IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES OF AMERICA, **GREGORY GROSS, COL** **MILITARY JUDGE**	PETITION FOR RELIEF IN THE NATURE OF AN EXTRAORDINARY WRIT AND APPLICATION FOR STAY OF PROCEEDINGS
Respondent	
v.	
NIDAL M. HASAN MAJ, US Army Headquarters and Headquarters Troop, 21st Cavalry Brig Fort Hood, Texas	Army Misc. Dkt. No. 20120876 19 September 2012
Petitioner	

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

Preamble

COME NOW the undersigned defense counsel, on behalf of Petitioner and pursuant to Rule 2(b) and 20 of this Court's Rules of Practice and Procedure, and request that this Honorable Court grant extraordinary relief by: (1) staying the trial proceedings pending a decision of this Court on this petition, and (2) granting petitioner's request for extraordinary relief in the nature of a writ of mandamus.

Facts

Those facts necessary for the disposition of this Petition are included in Petitioner's Brief in Support of the Petition for Extraordinary Relief.

Panel No. 2

Issues[1]

I.

WHETHER THE MILITARY JUDGE VIOLATED PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHTS BY HOLDING SUMMARY CONTEMPT PROCEEDINGS.

II.

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ENTERING MULTIPLE CONTEMPT FINDINGS AND PUNISHING PETITIONER REPEATEDLY FOR THE SAME ACT OF RELIGIOUS EXERCISE.

III.

WHETHER THE MILITARY JUDGE ERRED WHEN HE FOUND THE PETITIONER GUILTY OF CONTEMPT AFTER THE PETITIONER HAD ASSERTED THE RELIGIOUS FREEDOM RESTORATION ACT AS A DEFENSE.

IV.

WHETHER THE MILITARY JUDGE FAILED TO DISQUALIFY HIMSELF AS THE JUDGE PRESIDING OVER THE CONTEMPT PROCEEDINGS.

V.

WHETHER R.C.M. 809 UNCONSTITUTIONALLY VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS.

Jurisdictional Statement

[1] Petitioner will be submitting a separate and distinct Petition for Extraordinary Relief requesting that this Court prohibit the military judge from ordering the forcible shaving of petitioner's beard, in violation of his rights under the Religious Freedom Restoration Act.

It is well-established in military law that the superior military appellate courts have the authority to require "'inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do.'" *McPhail v. United States*, 1 M.J. 457, 461-62 (C.M.A. 1976) (quoting *Virginia v. Rives*, 100 U.S. 313, 323 (1879). As the highest judicial tribunal in the United States Army, this Court has the "'judicial authority over the actions of trial judges within the Department that may potentially reach [this Court]'enabling [this Court] to 'confine an inferior court . . . to the lawful exercise of its prescribed jurisdiction.'" *Ponder v. Stone*, 54 M.J. 613, 615-16 (N.M.C.Ct. Crim. App. 2000) (concluding that Courts of Criminal Appeals possess such authority, but declining to exercise it) (*quoting Dettinger v. United States*, 7 M.J. 216, 218 (C.M.A. 1979)); *see also United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996). As this court explained in *Davis v. United States,* 35 M.J. 640 at 645 (A.C.C.A. 1992):

> Our authority to issue extraordinary writs "in aid of jurisdiction" under the All Writs Act is not limited to our actual or potential appellate jurisdiction defined in Article 62, 66, and 69, [Uniform Code of Military Justice, 10 U.S.C. §§ 918, 880 [hereinafter U.C.M.J.]. These statutory provisions do not encompass our entire authority as a court. As the highest judicial tribunal in the Army's court-martial system, we are expected to fulfill an appropriate supervisory function over the administration of military justice.

In *Davis*, this court held that it had the authority to review constitutional claims under a petition for extraordinary relief, citing the Court of Military Appeals rationale in *Unger*. *Id.* In finding authority to exercise jurisdiction under the All Writs Act the *Unger* court held:

> Reexamining the history and judicial applications of the All Writs Act, we are convinced that our authority to issue an appropriate writ in "aid" of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67[,U.C.M.J.]. . . . we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority.

Id. (quoting *Robinson v. Abbott*, 23 C.M.A. 219 (1974)). The court in *Unger* further held "[o]ur power to grant extraordinary relief in cases [like this] allows the accused to obtain judicial review of constitutional claims without being required to undertake expensive collateral attack in the Article III Courts." *Unger*, 27 M.J. at 354. Finally, the court found that "Congress has never intended to allow evasion of the safeguards provided to servicemembers by the Constitution and the Uniform Code." *Id.* at 355. Therefore, this court has jurisdiction to review the constitutional claims asserted by the Petitioner under The All Writs Act.

Also, this Court has jurisdiction to review the claims of the Petitioner pursuant to the All Writs Act under the courts supervisory responsibility within the military justice scheme. As explained in *Noyd v. Bond*, 395 U.S. 683, 686, 695 (1969), this court has the inherent authority to oversee the

interlocutory actions of the inferior courts of the Army.[2] *Id.* (Air Force Board of Review is the "appellate military tribunal Congress has established to oversee the administration of criminal justice in Petitioner's branch of the Armed Forces"). This role of the court was also affirmatively recognized in *Dew v. United States*, 48 M.J.639, 645 (A.C.C.A. 1998) which held "[o]ur jurisdiction is predicated upon the All Writs Act and our supervisory responsibility in the military justice system."

Here, the Petitioner was found guilty on six separate allegations of contempt under Article 48, U.C.M.J. The findings and sentences on the first four contempt proceedings have been approved by the convening authority. At each of the summary contempt proceedings the Petitioner asserted several objections and defenses based on the Constitution, the U.C.M.J., and applicable law, all of which were summarily rejected by the military judge.

Any reading of R.C.M. 809(d) to prohibit military appellate courts from reviewing any contempt findings on appeal would violate petitioner's due process rights. This court's authority is independent and superior to any rule for court-martial that might be read to divest this court of its authority. Thus, R.C.M. 809(d)'s provision that "the action of the convening

[2] While not directly held, the Court of Military Appeals suggested that it may have authority under the All Writs Act, 28 U.S.C. 1651(a) to conduct direct reviews of contempt proceedings. See *United States v. Burnett*, 27 M.J. 99, 105 FN 9 (C.M.A. 1988).

authority [upon review of the contempt proceedings] is not subject to further review or appeal," while potentially binding on other actors within the Department of Defense cannot be applicable to this court. Further, absent review under the court's jurisdiction to issue extraordinary writs, Petitioner's only avenue for relief would lie with Article III Courts. Accordingly, review of this Petition under the All Writs Act is properly a matter in aid of the jurisdiction of this Court in its supervisory capacity over Army trial courts.

Reasons for Granting the Writ

Petitioner, Major Nidal M. Hasan, by and through his undersigned counsel, submits this brief in support of his Petition for Extraordinary Relief. As set forth herein, Petitioner's Constitutional rights to due process and free exercise of religion have been violated by the military judge who has repeatedly sentenced the Petitioner to pay multiple fines for the same act of religious exercise. Further, despite his bias, the military judge has failed to recuse himself for the contempt proceedings. Finally, because the Petitioner was deprived of his property under R.C.M. 809(d) without any opportunity to be meaningfully heard, he was unconstitutionally deprived of his property without due process.

