful. He is disobeying an order from the court; he is disobeying an order from his commander to be clean-shaven. His appearance is disruptive." (R. at 287-88). He also pointed out, in response to argument by defense counsel, "I agree with you that the accused is not being disruptive, as in a normal case, where someone is yelling, arguing with the military judge, or civilian judge, whatever it might be. However, I disagree with your assertion in your motion that his appearance does not take away

from the dignity, order and decorum of a court-martial." (R. at 287). The military judge terminated the Article 39(a), UCMJ session on 8 June 2012 due to the accused's appearance, and informed the accused that if he did not appear at the next session clean shaven, he would be removed from the courtroom. (R. at 273-74).

Because the military judge found the accused's wearing of a beard in violation of applicable uniform regulations and R.C.M. 804 to be disruptive, he excluded the accused from the courtroom beginning at the next Article 39(a), UCMJ session on 19 June 2012, and required that he view the proceedings via a closed circuit feed from a trailer outside the courtroom. (R. at 273-277). The accused was excluded from the courtroom during all subsequent Article 39(a), UCMJ, sessions, except for when the military judge conducted contempt proceedings and on 6 September 2012 when the military judge conducted an Article 39(a), UCMJ session concerning the accused's claims under RFRA.

On 24 July 2012, the military judge sent an e-mail to the parties explaining that if the accused was not present in court the next day clean shaven, he would institute contempt proceedings. (R. at 478). On 25 July 2012, the accused again appeared with a full beard and the military judge conducted contempt proceedings. (R. at 478). The military judge held petitioner in contempt, adjudged a fine of $1,000, and then

provided the accused with the opportunity to shave. (R. at 495). After the accused refused, the military judge removed the accused from the courtroom and resumed the hearing. (R. at 495-95).

The military judge, following a similar pattern, held petitioner in contempt on 3 August 2012, 9 August 2012, 14 August 2012, 15 August 2012, and 30 August 2012. (R. at 545, 568, 714, 774, and 787).

On 6 August 2012, petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition directly with the Court of Appeals for the Armed Forces (CAAF), requesting that the court prohibit the military judge from ordering petitioner to be forcibly shaved. Petitioner requested a stay of the proceedings, which was granted on 15 August 2012. *Hasan v. Gross*, Docket No. 12-8032/AR (C.A.A.F. 15 August 2012)(Order). On 27 August 2012, CAAF remanded the case back to the military judge to allow the military judge to issue a definitive order for petitioner to be forcibly shaved. *Hasan v. Gross*, Docket No. 12-8032/AR (C.A.A.F. 27 August 2012)(Order). CAAF further required that the military judge issue specific findings in response to petitioner's claims under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006) (RFRA). *Id.*

On 30 August 2012, the military judge held an Article 39(a), UCMJ session. He began by again conducting a contempt

proceeding. (R. at 784). During this hearing, petitioner did not testify under oath, but rather made an unsworn statement to the court explaining that his growing of the beard was based on religious requirements and his faith. (R. at 785). He explained that he was not attempting to disrespect the court, nor disrupt the proceedings. (R. at 785). The military judge again held him in contempt. (R. at 787).

On 6 September 2012, the military judge conducted an Article 39(a), UCMJ, session, addressing petitioner's arguments under RFRA. (R. at 814). Both the Government and Defense filed briefs in support of their arguments. (Appellate Exhibits [AE] CLXXXVII and CLXXXVIII). The Court also considered AE CLXXXIX-CXCII, and CXCV. (Ruling on Defense and Government Motions for Appropriate Relief Based on the Religious Freedom Restoration Act, dated 12 September 2012 [hereinafter MJ Ruling]).

During argument the defense argued that petitioner's wearing of a beard was based on a sincerely held religious belief. They pointed to: (1) petitioner's affidavit and his statement on 30 August 2012 (R. at 821); and (2) the memorandum for record of Chaplain (b) (6) a TRADOC Imam (R. at 821-22). The Government argued that petitioner's wearing of the beard was intended solely to attempt to thwart in-court identification, and pointed to the fact that two witnesses at the Article 32, UCMJ, hearing had difficulty identifying the accused when he was

wearing a beanie. (R. at 826-27). The Government further argued, based on recent phone transcripts, that the wearing of the beard is "actually a manifestation of his outward desire to affiliate himself with the Mujahideen," which was an attempt to intimidate witnesses. (R. at 828).

The military judge responded to the arguments by explaining that while he initially had no reason to question the sincerity of the accused's decision to wear a beard, based on the difficulty of the witnesses in identifying the accused at the Article 32 investigation, coupled with his inability to judge the basis for the Imam's opinion and the military judge's assessment of the accused's credibility, he explained that he was not convinced beyond a reasonable doubt that the wearing of the beard was based on a sincerely held religious belief. (R. at 830-31). The military judge thereafter ruled that the accused had failed to demonstrate that being involuntarily shaved substantially burdened his exercise of religion. (R. at 836). Further, the military judge found that even if it did, the involuntary shaving of the accused "furthers compelling government interests, and is the least restrictive means to further the compelling government interests." (R. at 836). The military judge then issued a definitive order that the accused was to be shaved; however, he delayed the enforcement of that order until the matter was resolved on appeal. (R. at 836).