Therefore, the Petitioner requests that this Court issue an order vacating the contempt findings and sentence, staying

further court-martial proceedings during the pendency of the litigation of his Petitions before this and superior courts, and disqualifying Judge Gross from presiding over any subsequent contempt proceedings. Additionally, based on Judge Gross's continuing actions further demonstrating actual and perceived bias, Petitioner renews his petition that the Court issue a Writ ordering the removal of Judge Gross as the military judge in Petitioner's court-martial and order the appointment of a new military judge to preside over Petitioner's trial.

Conclusion

Petitioner respectfully requests that this Honorable Court issue a stay in the proceedings pending a decision of this Court on this petition and grant Petitioner's request for extraordinary relief.

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KRISTIN MCGRORY
CPT, JA
Appellate ~~Defense~~ Counsel

CERTIFICATE OF SERVICE

UNITED STATES v . MAJ Nidal Hasan

Army No. _____

Petition for Extraordinary Relief ___X___

Motion_____

In accordance with Rule 20.2(a), I certify that the original and two copies were delivered to the Court and the Government Appellate Division on 19 September 2012.

KRISTIN MCGRORY
CPT, JA
Defense Appellate Division

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES OF AMERICA, GREGORY GROSS, COL MILITARY JUDGE Respondent v. NIDAL M. HASAN MAJ, US Army Headquarters and Headquarters Troop, 21st Cavalry Brigade Fort Hood, Texas	BRIEF IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF 19 September 2012 ARMY MISC 20120876

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Therefore, the Petitioner requests that this Court issue an order vacating the contempt findings and sentence, staying further court-martial proceedings during the pendency of the litigation of his Petitions before this and superior courts, and disqualifying Judge Gross from presiding over any subsequent contempt proceedings. Additionally, based on Judge Gross's continuing actions further demonstrating actual and perceived bias, Petitioner renews his petition that the Court issue a Writ ordering the removal of Judge Gross as the military judge in Petitioner's court-martial and order the appointment of a new military judge to preside over Petitioner's trial.

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Facts

CONTEMPT

On 12 November 2009, MAJ Nidal Hasan (petitioner) was charged with 13 specifications of premeditated murder, and 32 specifications of attempted murder, in violation of Articles 118 and 80, U.C.M.J., for actions that took place at Fort Hood on 5 November 2009. On 6 July 2011, the Convening Authority referred the charges against petitioner to a General Court-Martial authorized to impose a capital sentence. Petitioner was arraigned

on 20 July 2011, and trial was docketed for 5 March 2012. Colonel Gregory Gross was detailed as the presiding Military Judge for petitioner's court-martial.

In late April 2012, MAJ Hasan began to grow a beard and ceased shaving based upon his religious beliefs. On 7 June 2012, the Defense notified Judge Gross that MAJ Hasan had grown a beard and would not be in proper uniform at the Article 39a, U.C.M.J., session [hereinafter 39a session] scheduled for the following day. Judge Gross then notified the defense that he expected MAJ Hasan to be in proper uniform at the 39a session. (Enclosure 1).

On 8 June 2012, MAJ Hasan appeared in court with a beard. Judge Gross summarily stated that MAJ Hasan's appearance was a disruption to the trial, without further elaboration. (Enclosure 2 at 2). Judge Gross then warned MAJ Hasan that should he continue to refuse to be clean-shaven, he may be removed from the proceedings. *Id.* In response to the religious exception sought by MAJ Hasan through command channels, Judge Gross stated, "if there is some authority that can grant an exception, if they do that, fine, I will go along with their wishes, but until then, *we're following my rules*, the Rules for Court-Martial." (Enclosure 2 at 5) (emphasis added)). Judge Gross later clarified this statement at a subsequent proceeding: ". . . but that doesn't mean I couldn't still say, 'I don't care what they say. In my courtroom, you're going to shave.' I could've said that - that's my point." (Enclosure 4 at 6).

At the next 39a session on 19 June 2012, Judge Gross asked the Government to state for the record its position to his 8 June 2012 ruling. The Government asserted that MAJ Hasan's appearance was a disturbance, stating " . . . the prosecution feels, just looking there *it disrupts us from preparing.*" The government also gratuitously offered an opinion questioning MAJ Hasan's motives for wearing his beard, to which Judge Gross responded, "I have no reason to disbelieve the accused's [religious] reason for growing the beard - that's not the issue, though." (Enclosure 3 at 3)[2]

At this hearing, the defense renewed its objection to Judge Gross's order removing MAJ Hasan from the courtroom. (Enclosure 3 at 5). His defense counsel maintained that MAJ Hasan was sitting in the proper uniform, had a fresh haircut, was adhering to the court's standard's of decorum, and had done nothing to interrupt any court proceeding or pretrial proceeding. (Enclosure 3 at 5). In response Judge Gross stated, "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 the court martial." Judge Gross went on to assert that MAJ Hasan has a duty to follow orders and

[2] The military judge once again affirmed, "I don't doubt [MAJ Hasan's] religious beliefs. I put that on the record last time. I have no reason to doubt the reason that he's growing the beard." at a subsequent 39a hearing. (R. at 400)

by not shaving he was violating an order set forth in AR 670-1. (Enclosure 3 at 8).

Ultimately, Judge Gross ordered MAJ Hasan's removal from the courtroom because, according to the Judge, MAJ Hasan's insistence on wearing a beard and refusal to shave amounted to a disruption of the court proceedings under R.C.M. 804. Judge Gross also pointed to MAJ Hasan receiving the benefits of his service as a reason he should comply with a non-punitive regulation:

> Obviously, the accused is an officer in the United States Army; he has certain obligations. There are rules and regulations that he is required to follow. Apparently, the accused does not have any problem accepting everything that he is entitled to as an officer, as an accused; however, he doesn't want to follow the rules and regulations.

Judge Gross also became heated with defense when discussing the exceptions that have been made in the military for beards:

> There's a distinction about what you say about other people who have exception, and the key is, they have exceptions. The accused in this case does not have the exception. His 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.

(Enclosure 3 at 9). From this 39a session on, MAJ Hasan continued to be barred from the courtroom by order of Judge Gross under R.C.M. 804 for failing to shave.

In an R.C.M. 802 session, COL Mulligan, the lead trial counsel, requested that Judge Gross hold a contempt proceeding in regard to MAJ Hassan's refusal to shave. Directly following this

request Judge Gross agreed to hold a summary contempt proceeding. (Enclosure 4 at 4-5)

During the summary contempt proceedings, Judge Gross allowed MAJ Hasan to make a statement through counsel but refused to allow MAJ Hasan to present any evidence. Judge Gross stated firmly, "We're not having a hearing - not a formal hearing." (Enclosure 4 at 6). The defense sought to clarify this statement by asking the judge "Just to be clear, you're denying the defense the opportunity to rebut this----," the judge interjected "Right exactly." *Id.* Judge Gross reiterated this ruling by denying attempts to offer evidence in the summary contempt proceedings held on 3 August 2012 and 9 August 2012. (Enclosures 5, 6).