The military judge issued his written findings on 12 September 2012. (MJ Ruling). The military judge found that the accused's growing of a beard is not based on a sincerely held belief because "the accused has not demonstrated he is growing a beard **at this time** as a sincere exercise of religion. He has not demonstrated that growing the beard at this time is religiously motivated." (MJ Ruling at 4)(emphasis original). He found that despite the accused's assertions or the opinion of MAJ Hulwe, "it is equally likely the accused is growing the beard at this time for purely secular reasons and is using his religious beliefs as a cover." (MJ Ruling at 5). The military judge found that the evidence suggested the refusal to shave was "an act of defiance toward the U.S. Army and the Court, or was done to frustrate his in-court identification," and that the accused's statements to Al-Jazeera, refusal to sign a non-disclosure agreement, and witness identification issues "support other reasons for the accused's refusal to shave." (MJ Ruling at 5).

The military judge addressed the underlying RFRA argument as well, assuming that the accused's wearing of the beard was based on a sincerely held religious belief. He found that the military had a compelling interest in "maintaining good order, discipline, and security," and the proper wear of a uniform is directly tied to those interests. (MJ Ruling at 6). He further

found that the Court itself had a compelling interest to preserve the "dignity, order, and decorum" of the courtroom. (MJ Ruling at 6). Finally, he found a compelling governmental interest in preventing the accused from attempting to thwart in-court identification. (MJ Ruling at 6).

The military judge found that "[f]orcibly shaving the accused is the only means to accomplish those compelling interests." (MJ Ruling at 6).

On 19 September 2012, petitioner filed a Motion for Reconsideration with the military judge. (Encl 9 to Petition) That motion included: (1) an affidavit from Mrs. (b) (6) (b) (6) attesting to petitioner's religious practices while confined; (2) an affidavit from Petitioner himself indicating that his refusal to sign a non-disclosure agreement was based on his religious obligations precluding him from entering into express covenants; and (3) Petitioner's Notice of Intent to Plead Guilty, filed on 19 September 2012. The military judge denied outright the motion for reconsideration on 26 September 2012.[1]

[1] A military judge is not required to reconsider a ruling. *See* R.C.M. 905(f)("the military judge *may* . . . reconsider any ruling.")(emphasis added); *see also Littles v. Commissioner of Correction*, 444 Mass. 871, 832 N.E.2d 651 (Mass. 2005)("As we have long held, if there is no material change in circumstances, a judge is not obliged to reconsider a case, issue, or question of law after it has been decided."), citing *King v. Globe Newspaper Co.*, 400 Mass. 705, 707, 512 N.E.2d 241 (1981), cert. denied., 485 U.S. 940 and 485 U.S. 962 (1988). This is particularly applicable here, where the military judge asked defense counsel if he wished to submit additional

Petitioner's Statement of the Issue

WHETHER THE MILITARY JUDGE HAS THE AUTHORITY TO ORDER THE FORCIBLE SHAVING OF PETITIONER WHEN SUCH AN ORDER VIOLATES PETITIONER'S RIGHTS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

Specific Relief Sought

Petitioner requests that his Honorable Court prevent the military judge from enforcing an order that petitioner be involuntarily shaved. The Government requests that this Honorable Court deny the requested relief.

Jurisdictional Statement

This Court reviews petitions for extraordinary relief pursuant to the All Writs Act. 28 U.S.C. § 1651(a); *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008). The Act provides that "all courts established by 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). The Act requires two separate determinations: first, whether the requested writ is "in aid of" the court's jurisdiction; and second, whether the requested writ is "necessary or appropriate." *Denedo*, 66 M.J. at 119.

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evidence, and defense counsel responded: "Your honor, I have no additional evidence." (R. at 821).

1. The Court has jurisdiction to hear this original writ petition because it is "in aid of" the Court's statutory jurisdiction.

While this Court is empowered to issue extraordinary writs under the All Writs Act, the express terms of the Act "confine the power of [the Court] to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999); *Denedo*, 66 M.J. at 119-120, quoting *Goldsmith*, 526 U.S. at 534-35. A petition for extraordinary relief is "in aid of" this Court's jurisdiction when the petitioner seeks to "modify an action that was taken within the subject matter jurisdiction of the military justice system." *Denedo*, 66 M.J. at 120. For example, a petition seeking to confine a lower military court to the lawful exercise of its prescribed jurisdiction or its "sphere of discretionary power" would be sufficient.[2] *Dettinger v. United States*, 7 M.J. 216, 218-220 (C.M.A. 1979).

In this case petitioner alleges the military judge, as the presiding officer in the court-martial, R.C.M. 801(a), exceeded his authority by ordering the involuntary shaving of petitioner's facial hair, and in turn violated petitioner's rights under the Religious Freedom Restoration Act (RFRA).

[2] A finding or sentence need not be entered in order for this Court to entertain original petitions for extraordinary relief. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (The court's authority "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.").

There can be no doubt that petitioner's case, a general court-martial authorized to impose a capital sentence, is within this Court's subject matter jurisdiction, and his petition is an attempt to limit the court-martial's sphere of discretionary power. This is not a case, like *Goldsmith*, where the petitioner challenged a separate administrative action unrelated to any court-martial proceeding. *Goldsmith*, 526 U.S. at 535. Rather, this is a direct challenge to the military judge's authority under R.C.M. 804, and as such the petition is "in aid of" the Court's statutory jurisdiction.

2. A writ is not necessary or appropriate because petitioner cannot establish that his right to relief is clear and indisputable.

A writ of mandamus or prohibition is a "drastic remedy... [which] should be invoked only in truly extraordinary situations." *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (citing *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983); and *United States v. Thomas*, 33 M.J. 768 (N.M.C.M.R. 1991)). Therefore, petitioner has an "extremely heavy burden" to justify the granting of a writ. *Dew v. United States*, 48 M.J. 639, 648 (Army Ct. Crim. App. 1997) (citing *McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997) and *Bankers Life and Casualty Co.*, 346 U.S. at 384).

> As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue. First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires-a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 381 (2004) (internal quotation marks and brackets omitted) (quoting *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953); and *Ex parte Fahey*, 332 U.S. 258, 260, (1947)). If petitioner fails to meet any of these requirements, then the writ is not necessary or appropriate.

Here, the Government agrees that petitioner has no other adequate means of attaining the relief he seeks. Petitioner, however, is not entitled to relief on the merits because his right to the writ is not "clear and indisputable." As discussed herein, the military judge has authority, pursuant to R.C.M. 804, to compel the accused to appear in the proper uniform. Moreover, when a uniform violation becomes a disruption to the

court-martial (as it did here), the military judge has additional authority pursuant to the Supreme Court's decision in *Illinois v. Allen*, 397 U.S. 337 (1970), to remedy the disruption. Further, petitioner has failed to establish that RFRA precludes the enforcement of the court's order.

Law and Argument

I. Standard of Review

This Honorable Court reviews de novo "the definitions as to what constitutes substantial burden and what constitutes religious belief, and the ultimate determination as to whether the RFRA has been violated." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). Further, whether there is a compelling interest and whether the least restrictive means available is utilized are questions of law reviewed de novo. *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegtal*, 546 U.S. 418, 430-31 (2006).

However, whether a particular religious belief is sincerely held is a "factual matter," and findings concerning that issue will not be overturned on appeal unless those findings are clearly erroneous. *United States v. Quintance*, 608 F.3d 717, 721 (10th Cir. 2010), citing *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). This means that a military judge's ruling concerning whether an accused's actions are based on a

"sincerely held religious belief" will be not be disturbed unless "the court's finding is without factual support in the record or if, after reviewing all the evidence, [the court is] left with a definite and firm conviction that a mistake has been made." *Quintance*, 608 F.3d at 721, citing *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1263 (10th Cir. 2008). "To be clearly erroneous, 'a finding must be more than possibly or even probably wrong; the error must be pellucid to any objective observer.'" *Id.*, citing *Watson v. United States*, 485 F.3d 1100, 1108 (10th Cir. 2007).

II. Authority to Enforce Compliance

"It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country." *Allen*, 397 U.S. at 343. To that end, "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *See Chambers v. NASCO, Inc.* 501 U.S. 32, 43 (1991) (discussing a court's inherent authority to sanction conduct by an attorney), quoting *Anderson v. Dunn,* 6 Wheat. 204, 227, 5 L.Ed. 242 (1821). The "flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." *Allen*, 397 U.S. at 343.

The military has long recognized the authority of the court-martial to compel an accused to appear in the proper uniform to maintain the decorum of the court. "If the accused makes his appearance improperly dressed, or in a dirty or unkempt condition, the court may require him to be removed and returned with the neglect remedied." William Winthrop, *Military Law and Precedents* 165 (2d ed., Government Printing Office 1920).

To that end, the Rules for Courts-Martial [R.C.M.] require that an accused appear before the court-martial in the proper uniform. R.C.M. 804(e)(1)("The accused *shall* be properly attired in the uniform or dress prescribed by the military judge.")(emphasis added). The discussion to this rule provides that "[a]n accused service member who refuses to present a proper military appearance before a court-martial *may be compelled to do so*." R.C.M. 804(e)(1) discussion (emphasis added). While the discussion to the Rules for Courts-Martial is of course not binding, *see United States v. Lazauskas*, 62 M.J. 39, 43 (C.A.A.F. 2005)(Gierke, C.J., concurring), interpreting the rule to not include the authority of the military judge to enforce compliance would render the mandatory nature of R.C.M. 804(e)(1) meaningless.