At the initial contempt proceeding 25 July 2012, the Defense requested an unbiased judge, made due process objections, and asserted the Religious Freedom Restoration Act, 42 U.S.C. §200bb(a) (hereinafter RFRA) as a defense on behalf of MAJ Hasan. (Enclosure 4 at 4) The Defense reasserted and incorporated these objections at each subsequent contempt proceeding. At the 30 August 2012 proceeding, the Defense additionally objected to the repeated contempt proceedings as analogous to an unreasonable multiplication of charges. (Enclosure 9 at 4).

Were the defense permitted to introduce evidence during the contempt proceedings, the defense would have called First Sergeant [redacted] who is MAJ Hasan's First Sergeant. First Sergeant [redacted] would provide testimony directly refuting the Army's reasons for

denying MAJ Hasan's accommodation request, and that MAJ Hasan's beard had not impacted morale, unit cohesion, or discipline. The Defense would have called MAJ [redacted] the acting brigade commander to offer similar testimony. The Defense would also have called Chaplain [redacted] who would testify about MAJ Hasan's sincerely held religious belief. Further, the Defense would have called Mr. [redacted] to question him about his denial of MAJ Hasan's request for religious accommodation to wear a beard.

Despite the Petitioner's request to call witnesses, on 25 July 2012, Judge Gross found MAJ Hasan in contempt-of-court for willfully disobeying his order to be clean-shaven. (Enclosure 4 at 1-17). Judge Gross found beyond a reasonable doubt that MAJ Hasan's refusal to shave constituted a disturbance of the proceedings of the court and a willful disobedience of a lawful order of the court-martial. (Enclosure 4 at 17). Judge Gross sentenced MAJ Hasan to the maximum allowable fine of $1000.00. *Id.*

On 3 August 2012, 9 August 2012, 14 August 2012, 15 August 2012, and 30 August 2012, Judge Gross held identical summary contempt proceedings for the same conduct with identical results. (Enclosures 5, 6, 7, 8, 9). On 30 August 2012, without prior notice to petitioner or an opportunity to submit matters, the Convening Authority approved the fines adjudged on 25 July 2012 and 3 August 2012, and ordered the fines executed. (Enclosure 10). On 6 September 2012, the Convening Authority likewise

summarily and without prior notice approved the fines adjudged on 9 and 14 August 2012, and ordered the fines executed. *Id.*

During the proceedings Judge Gross conceded that MAJ Hasan has never created any sort of disturbance, menacing act or threatening gesture, but had consistently sat quietly and attentively at every proceeding. (Enclosure 4 at 3). In addition to sitting quietly throughout all of the proceedings without creating a disturbance, MAJ Hasan made an in-court statement during the 30 August 2012 summary contempt proceeding, in order to explain the religious basis for his refusal to shave. MAJ Hasan stated, "Your Honor, in the name of Almighty Allah, the most generous, the most gracious, the most merciful, I am Muslim. I believe that my religion requires me to wear a beard. I am wearing my beard based on my faith. I am not trying to disrespect your authority as a military judge, and I am not trying to disrupt the proceedings or the decorum of the court. When I stand before God, I am individually responsible for my actions." (Enclosure 9 at 3).

JUDICIAL BIAS

At the summary contempt proceeding on 25 July 2012, defense counsel requested that Judge Gross disqualify himself from adjudicating the contempt proceedings and appoint another judge to preside over the contempt hearing. (Enclosure 4 at 4). This request was denied. The defense renewed this request at each contempt hearing.

Prior to the commencement of the first contempt preceding the defense objected and pointed out that by holding the contempt proceedings at the request of the government, Judge Gross was manifesting evidence of actual and implied bias. *Id.* It is apparent that Judge Gross held the contempt proceedings at the behest of the Trial Counsel.

This was not the first time that Judge Gross *sua sponte* took up a request from the Trial Counsel. On 16 May 2012, COL Mulligan, the lead trial counsel, sent a terse email to Judge Gross, cc'ing the Defense, requesting a scheduling order, and that an Article 39(a) hearing be held on Monday, 4 June 2012, in order to litigate "all outstanding issues." (Enclosure 11). Without requesting Defense input, Judge Gross responded the following day, 17 May 2012, by issuing a scheduling order with a 30 May 2012, deadline for "all" motions and witness requests, a full 94 days prior to the scheduled trial date of 20 August 2012. *Id.* In the same email, Judge Gross set the next Article 39(a) hearing date for 4 June 2012. *Id.*

Judge Gross addressed the Trial Counsel's request during the initial summary contempt proceeding. At this proceeding, Judge Gross stated that COL Mulligan's request for a contempt hearing had nothing to do with his decision to actually hold the contempt hearing. (Enclosure 4 at 5). The facts are clearly contrary to the Judge's statement. (Enclosure 4 at 5-7). Specifically, Judge Gross held Article 39a sessions without contempt proceedings up

until the point that COL Mulligan made this request. After COL Mulligan made the request for contempt hearings, Judge Gross immediately, and without defense input, granted the Trial Counsel's request. The important distinction here is that this was the second time Judge Gross had immediately, and without defense input, granted a request of this sort from COL Mulligan.

At the summary proceeding on 25 July 2012, the military judge grew frustrated with assistant defense counsel. When the assistant defense counsel pointed out that the government had other options than requesting a contempt proceeding, Judge Gross responded:

> MJ: Stop, defense. Do you think Major Hasan cares if he is charged with disobeying an order when he is facing 13 counts of premeditated murder and 32 counts of attempted premeditated murder?
>
> If they offer him an Article 15, do you think he is going to take it, or is he going to demand trial by court-martial?
>
> ADC2: Your Honor, I don't know ----
>
> MJ: It just makes no sense to say that they could do something else. The Rules also say that I can do something else, for example, have a contempt proceeding, and that's what I'm doing.
>
> ADC2: Yes, Your Honor.
>
> MJ: So for you to argue that they could take some other means is just ridiculous, because we all know that's not going to work. If I sit here and order him to shave, and he refuses to do it, what good is it going to do to offer him an Article 15? I don't think any. Go ahead.
>
> ADC2: Your Honor, just to highlight there, nobody knows what Major Hasan is going to do. All we know is he has a sincerely held religious belief, based on his death

being imminent, that he needs to have a beard for religious reasons. That's all we know that he has offered to the court; he hasn't offered anything else - that he would decline any other remedial measure.

Further, during the 30 August 2012 summary contempt proceeding, the military judge once again interacted with government counsel in a biased manner. Judge Gross stated at this session that he intended to rule on all outstanding issues and order the forcible shaving of MAJ Hasan, but was not going to do so at the request of Trial Counsel. Judge Gross explained the basis for this ruling by explaining "because, they'd [Government counsel] . . . not have me order the accused to be shaved today; they'd like to do that next week, so that we have an opportunity to put all of the factual issues on the record regarding the Religious Freedom Restoration Act." (Enclosure 9 at 2 (emphasis added)). This statement was prompted by an email request from the Assistant Trial Counsel the previous day to which Judge Gross summarily granted the same day. (Enclosure 12).