There can be no question that judges generally have the authority to utilize physical compulsion against an accused,

depending on the circumstances, to ensure compliance with the court's orders. The Supreme Court has recognized that "binding and gagging might possibly be the fairest and most reasonable way to handle a defendant...." *Allen*, 397 U.S. at 344; *see also United States v. Gentile*, 1 M.J. 69, 70 (C.M.A. 1975)("[d]etermining whether to restrain the accused and, if so, the degree of restraint necessary to maintain dignity, order, and decorum in the courtroom are matters within the sound discretion of the military judge.") The physical act of binding someone to a chair or gagging their mouth to prevent them from speaking is akin to, and no more bodily invasive than, having someone shaved with an electric razor.[3]

Further, judges are clearly recognized with the authority to ensure that an accused maintains or conforms to a specific appearance. *See United States v. Emanuele*, 51 F.3d 1123, 1132-33 (3d Cir. 1995)(order to defendant to be clean shaven while appearing in court); *United States v. Valenzuela*, 722 F.2d 1431, 1433-34 (9th Cir. 1983)(requiring defendant to appear clean shaven at trial); *United States v. Benfield*, 575 F.2d 1310, 1316 (10th Cir. 1978)(ordering defendant to shave beard during trial because growing of the beard was an attempt to disguise appearance); *United States v. Crouch*, 478 F. Supp. 867, 869 (E.D. Cal. 1979)(order to shave for lineup); *United States v.*

[3] *See* Army Regulation 190-47, The Army Corrections System, 15 June 2006, para. 11-5(f)(5)(requiring that shaving be performed only with an electric razor).

O'Neal, 349 F. Supp. 572, 573 (N.D. Ohio 1972)("It is the Court's opinion that requiring the defendant to shave for the purposes of the lineup is consistent with the philosophy expressed by the Supreme Court in *Holt v. United States*, that, as a part of a criminal proceeding, a defendant may be required to alter his physical appearance without infringing upon any constitutional guarantees."); *Commonwealth v. Cinelli*, 389 Mass. 197, 206, 449 N.E.2d 1207, 1212-13 (Mass. 1983)("A substantial body of law exists upholding the power of the State to compel a criminal defendant to alter his appearance and to shave a beard prior to a lineup.")(and cases cited therein). To infer in those cases that a defendant could not be physically brought into compliance with the court's order would undermine the purpose of such orders and render the orders themselves meaningless.

The involuntary shaving of persons in the military is not a novel concept. Army Regulation [AR] 190-47, The Army Corrections System, 15 June 2006, para. 11-5(f), provides that when "a prisoner refuses to . . . comply with . . . shave standards . . . the prisoner may be restrained with the reasonable force necessary to administer the appropriate action." An appropriate official will then shave the prisoner utilizing an electric shaver. AR 190-47, para. 11-5(f)(5).

The foregoing establishes that a military judge generally has the authority, by virtue of R.C.M. 804 and judicial precedent, to order that an accused be involuntarily shaved in order to ensure that they appear in the proper uniform. As discussed in detail below, the order to shave the accused in this case is appropriate based on the fact that it is the only means remaining to the military judge to ensure compliance with the uniform requirements of the court-martial and Army Regulation, and is necessary to ensure the compelling governmental interests are upheld.

III. Religious Freedom Restoration Act

Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb(a)(5), in response to the Supreme Court's decision in *Employment Division v. Smith*.[4] Under the framework set up by Congress, a petitioner establishes a prima facie case under RFRA by showing that the government "substantially burdens" his "exercise of religion." 42 U.S.C. § 2000bb-1(a). If the petitioner makes this showing, then the burden of persuasion shifts to the government to demonstrate

[4] 494 U.S. 872 (1990). In *Smith*, the Supreme Court held that the Free Exercise Clause of the First Amendment does not prevent enforcement of otherwise valid laws of general application that incidentally burden religious conduct. *Smith*, 494 U.S. at 877-882. In reaching this conclusion, the Supreme Court did not apply the compelling interest test that it had previously used in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Under the compelling interest test, the government may only substantially burden a person's exercise of religion if it is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. *Yoder*, 406 U.S. 205. RFRA therefore effectively overturned *Smith*.

that the burden on religion (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest. *See* 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3).

A. Substantial Burden to Exercise of Religion

To establish a prima facie RFRA defense, an accused must show by a preponderance of the evidence that the governmental action: (1) substantially burdens (2) a religious belief, not merely a philosophical way of life, (3) that the defendant sincerely holds. *United States v. Quintance*, 608 F.3d 717, 719 (10th Cir. 2010), citing *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). Here, as in *Quintance*, the Government agrees with the military judge that the involuntary shaving of petitioner would be a "substantial burden." (MJ Ruling at 6); *Quintance*, 608 F.3d at 719. The Government does not contest that the wearing of a beard is a tenet of Islam.[5] (Encl 2 to Petition). Consequently, petitioner was required only to show that his actual wearing of the beard was based on a sincerely held religious belief.

[5] Whether the wearing of a beard is a mandatory tenet for all Muslims is clearly a question open to interpretation. (*See* Encl 2 to Petition)("There are two opinions from Islamic scholars in reference to this issue. The first is that growing a beard is mandatory for Muslim men. The second is that Muslim men are encouraged to grow their beard."). However, the religious act in question under a RFRA analysis need not be mandatory. *See, e.g., Blanken v. Ohio Dep't of Rehab and Correction*, 944 F. Supp. 1359, 1364-66 (S.D. Ohio 1996).

"Sincerity analysis seeks to determine an adherent's good faith in the expression of his religious belief." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984), citing *International Society for Krishna Consciousness v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981).

> This test provides a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud. *The latter variety, of course, must be subject to governmental invasion*, lest our society abjure from distinguishing between the incantation of 'sincerely held religious beliefs' as a talisman for self-indulgence or material gain and those genuinely dictated by conscience.

Patrick v. LeFevre, 745 F.2d at 157 (emphasis added). In *Quintance*, the court rejected the defendant's claims that their illicit narcotics activity was based on sincerely held religious beliefs because the objective facts surrounding their activities belied their claim that it was based on religion. *Quintance*, 608 F.3d at 722-724.

In this case, the military judge did not question whether petitioner sincerely believed that Muslims are required to wear beards. (MJ Ruling at 4). The military judge found, rather, that petitioner did not establish by a preponderance of the evidence that his wearing of a beard *at this time* was actually based on his religious beliefs. (MJ Ruling at 5). The military judge found that based on the evidence presented it "is equally

likely the accused is growing the beard at this time for purely secular reasons and is using his religious beliefs as a cover." (MJ Ruling at 5). In particular, the military judge pointed out it was equally likely that the refusal to shave "is an act of defiance toward the U.S. Army and the Court," and "was done to frustrate his in-court identification." (MJ Ruling at 5). It is important to note, also, that the military judge did not find his wearing of a beard was insincere; rather, the accused failed to establish by a preponderance of the evidence that it is sincere. (MJ Ruling at 6). *See, e.g., Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1040 (10th Cir. 2006)("[t]he preponderance of the evidence standard requires the party with the burden of proof to support its position [only] with the greater weight of the evidence.").

The military judge's findings cannot be considered clearly erroneous, and are amply supported by evidence in the record. First, the timing of petitioner's decision to grow a beard is objectively questionable. *See, e.g., People v. Bailey*, 2012 WL 4039713 (Mich. 2012)(no error to infer that accused was attempting to alter his appearance for purposes of thwarting identification at trial where there was evidence that his appearance differed at the time of the offense).

Second, it is undisputed that two witnesses at the Article 32 hearing had trouble identifying petitioner based solely on

the fact that he was wearing a beanie cap. (Encl 2 to AE CLXXXVIII). In light of the pictures portraying petitioner at the time of the offense and presently with a beard, there is no question that his appearance is dramatically different than at the time of the offenses. (CXCV). Petitioner argues this evidence is irrelevant because there was no evidence that petitioner intended to disguise himself at the Article 32 hearing with the beanie cap. (Brief in Support of Petition at 32-33). However, this evidence is probative not of the fact that the accused had previously attempted to thwart witness identification, but that he now has knowledge that witnesses may have difficulty identifying him if his appearance is altered in some manner. This fact supports a permissible inference that the growing of the beard, in light of the timing of its growth, is intended to alter his appearance for trial. While petitioner also argues this issue is irrelevant because he intends to plead guilty during his court-martial and thus render witness identification moot, the military judge has already ruled that petitioner will not be allowed to plead guilty pursuant to Article 45, UCMJ. (R. at 776). Consequently, witness identification will be an important issue during petitioner's court-martial.

Third, petitioner made it clear in an interview with Al Jazeera on 17 July 2011 that he wishes to align himself with the

Mujahedeen, asking "Almighty Allah to unite the believers as one solid fighting structure and not allow the enemies of His plan to divide us." (Encl 7 to Petition at 2). These statements, coupled with the findings of Mr. (b) (6) that the accused meets the criteria of a "homegrown terrorist" (Encl 16 to AE CLXXXVIII), directly support the military judge's conclusions that his wearing of a beard at this time may be intended to serve as an act of defiance towards the Army and the Court.