Not only is the use of the word "we" notable, as though the government and Judge Gross need to work together to build a record that will withstand appeal on this issue, but it is in sharp contrast to the struggle the defense has had in getting Judge Gross to grant its continuance requests. Judge Gross has twice on the record accused MAJ Hasan of wasting his counsel's time and distracting them from real issues by his refusal to shave, and Judge Gross has expressly stated that he will use that as a factor

against granting continuance requests.

During the 8 June 2012 Article 39a hearing where the judge first addressed the issue of the beard, he initially denied a continuance for the lead defense counsel to attend capital litigation training stating, "the bottom line is the defense is saying they need more time to prepare for trial. What is happening here, the accused is making - the things that he is doing are causing you to divert your attention from preparing for trial to address issues like this. **That is certainly one factor that I'm going to consider when I'm deciding on whether or not to grant that continuance.**" (Enclosure 2 at 5-6). At a subsequent 39a session, Judge Gross reiterated this statement, "once again, just like I highlighted at the last session - the accused is making deliberate decisions that divert your attention from preparing for trial, to cover now, you're going to file a writ, again, **I'm considering all those things when I'm considering your motion for a continuance. I'm just letting you know.**" (R. at 371).

On 29 June 2012, another session was held in accordance with Article 39(a), U.C.M.J. Judge Gross took up the Petitioner's request for continuance, Supplement to request for continuance, and additional supplement to request for continuance. (Enclosure 13 at 408-417). Petitioner's defense counsel argued that a continuance was absolutely necessary to adequately prepare for trial. *Id.* At this proceeding and previous hearings, defense

counsel established several reasons why delay was necessary, which included but were not limited to: an inability to review all evidence provided by the government prior to trial date, an inability to interview all government witnesses on the merits prior to the trial date, an inability to interview critical mitigation witnesses prior to the trial date, last minute notice of discovery and witnesses by the government, the need to identify and obtain an expert witness to rebut the opinions of a last minute expert report provided to the defense, and personnel issues.[3] *Id.* Defense counsel explained that should they be required to proceed to trial on the scheduled date, they would be ineffective under well established case law for capital cases. *Id.* Judge Gross immediately denied the motion stating that he had previously granted the defense requests for continuance and that the defense had a year to prepare for trial from the time the Government announced it would be ready for trial. *Id.* No further analysis was done by Judge Gross on the record. *Id.*

At the last summary contempt hearing to date, held on 30 August 2012, Judge Gross denied the defense request that contempt hearings be discontinued until the RFRA review ordered by CAAF had been completed. (Enclosure 9 at 3-5). As noted above, Judge Gross once again found MAJ Hasan in contempt and made a

[3] Petitioner's Defense counsel will be unable to review approximately 118,000 pages of discovery (out of over 409,000 total pieces of discovery) prior to current trial date. Petitioner's Defense counsel will be unable to interview approximately 171 Government witnesses (out of over 650 potential witnesses) prior to trial.

point (as he has done at each of the proceedings) of emphasizing that the he was sentencing MAJ Hasan to a fine of $1000.00, "which [is] the maximum authorized fine for contempt."(Enclosure 9 at 5).

Interestingly, on 6 September 2012, Judge Gross held a 39a session to address the RFRA. Unlike the previous 39a sessions, he did not hold MAJ Hasan in contempt and allowed him to remain in the courtroom for the hearing. The hearing, which exceeded an hour in length, was conducted in an orderly manner without delay or disruption.[4]

Issues

I.

WHETHER THE MILITARY JUDGE VIOLATED PETITIONER'S FIFTH AMENDMENT DUE PROCESSES RIGHTS BY HOLDING SUMMARY CONTEMPT PROCEEDINGS.

Law

> *"It is 'the law of the land' that no man'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."*

In re Oliver, 333 U.S. 257, 275 (1948).

Summary contempt proceedings are permitted in courts-martial, "when conduct constituting contempt is directly witnessed by the

[4] On 12 September 2012, Judge Gross issued a written ruling on Petitioner's RFRA assertion regarding the forcible shaving, where he determined for the first time that petitioner's refusal to shave was not based on a sincerely held religious belief. (Encl. 14 at 4). The judge's ruling will be addressed pursuant to C.A.A.F.'s order in a separate filing with this Court.

court-martial." R.C.M. 809(b)(1). This power, however, is limited by the Constitution.

In *Cooke v. United States*, 267 U.S. 517, 534 (1925), the Supreme Court recognized the need for summary contempt proceedings under certain circumstances, stating:

> To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbances or violence or physical obstruction or disrespect to the court when appearing in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of common law and the punishment imposed is due process of law.

Due Process is central to the determination of whether the immediate circumstances justify summary contempt proceeding, thus depriving an individual of many fundamental due process protections. In *In re Oliver*, 333 U.S. at 265, the Supreme Court in review of a state contempt proceeding addressed "the [C]onstitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both." One of those Constitutional standards is:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

Id. at 273. The Court further explained the narrow applicability of the summary proceedings mentioned in its previous cases stating:

> This Court reached its conclusion [in *Ex parte Terry, 128 U.S. 289* (1888)] because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise. . . .

Id. at 274. More specifically, the Court stated:

> That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in *Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767,* a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, **the court-disturbing misconduct** must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. . . . Furthermore, the Court explained the *Terry* rule as reaching only such conduct **as created 'an open threat to the orderly procedure of the court** and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.' *Id.*, at page 536 of 267 U.S., at pages 394, 395 of 45 S.Ct.
>
> ~~Except for a narrowly limited category of contempts, due~~ process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges

> of misconduct, in open court, in the presence of the judge, **which disturbs the court's business**, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority before the public.'

Id. at 274-76 (emphasis added).[5]

Argument

The narrow circumstances justifying summary contempt hearings are not applicable here. Although Judge Gross may have observed the Petitioner in court wearing a beard contrary to his order, this conduct did not create an open threat to the orderly procedure of the court or disturb the courts business. Major Hasan has not acted in a manner which disrupts the "orderly progress" of his trial. Aside from his beard, the Petitioner has continually abided by the rules of court and has sat quietly and intently throughout all proceedings, to include six contempt proceedings and over an hour-long hearing on the RFRA. He has not used abusive language, he has not verbally assaulted members of the court-martial, and he has not conducted himself in a manner which interrupts the orderly flow of the trial. The Military Judge even recognized this himself. (Enclosure 3 at 8) As such, his actions cannot be deemed disruptive.

The contempt hearings themselves and the 39a hearing addressing the RFRA serve as the strongest evidence that

[5] *See also Wolfe v. Coleman*, 681 F.2d 1302, 1306, (11th Cir. 1982; *United States v. Brannon*, 546 F.2d 1242, 1248 (5th Cir. 1977).

Petitioner's facial hair is not disruptive. In no less than six contempt hearings the Petitioner has been present in the courtroom with his beard and there has been no disruption or disturbance to the proceedings. Even more telling is the 39a session addressing RFRA, where unlike the previous 39a sessions, Judge Gross did not hold MAJ Hasan in contempt and instead allowed him to remain in the courtroom for the hearing. The over hour-long hearing was conducted in an orderly manner without delay or disruption.