The evidence presented by petitioner does not overcome the other evidence considered by the military judge, sufficient to establish his sincerity by a preponderance of the evidence. His statement that it is sincere is self-serving and need not be accepted by the military judge on its face. *See Quintance*, 608 F.3d at 724 (rejecting argument that defendant's statements alone met the sincerity requirement).[6] Further, the defense never called the Imam Chaplain, MAJ (b) (6) to testify or submit an affidavit explaining why he came to the conclusion that the accused's beard was based on a sincerely held belief. (MJ Ruling at 5)("The Court was also unable to question MAJ (b) (6) as

[6] Petitioner's citation to *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012) for support that an accused's in-court statement is alone sufficient to establish sincerity is unsupported by that case. The Court in *Ali* made clear that "the parties do not dispute that Ali's refusal to stand was rooted in her sincerely held religious belief." *Ali*, 682 F.3d at 711. Therefore, the Court was never asked to address whether her actions were sincere, and certainly did not hold that her statement alone sufficed to establish sincerity.

to his knowledge and/or consideration of all of the facts and circumstances surrounding the accused.").

The additional evidence presented by petitioner in his motion for reconsideration does not affect the military judge's findings. (Encl 9 to Petition). While the additional time praying shows that petitioner is a devout Muslim, it does not establish that his wearing of the beard in particular is sincere, sufficient to establish the matter by a preponderance of the evidence.[7]

Further, petitioner argues that the military judge improperly considered evidence of petitioner's practice of general Islamic tenets, such as "plucking hair under the armpits and shaving the pubes." (MJ Ruling at 5; Brief in Support of Petition at 28).[8] The military judge did not consider the lack of evidence concerning whether the accused engaged in the practice of other Islamic tenets as affirmative proof of insincerity. In fact, the military judge never held that petitioner's wearing of a beard is insincere. Rather, the military judge found that the accused had failed to meet the burden of proof that his wearing of a beard was sincere, and

[7] By analogy, the number of masses that a Catholic attends does not translate into proof that they refrain from eating meat on Fridays during Lent.

[8] This argument is inconsistent with the defense position that the military judge should have considered other Islamic practices that the accused engaged in, such as the length of time he prays per day, as support for their argument that the wearing of a beard is sincere. (Brief in Support of Petition at 27).

that these other tenets were merely examples of other evidence that could have provided additional support to petitioner's claims.

Based on the foregoing, the military judge's factual findings that petitioner failed to prove by a preponderance of the evidence that his wearing of a beard is based on a sincerely held religious belief are not clearly erroneous. Therefore, petitioner has failed to make a prima facie case under RFRA.

B. Compelling Governmental Interests

The term "compelling interest" is not defined by RFRA. *See* 52 U.S.C. § 2000bb(a)(5). However, the Supreme Court has noted that it does not mean merely a "reasonable means of promoting a legitimate public interest." *Blanken*, 944 F. Supp. at 1366, citing *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987). "To be compelling, the interest must be of the 'highest order.'" *Id.*, citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

1. Military Grooming Policy

The Supreme Court has recognized that the "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). This deference is due largely to the Court's recognition that "[t]he essence of

military service is the subordination of the desires and interests of the individual to the needs of the service," and that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Id.*

While the recognition in *Goldman* of these compelling governmental interests pre-dates RFRA, the enactment of RFRA does not call into question those interests. "In enacting RFRA, Congress intended to incorporate the standard governing free exercise claims that prevailed before the Supreme Court's decision in *Employment Division v. Smith.*" *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009); *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 166-67 (D.C. Cir. 2003). "The aim was to restore what, in Congress's view, is the free exercise right the Constitution guaranteed - in both substance and scope." *Rasul*, 563 F.3d at 532. Thus, "Congress legislated against the background of precedent" that preceded the Supreme Court's decision in *Employment Division v. Smith*. *Id.* The Supreme Court's decision in *Goldman* is plainly one such decision. *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

Further, as the Senate Report for RFRA recognized: "Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test. The committee is

confident that the bill will not adversely impair the ability of the U.S. military to maintain good order, discipline, and security." *See* S. Rep. 103-111 (July 27, 1993). The Senate Committee continued: "The courts have always recognized the compelling nature of the military's interest in these objectives in the regulations of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. *The committee intends and expects that such deference will continue under this bill.*" *Id.* (emphasis added).

The House Committee similarly expected that RFRA would not eliminate the deference that courts show to the military. *See* H.R. Rep. 103-88 (May 11, 1993). Specifically, the House Committee "recognize[d] that religious liberty claims in the context of prisons and the military present far different problems for the operation of those institutions than they do in civilian settings." *Id.* The House Report expressly noted that ensuring "discipline in our armed forces [has] been recognized as [a] governmental interest[] of *the highest order.*" *Id.* (emphasis added).