As discussed in *Cooke* and *Olive*, the disruptive conduct must be so disruptive that the judge must *immediately* address the conduct through a summarized contempt hearing which only affords the respondent a mere scintilla of due process. Unlike disruptive conduct that must be immediately addressed by the judge, the Petitioner's conduct in this case was not an outburst and it was not disruptive. Indeed in each instance of summary contempt, the military judge gave notice that if the Petitioner did not appear shaven the following day, the judge would conduct a summarized contempt proceeding. In each of these instances notice of the contempt proceeding was given at least the night before the proceeding began. This notice itself is evidence that the military judge should have conducted formal contempt hearings instead of summarized proceedings.

As applied to the facts of this case, such a deprivation of the Petitioner's due process rights was constitutional error. If the military judge could give such significant notice of the

contempt proceedings, then certainly he could have conducted more formal contempt hearings. Because the Petitioner's conduct did not require immediate summary contempt proceedings, by holding summarized proceedings, the military judge denied the Petitioner fundamental due process protections articulated in *Cooke*. *Cooke*, 267 U.S. at 534.

Specifically, while defense counsel made statements on behalf of the Petitioner, the Petitioner was denied true assistance of counsel, the ability to present defenses, and the opportunity to call witnesses. Further, the summarized nature of the proceedings denied the Petitioner the opportunity to introduce evidence of the Petitioner's religious beliefs under the Religious Freedom Restoration Act, which is a defense to contempt.[6] Additionally, the summarized proceedings prohibited the Petitioner from adequately raising the issue of unreasonable multiplication of charges, and fully requesting the disqualification of Judge Gross as the presiding judge for the contempt proceedings.[7] Finally, the summarized proceedings prohibited the Petitioner from calling witnesses when he requested to do so through counsel.

Consequently, the summarized nature of the contempt proceedings violated the Petitioner's right to due process. *See Id.*; *In re Oliver*, 333 U.S. at 273-76. Under no circumstances did

[6] See below for a detailed discussion of the Petitioner's Religious Freedom Restoration Act defense. (Issue III)

[7] See below for detailed discussions on the unreasonable multiplication of charges (Issue II), and also the requirement that Judge Gross disqualify himself for the contempt proceedings due to implied and actual bias. (Issue IV).

a situation demanding immediate judicial action exist. Each instance could be fully anticipated by the military judge. It should have been apparent to Judge Gross after successive contempt proceedings that, based upon the Petitioner's religious beliefs, he was simply not going to shave. There is simply no reason why the judge, on notice of the issue each time, could not have scheduled a hearing as demanded by the Fifth Amendment. The judge's failure to conduct formal contempt hearings violated the Petitioner's constitutional right to due process.

Accordingly, the use of summary contempt proceedings was error and a violation of MAJ Hasan's Fifth Amendment right to due process.

II.

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ENTERING MULTIPLE CONTEMPT FINDINGS AND PUNISHING PETITIONER REPEATEDLY FOR THE SAME ACT OF RELIGIOUS EXERCISE.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). This principle is well established in military law. In *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), the Court noted:

> [t]he prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard -- reasonableness -- to address the consequences of an abuse of prosecutorial discretion in the context of the

unique aspects of the military justice system.

Id. at 338.

In *Quiroz*, the CAAF adopted a five-part test for determining whether charges were unreasonably multiplied:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?; and
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338. These five factors are not all-inclusive, but rather serve as a guide. *Id.* "[O]ne or more factors may be sufficiently compelling, without more, to warrant relief on unreasonable multiplication of charges based on prosecutorial overreaching." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012).

Argument

The concept of "unreasonableness" applies to summary contempt proceedings as much as to other punitive violations of the U.C.M.J. In this case, the military judge's findings of contempt turn on disobedience of an order to be clean shaven, which could have also been charged as a violation of Articles 90 or 92, U.C.M.J. The Discussion to R.C.M. 809 provides that a person

subject to the code may be tried by court-martial "in addition to or instead of punishment for contempt," and that violations of a judge's orders intended to ensure "the orderly progress of trial" are "not punishable under Article 48, [U.C.M.J.,] but may be prosecuted as a violation of Article 90 or 92[U.C.M.J]."

Even if this particular language in the Discussion does not reflect the 2011 changes to Article 48, U.C.M.J., (adding, inter alia, willful disobedience of the military judge as a punishable type of contempt), the point remains that the alleged contemptuous behavior in this case should be analogized to an Article 90 or 92, U.C.M.J., violation under principles of law and equity, because the underlying conduct is the same. The military judge should not be able to escape scrutiny for unreasonably multiplying contempt proceedings, when the same number of charges under Article 90 or 92, U.C.M.J., would be considered unreasonable. As stated as early as the 1951 Manual for Courts-Martial: "If a person willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is given by the same or other superior, a multiplication of charges to disobedience should be avoided." *See* MCM, para. 26b (1951); *United States v. Doss*, 15 M.J. 409 (C.M.A. 1983).

When a military judge at a general court-martial summarily imposes fines, and potentially confinement, on an accused for what could also be charged as punitive U.C.M.J. violations, he fills the role of a "prosecutor" for purposes of analysis under *Quiroz*.

Under this analogy, all five *Quiroz* factors indicate that summary contempt proceedings were unreasonably multiplied in this case.

Under the first *Quiroz* factor, MAJ Hasan objected at trial to repeated contempt proceedings, and their summary nature. (Enclosure 9 at 3). Under the second factor, MAJ Hasan's growing of a beard contrary to Army Regulation is one continuous act. Major Hasan has been wearing his beard since late April 2012, and there has been no "distinctly separate" act since that time, other than MAJ Hasan appearing in court *whenever ordered by the military judge*. Simply because Judge Gross has individual views of the act does not transform each appearance into separate acts.

For the same reason, under the third and fourth factors, repeated contempt findings do exaggerate MAJ Hasan's "criminality," and unreasonably increase MAJ Hasan's punitive exposure. Even if, for the sake of argument, Major Hasan could be held in contempt (under non-summarized procedures) for the first occasion he came to court in violation of an Army Regulation and the military judge's order, there is no legal justification for repeatedly punishing him for this same act, when there has been no change in behavior or demeanor, and no separate, identifiable act of disobedience. Here MAJ Hasan is wearing his beard because he sincerely believes that to not have a beard is a sin. He did not simply decide that he likes facial hair.

Finally, under the fifth factor, Judge Gross's insistence on sentencing MAJ Hasan as harshly and on as many occasions as

possible (with the exception of the last hearing), does indeed indicate "prosecutorial" (or judicial) overreaching. Major Hasan's behavior and outward posture have not changed since his initial decision to grow a beard for religious reasons. The military judge's successive contempt hearings are the only interruption to this single, continuous course of conduct.

As a matter of both law and equity, MAJ Hasan should not have to endure six separate summary findings of contempt, each with the maximum allowable fine for a total of $6000.00, merely because he continues to maintain his beard for religious reasons. As the C.A.A.F. held in *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006), dismissal of charges is an available remedy to address an unreasonable multiplication of charges on findings. Unreasonable multiplication of charges is also a recognized doctrine in sentencing, where the focus is on appropriate punishment. The *Quiroz* factors apply to unreasonable multiplication of charges on both findings and sentencing. *See* R.C.M. 1003(c)(1)(C), *Quiroz*, 55 M.J. at 339. *Campbell*, 71 M.J. at 24.

In this case, both the sheer number of summary contempt proceedings and the repeated maximum fines constitute an unreasonable multiplication of charges, to the detriment of MAJ Hasan.

III.

WHETHER THE MILITARY JUDGE ERRED WHEN HE FOUND THE PETITIONER GUILTY OF CONTEMPT AFTER THE PETITIONER HAD ASSERTED THE RELIGIOUS FREEDOM RESTORATION ACT AS A DEFENSE.

Law

The Free Exercise Clause of the First Amendment to the Constitution mandates that the government cannot "prohibit[] the free exercise" of religion. Historically, the Supreme Court drew a distinction between religiously motivated conduct – which may be restricted based on a legitimate secular concern even if a citizen's free exercise is affected – and religious belief. *See West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (holding government cannot control beliefs and stating, "[i]f there is any fixed star in our [C]onstitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.").

The Supreme Court subsequently developed a framework to analyze whether a government action justifiably infringed on a citizen's free exercise of religion. That framework, however, has fluctuated. In 1963, the Supreme Court determined a state had to have a "compelling state interest" and not merely "a relationship to some colorable state interest" before it could burden the free exercise of religion. *Sherbert v. Verner*, 374 U.S. 398, 406

(1963). Nearly a decade later in a challenge to a compulsory public school attendance law by Amish parents, the Supreme Court again rejected the notion that "religiously grounded conduct is always outside the protection of the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972). In overturning the conviction, the Supreme Court determined "it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." *Id.* at 236.

However, the Supreme Court subsequently rejected this "compelling state interest test," replacing it with a less stringent standard in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). The Supreme Court stated "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879.

Congress specifically responded to the *Smith* holding in 1993 with the Religious Freedom Restoration Act (RFRA), by reestablishing the "compelling state interest test" set forth in *Verner* and *Yoder*. In the RFRA, Congress found in part:

> [G]overnments should not substantially burden religious exercise without compelling justification; . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and . . . the compelling interest test as set forth in prior Federal

> court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a). The resulting RFRA framework is thus whether a sincerely held religious belief is substantially burdened; and where under RFRA, a "'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*)[,] or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. Ariz. 2008).[8]

Section C of 42 U.S.C. §2200bb states, "(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim *or defense* in a judicial proceeding and obtain appropriate relief . . ." 42 USCS § 2000bb-1(c) (*Emphasis Added*). As such, when it can be

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[8] This framework best explains the substantial burden test. Other circuits have adopted similar tests all within the framework established under *Yoder* and *Sherbert*. See *Patel v. U.S. Bureau of Prisons,* 515 F.3d 807, 813 (8th Cir. 2008) (quoting *Murphy v. Mo. Dep't of Corr.,* 372 F.3d 979, 988 (8th Cir.2004)) ("[s]ubstantially burdening one's free exercise of religion means that the regulation 'must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunity to engage in those activities that are fundamental to a person's religion); see also *United States v. Ali,* 682 F.3d 705, 711 (8th Cir. 2012) (An order requiring someone to act affirmatively in violation of a sincerely held religious belief, or face involuntary enforcement of that order (in this case through a fine), clearly burdens the free exercise of religion).

sufficiently raised, RFRA serves as a defense to a criminal charge. See *United States v. Quaintance*, 523 F.3d 1144, 1146 (10th Cir. 2008). Further, as held in *United States v. Ambort*, 193 F.3d 1169, 1172 (10th Cir. 1999), "First Amendment defenses . . . are adequately safeguarded by review [of appellate courts] after any adverse final judgment." *Id.* As such, the Petitioner can assert the RFRA as a defense to contempt, and any finding of contempt should be reviewed by this court.

Finally, RFRA's application to the military is clear since 42 U.S.C. § 2000bb(a) applies to the "government," which is defined as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States[.]" *Id.* at §2000bb(b)(2). In his 12 September 2012 Ruling, The military judge made a similar conclusion. (Enclosure 14 at 3). As articulated in the RFRA Senate Report: "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." S. Rep. 103-111 (July 27, 1993).

Argument

a. Judge Gross's order substantially burdens MAJ Hasan's sincerely held religious beliefs.

The military judge has held six summarized contempt proceedings. According to the judge, the Petitioner's beard

amounts to a disruption to the court proceedings. At each of the summarized contempt proceedings the Petitioner, through counsel, asserted that he believed that his religion required him to wear a beard. The Petitioner then objected to each proceeding, and at each proceeding asserted his rights under the First Amendment and the Religious Freedom Restoration Act. During the contempt hearing on 30 August 2012, the Petitioner himself stated on the record, "Your Honor, in the name of all mighty Allah, I am a Muslim. I believe that my religion requires me to wear a beard. I am not trying to disrespect your authority as military judge, and I am not trying to disrupt the proceedings or decorum of the court. When I stand before God, I am individually responsible for my actions." (Enclosure 9 at 3). Despite the Petitioner's assertion of the RFRA as a defense, the military judge fined the Petitioner $1,000.00 at each summarized contempt proceeding. The military judge has not made findings on the record with respect to Petitioner's assertion of the RFRA as a defense and its application to the judge's findings that Petitioner has been in contempt of court.

Within the context of the RFRA, the act extends free exercise rights even to religious practices that are not compelled by or central to a particular belief system. *See Van Wyhe v. Reisch,* 581 F.3d 639, 656 (8th Cir.2009) (construing the definition of "religious exercise" established in 42 U.S.C. § 2000cc-5 ("'religious exercise' includes any exercise of religion, whether

or not compelled by, or central to, a system of religious belief"); 42 U.S.C. § 2000bb-2(4) (defining "exercise of religion" under RFRA as meaning "religious exercise, as defined in [42 U.S.C. §] 2000cc-5"). Thus, in a RFRA analysis, a rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both "sincerely held" by and "rooted in [the] religious belief[s]" of the party asserting the claim or defense. *See United States v. Zimmerman,* 514 F.3d 851, 853 (9th Cir.2007).

The Petitioner's wearing of a beard is rooted in his sincerely held religious beliefs. Petitioner is a practicing Muslim and has recently come to believe that not having a beard is a sin in accordance with his faith. (Enclosure 2 at 3). This belief is directly related to the Petitioner's own beliefs about the Muslim faith. *See United States v. Ali,* 682 F.3d 705 (8th Cir. 2012) (whether accused's beliefs were consistent with other Muslims' was not relevant to an analysis under the RFRA). The Petitioner has discussed his reasons for growing his beard with MAJ [redacted] the TRADOC Imam and member of the Defense team. Chaplain [redacted] believes that Petitioner's desire for growing the beard is a sincere, personal religious conviction. (Enclosure 4 at 4). In fact, Judge Gross has asserted, on the record, that he did not dispute MAJ Hasan's reasoning for not abiding by the court order. However, Judge Gross did not believe that MAJ Hasan's religious convictions excused his actions. (Enclosure 3 at 3).