The Army has effectuated its interest "of the highest order" through its grooming policy, outlined in AR 670-1. This regulation promotes discipline, unit cohesion, and esprit de corps. Military discipline is founded upon self-discipline,

respect for properly constituted authority, and members embracing the professional Army ethic with its supporting individual values. Army Reg. 600-20, para. 4-1a. Military discipline is affected by every feature of military life. It is manifested in individuals and units by cohesion, bonding, and a spirit of teamwork; by cleanliness and maintenance of dress, equipment and quarters; by deference to senior officers and mutual respect between senior and subordinate personnel; by the prompt and willing execution of both the letter and the spirit of legal orders of their lawful commanders; and by fairness, justice, and equity for all Soldiers. Army Reg. 600-20, para. 4-1b.

A vital ingredient of the Army's strength and military effectiveness is the discipline Soldiers bring to their service through a conservative military image. Army Reg. 670-1, para. 1-7a. "The Army is a uniformed service where discipline is judged, in part, by the manner in which a soldier wears a prescribed uniform, as well as by the soldier's personal appearance." *Id.* As the D.C. Circuit noted in their opinion in *Goldman*:

> Insistence on strict compliance with uniform regulations breaks down the barrier of resentment to discipline, possibly more than anything else. If men strictly obey the regulations about wearing the uniform, they can be held truly disciplined men.

Goldman v. Secretary of Defense, 734 F.2d 1531, 1538-39 (D.C. Cir. 1984), quoting H. Semmes, Portrait of Patton 8 (1955)). Individual compliance with strict grooming and appearance standards requires and supports discipline. The willingness of all Army personnel to present a neat and well-groomed appearance is fundamental to the Army and contributes to building the pride and esprit de corps essential to an effective military force. There is no question that the discipline, unit cohesion, and esprit de corps advanced by the Army's grooming policy are compelling interests.

The military judge found similarly: "[a]ddressing the application of RFRA to the military, the Senate Report acknowledged courts have always recognized the compelling nature of the military's interest in maintaining good order, discipline, and security." (MJ Ruling at 6). The military judge also afforded deference to the Deputy Chief of Staff, G-1's conclusion that petitioner's wearing of a beard "would have an adverse impact on military necessity, particularly with regard to discipline, unit cohesion, and morale." (MJ Ruling at 6).

2. Court-Martial Uniform Requirements

The President has declared that "[t]he accused shall be properly attired in the uniform or dress prescribed by the military judge." R.C.M. 804(e)(1). There are a number of

compelling governmental interests particular to the court-martial which necessitate that an accused be in the proper uniform.

a. Decorum of the Court-Martial

As has been noted, "[a] courtroom . . . is a special context in which special needs arise, requiring a significant amount of discretion to be vested in the district court." *United States v. Ali*, 682 F.3d 705, 711 (8th Cir. 2012). "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). To that end, "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *See Chambers v. NASCO, Inc.* 501 U.S. 32, 43 (1991) (discussing a court's inherent authority to sanction conduct by an attorney), quoting *Anderson v. Dunn,* 6 Wheat. 204, 227, 5 L.Ed. 242 (1821). The "flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." *Allen*, 397 U.S. at 343.

The military judge recognized these compelling governmental interests when he found that "[t]he accused's appearance

denigrates the dignity, order, and decorum of a court-martial. It is disrespectful and disruptive." (MJ Ruling at 6).

b. Identification of the Accused

The military judge recognized that "[a]nother compelling government interest in this court-martial is to prevent the accused from altering his appearance to thwart in-court identification by eyewitnesses." (MJ Ruling at 6).[9]

There should be no question that a court has a compelling interest in preventing an accused from intentionally altering their appearance in order to attempt to thwart their identification as the perpetrator of an offense. *See United States v. Emanuele*, 51 F.3d 1123, 1132-33 (3d Cir. 1995); *United States v. Valenzuela*, 722 F.2d 1431, 1433-34 (9th Cir. 1983); *United States v. Benfield*, 575 F.2d 1310, 1316 (10th Cir. 1978); *United States v. Crouch*, 478 F. Supp. 867, 869 (E.D. Cal. 1979); *United States v. O'Neal*, 349 F. Supp. 572, 573 (N.D. Ohio 1972); *Commonwealth v. Cinelli*, 389 Mass. 197, 206, 449 N.E.2d 1207, 1212-13 (Mass. 1983).

c. Prejudice to the Accused

As the Navy Board of Review stated in *United States v. Whitehead*:

[9] While the military judge indicates the issue as to in-court identification is not yet ripe, none of the cases cited concerning ordering an accused to change his appearance require that there first be an actual difficulty in identification; rather, it appears the authority to order someone to alter their appearance is based on the possibility of misidentification.

> "It cannot be denied, we think, that the sight of the accused at trial, as he is arraigned, as he testifies...as he confers with counsel, and as he stands to be sentenced, is part of the 'silent evidence' in the case. Accordingly, it is but part of a full and fair proceeding that he be entitled to stand before the court-martial as a sailor should, neat, clean, and sharp, in the uniform-of-the-day, complete with merited insignia, ribbons, and decorations....*[N]othing is more inflammatory to an officer of the military than to see a member of his service 'out of uniform' or wearing a soiled or ill-fitting uniform.*"

27 C.M.R. 875, 876 (N.B.R. 1959)(emphasis added). For petitioner to appear at his court-martial, before the panel and the public, while wearing a full beard and the uniform of the United States Army, in flagrant violation of the orders of his superior officers and the court, would constitute one of the most "inflammatory" actions he could undertake. Even the most rational and well reasoning officer would have difficulty in not viewing petitioner in a negative light from the outset based on his flagrant disregard of military customs and regulation. At the very least, such an appearance would unduly hinder the voir dire process.