The Petitioner's 30 August 2012, statement, on the record and during open court is by itself sufficient to establish a sincerely held religious belief. Within the context of *Ali*, it was sufficient for Ali to state on the record during open court that, by refusing to stand for the judge she "never intended not to follow the rules of the court" but that her Muslim religion prohibited her from rising. *Ali*, 682 F.3d at 707. After being questioned again by the judge, Ali further stated:

> "I am willing to do anything else, but this is not to disrespect anyone. This is not to [not] follow the court rules. It's just a matter of faith for me to not stand for anyone. I am willing to do anything and everything other than . . . to compromise my faith . . . . As far as the other people who have the same faith as me, if they stand up for the jury or for anyone else, that's their rights. When I am before God, God will charge me individually and they will be charged individually."

Id. Ali's statement was not made from the witness stand nor was it under oath. She simply asserted her religious belief and this assertion was sufficient to establish her sincerely held religious belief under the RFRA framework. In this case, the Petitioner has similarly made a statement on the record, which would itself be sufficient to establish his sincerely held religious belief.

The Petitioner's refusal to shave is based upon his sincerely held religious belief that he must grow a beard and not shave. As the prophet of Islam said: "Trim closely the moustache, and let the beard flow (grow)." - Narated Ibn Umar (R.A.). Further, Hadith no. 498, "Rasulullah (Sallallahu Alayhi Wasallam)" orders Islamic men to "trim the moustache closely and spare the bard."

Ibn Umar - Muslim, Hadith no. 449. Simply put, the Petitioner shares a belief with other Muslims that he must grow a beard, his decision to not shave is an exercise of his sincerely held religious beliefs.

Forcing the Petitioner to choose between exercising his sincerely held religious belief and being fined $1000.00 every time a court session is held, substantially burdens the Petitioner's religious practice. Ultimately, the choice faced by the Petitioner is to either violate his religious beliefs on a daily basis by shaving his own beard, or be fined by Judge Gross for demonstrably adhering to his religious belief that Islam requires male followers to remain unshaven. This precise situation arises to a substantial burden within the definition of the Supreme Court, Ninth Circuit and Eighth Circuit. Here, the Court is forcing the Petitioner to choose between following what he believes to be a tenet his religious faith and facing criminal sanctions. Because shaving is a daily act, the Petitioner must decide each day whether to violate his own beliefs, or allow the Court to fine him $1000.00 for exercising his religious beliefs. Therefore, an order requiring Petitioner to act affirmatively in violation of his sincerely held religious belief, or face involuntary enforcement of that order (in this case through a fine), clearly and substantially burdens his free exercise of religion. *Ali,* 682 F.3d at 711.

Because there is sufficient evidence to conclude that the Petitioner has a sincerely held religious belief that would be substantially burdened, the military judge should have considered the Petitioner's assertion of the RFRA as a defense to the contempt proceedings. It was improper and reversible error for the military judge to conduct summarized contempt proceedings where the Petitioner's assertion of the RFRA could not be adjudicated adequately or properly.

In sum, it is clear that the Military Judge should have held a full contempt hearing and found the Petitioner not-guilty due to the Petitioner's assertion of the RFRA as defense.

IV.

WHETHER THE MILITARY JUDGE FAILED TO DISQUALIFY HIMSELF AS THE JUDGE PRESIDING OVER THE CONTEMPT PROCEEDINGS.

Law

There are two grounds for disqualification of a military judge: "specific circumstances connoting actual bias and the appearance of bias." *United States v. Quintanilla,* 56 M.J. 37, 44-45 (C.A.A.F. 2001). *See also* R.C.M. 902. Rule for Courts-Martial 902 is based on 28 U.S.C. §455 and has the same test as the federal statute. *Analysis,* R.C.M. 902.

Under the actual bias standard, a military judge *shall* disqualify himself "Where the military judge has a personal bias or prejudice concerning a party. . ." R.C.M. 902(b)(1). The term

"personal" means the bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Kratzenberg*, 20 M.J. 670, 672 (A.F.C.M.R.1985) (*quoting United States v. Grinnell Corp.*, 384 U.S. 563 (1966)). "Non-personal" bias or prejudice, which does not stem from an extrajudicial source, requires disqualification only when "it is so egregious as to destroy all semblance of fairness." *Wright*, 52 M.J. at 141 (*quoting* J. Shaman et al., Judicial Conduct and Ethics § 4.05 at 102 (2d ed.1995)).

Under implied bias, even appearances can be disqualifying. R.C.M. 902(a) provides that the military judge *shall* disqualify himself in any proceeding "in which that military judge's impartiality might reasonably be questioned." As a federal court noted,

> The goal of *[28 U.S.C.]* §455 (a) *[and by extension, R.C.M. 902]* is to avoid even the appearance of partiality. If it would appear to a reasonable person that a Judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the Judge does not recall the facts, because the Judge actually has no interest in the case or because the Judge is pure in heart and incorruptible.

Nichols v. Alley, 71 F.3d 347, 351 (10th Cir., 1995), *italicized words added.*

The legal test applied under R.C.M. 902(a) is "whether a reasonable person, knowing all the relevant facts, would harbor

doubts about the Judge's impartiality." *Id. (quoting United States v. Cooley*, 1 F.3d 985, 993 (10th Cir., 1993)). Further, the hypothetical "reasonable person" in the test is not a judge, because "[w]e must bear in mind that 'these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be'." *In re Nettles*, 394 F.3d 1001, 1002 (7th Cir., 2005). In applying this test, the Military Judge "should broadly construe grounds for challenge but should not step down from a case unnecessarily." Discussion, R.C.M. 902. "[E]ach . . . case is extremely fact intensive and fact bound, and must be judged on its unique facts and circumstances more than by comparison to situations considered in prior jurisprudence." *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir, 1995).

The Court should consider the totality of the circumstances and balance the possible questioning of the impartiality by a reasonable person against the relative ease of replacing the presiding judge with one available from an outside pool of judges. *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir., 1995). "If the question of whether section 455 [and thereby R.C.M. 902] requires disqualification is a close one, the balance tips in favor of recusal." *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir., 1995).

Argument

a. Judge Gross has an actual personal bias towards appellant and his recusal was required to ensure fair contempt proceedings, and is required to ensure a fair trial.

The record in this case clearly demonstrates an actual bias on the part of Judge Gross towards MAJ Hasan, such that recusal was mandated to ensure a fair and impartial contempt hearing. The actual bias stems in part from the fact that MAJ Hasan defied the military judges own order. This is not the normal court-martial where the judge sits in judgment over an accused's actions with others, instead the military judge was personally involved as the order being violated was his own. As the military judge had heatedly reminded defense counsel and MAJ Hasan, "[h]is conduct is *disrespectful. He is disobeying an order from the court.*" (Enclosure 3 at 9). Judge Gross also had a pattern of unfair rulings that demonstrated his preferential treatment of government counsel and requests and his bias towards MAJ Hasan and defense counsel requests. On 17 May 2012, Judge Gross issued a rapid-fire docketing order, without Defense input, only the day after the senior prosecutor and future Fort Hood SJA sent a terse email requesting such an order. Judge Gross also set a 4 June 2012 hearing date without requested input from the Defense, a date that the Defense was in fact not available. (Enclosure 11). Judge Gross initiated contempt proceedings at the request of the future Fort Hood SJA. (Enclosure 4 at 4-6). Further, Judge Gross continually denied defense requests for a continuance, with little

to no explanation, on the record, regarding his ruling except to point out that MAJ Hasan's actions in growing a beard will be used against him in deciding the continuance request. (Enclosures 2 at 5-6 and 13 at 42). The military judge even granted a government request for continuance from 30 August until 6 September 2012, in order for the government to perfect the record regarding the Religious Freedom Restoration Act despite indicating previously that he was prepared to order MAJ Hasan forcibly shaved on 30 September. It is troubling that the military judge was willing to grant the government time to perfect its case on an ancillary matter that helped the military judge, but was not willing to give MAJ Hasan's attorneys enough time in a capital case to review all of the government provided discovery or interview all of the government's noticed witnesses.