The Court has a compelling governmental interest to prevent petitioner from intentionally injecting this level of prejudice into his court-martial. *See United States v. Ali*, 2012 WL 4128387 at *4 (D. Minn. 19 Sept 2012)(slip copy)(finding a

compelling governmental interest in preventing the accused from potentially prejudicing the jury by refusing to stand).

C. Least Restrictive Means

There is little question that there are compelling governmental interests in ensuring that an accused servicemember is in the proper uniform during court-martial. The fundamental disagreement between the parties in this case focuses upon the means of upholding those governmental interests. The differences in this case are analogous to the differences in remedies (damages vice specific performance) under contract law.

In this case, petitioner's position is that the least restrictive means available are retroactive measures (i.e., damages), such as charges under the UCMJ or contempt procedures, are sufficient to effectuate the compelling governmental interests. In contrast, the Government's position, in accord with the military judge's findings, is that the only means to effectively uphold the compelling governmental interests is for petitioner to actually obey the order (i.e., specific performance) and appear clean-shaven.

If the only governmental interest identified in this case was the interest in precluding an accused from injecting prejudice, an instruction to the panel might be sufficient to remedy the violation of the order. However, as discussed above, there are a host of compelling governmental interests applicable

in this circumstance, all of which must be effectuated cumulatively and equally. Punitive measures would not change the fact that petitioner's appearance has been dramatically altered from the time of the offense. Punitive measures here do not prospectively prevent the actual disruption of the court-martial through petitioner's flagrant, willful, and disrespectful violation of the court's orders and Army regulations. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970)("The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated."). An instruction to the panel does not actually prevent the interjection of prejudice into the court-martial; it is simply a remedial measure.

The only way to actually effectuate the compelling governmental interests in this case is for petitioner to appear clean shaven. At this stage of the proceedings, the only remaining means available to the court, as found by the military judge, is for petitioner to be involuntarily shaved. (MJ Ruling at 6)("Forcibly shaving the accused is the only means to accomplish those compelling interests.").

Both the military judge and petitioner's commander have explicitly ordered petitioner to shave on a number of occasions, to no avail. (MJ Ruling at 1; R. at 273, 478, 542, 566, 713, 772). The military judge excluded petitioner from the courtroom

on a number of occasions in response to his having grown a beard, which has not convinced petitioner to shave. (R. at 288-89, 373, 418, 447, 495-96, 545, 568, 714, 774, 787). The military judge thereafter held petitioner in contempt on six separate occasions, fining him the maximum amount possible under Article 48, UCMJ. (R. at 494-95, 545, 568, 714, 774, 787). The sanctions imposed by the military judge have not compelled petitioner to shave. Finally, the military judge explicitly found that charging petitioner with a violation of a lawful order under the UCMJ would be futile, based on the fact that petitioner "is facing 13 counts of premeditated murder and 32 counts of attempted premeditated murder," each of which carries a mandatory minimum life sentence. (R. at 492). As petitioner continuously argues at this time, his intention is to plead guilty to the offenses, meaning he is already planning to serve a minimum life sentence. In light of the fact that the punishment imposed due to the contempt findings have been ineffective to compel him to shave, any potential future punishment as a violation of Articles 90 or 91, UCMJ, would be de minimus in comparison to the punishment he is already expecting. *See, e.g., Allen*, 397 U.S. at 345 (noting the "obvious limitations" of certain sanctions when the defendant is "charged with a crime so serious that a very severe sentence such as death or life imprisonment is likely to be imposed.").

It is incomprehensible at this time that charging petitioner with a violation of a lawful order would somehow serve to compel him to shave.

The military judge has exhausted every conceivable means to compel petitioner to shave. All have failed. The only possible means remaining to ensure that petitioner appears clean shaven at trial is for him to be involuntarily shaved. It is consequently not only the least restrictive means available, it is the only means available.

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court deny the requested relief.

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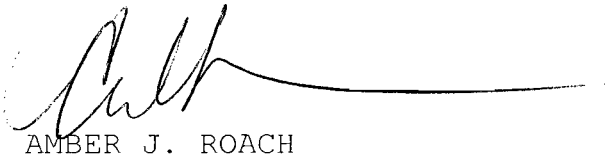

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CERTIFICATE OF SERVICE AND FILING

I certify that a copy of the foregoing was delivered to this Court and appellate defense counsel on the 28 day of September 2012.

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