Judge Gross's behavior on 8 June 2012 also shows that he was and is in fact actually, personally biased toward MAJ Hasan. Judge Gross entered the Article 39(a) session on 8 June already knowing that MAJ Hasan had grown a beard purely for religious reasons. Even though MAJ Hasan was otherwise in proper uniform and maintained appropriate demeanor, Judge Gross' attention at the 8 June hearing shifted exclusively and intensively on the fact that MAJ Hasan had a beard. Rather than consider any alternative, Judge Gross refused to hear any other issue that day, and jumped straight to the constitutionally-suspect extreme of barring MAJ Hasan from the courtroom unless and until he was clean-shaven. He

then proceeded to blame MAJ Hasan for any delay occurring in the case. He stated, "what is happening here, the accused is making- the things that he is doing are causing you to divert your attention from preparing for trial. . ." (Enclosure 2 at 5).

After his notable frustration with MAJ Hasan's religious decision, the situation only escalated. Sometime after the parties left the courtroom, Judge Gross discovered what he *believed* were feces on the floor of the deliberation room bathroom. It is clear from Judge Gross' immediate reaction that he believed the "feces" had been left on the bathroom floor by MAJ Hasan. Rather than holding Trial Counsel, the command, or the DES responsible for their stated duties, Judge Gross moved immediately to the conclusion and expectation that the Defense would clean up "MAJ Hasan's" mess. (Enclosure 13 at 22). For an apparently preconceived reason - the very definition of bias - Judge Gross put MAJ Hasan at fault for an "incident" that was later discovered to be no more than a DES guard tracking in mud. *Id.* Even after being informed, by DES, that the substance was mud, Judge Gross refused to accept that MAJ Hasan was not at fault. On the record, he stated, "It doesn't matter what it was; the fact is is (sic) that the accused was at least partially responsible for the mess that was in the latrine. As I said, I'm perfectly within my right to tell the side that created the mess to come clean it up, and that's what I did." (Enclosure 13 at 22). This meets the very

definition of bias. Even in the face of evidence proving otherwise, Judge Gross was unable to take blame off of MAJ Hasan.

Even under the strictest "actual bias" standard, Judge Gross' default behavior, to immediately blame MAJ Hasan for a potentially embarrassing situation, was "so egregious as to destroy all semblance of fairness." Given that Judge Gross had earlier taken it upon himself, for some unexplained reason, to take out MAJ Hasan's diaper bags, it is not unreasonable to believe that Judge Gross may already have harbored some pent-up resentment toward MAJ Hasan that visibly manifested itself on 8 June 2012.

Judge Gross continued to display an outward bias towards MAJ Hasan when he excluded him from the courtroom on 19 June 2012. Specifically, the military judge's comments indicated his personal issues with MAJ Hasan. Judge Gross indicated he had a personal issue with MAJ Hasan who "does not have any problem accepting everything that he is entitled to as an officer" when "he doesn't want to follow the rules and regulations." (Enclosure 3 at 9). The military judge has no idea if MAJ Hasan has a "problem" accepting the entitlements of an officer or of a pre-trial confinee, yet Judge Gross choose to inappropriately admonish MAJ Hasan on the record for something he has no control over (the Army's decision to pay him pending trial).

The military judge's speculation and bias toward MAJ Hasan continued during the first summary contempt proceeding on 25 July 2012. The military judge called assistant defense counsel's

arguments that other means were available to handle MAJ Hasan's beard "just ridiculous, because we all know that's not going to work." The military judge highlighted his personal stake in the beard, "If *I sit here and order him to shave*, and he refuses to do it, what good is it going to do to offer him an Article 15? I don't think any." Again, without actually knowing what MAJ Hasan would do and refusing to consider MAJ Hasan's Religious Freedom Restoration Act defense, the military judge's comments show his bias and disdain for MAJ Hasan. This is highlighted by the military judge's comments earlier in the 25 July hearing, "Stop, Defense. Do you think Major Hasan cares is he is charged with disobeying an order when his is facing 13 counts of premeditated murder and 32 counts of attempt premeditated murder." The military judge continued by asking if MAJ Hasan would take an Article 15 or "demand trial by court-martial" clearly indicating a negative view of MAJ Hasan exercising his rights under the Uniform Code of Military Justice just like he indicated a negative view of MAJ Hasan for accepting his entitlements when not following the rules. Most notably, Judge Gross held MAJ Hasan in contempt of court, for the same misconduct, on six different occasions. During each of the contempt proceedings, Judge Gross refused to allow the defense to present evidence on behalf of MAJ Hasan and he sentenced him to the maximum fine available under Article 48, U.C.M.J.

b. Judge Gross should have disqualified himself as the military judge because, looking at all relevant facts, his impartiality might reasonably be questioned.[9]

Based on the extraordinary circumstances in this case, it is inescapable that a reasonable person, knowing all the relevant facts, would harbor doubts as to Judge Gross's impartiality. This is especially true where Judge Gross was physically present and had family members present on Fort Hood when the shootings occurred, was a victim of the hours long lock-down of Fort Hood, and was present for the after-math of the shootings when the public outcry against MAJ Hasan was rampant within the Fort Hood community. (Enclosure 15).

However, it is not merely the fact that COL Gross was on Fort Hood on 5 November 2009, which created the appearance of bias. It is that fact combined with the adverse judicial rulings made by COL Gross with little to no explanation, his demeanor and actions towards Petitioner, his removal of Petitioner from the courtroom, his repeated summary contempt hearings in which he imposes the maximum sentence against petitioner, and his threat to forcibly shave petitioner all serve as evidence of his bias. Most notably, however, Judge Gross, continually displayed a proclivity to blame MAJ Hasan for issues arising during the trial. This was evidenced through Judge Gross' accusatory statements towards petitioner regarding the alleged fecal matter and his statements blaming

[9] MAJ Hasan requests this court to also include the facts in section a, *supra*, when determining recusal based on an implied bias standard. MAJ Hasan also requests that this court disqualify Judge Gross for the entire proceedings.

petitioner for any delay in the proceedings of the trial. (Enclosure 13).

Based on the extraordinary circumstances in this case, it is inescapable that a reasonable person, knowing all the relevant facts, would harbor doubts as to Judge Gross's ability to be impartial, especially when it is his order that is being disobeyed. Considering all of the evidence above, an outside observer would have likely conclude that Judge Gross had actual bias towards MAJ Hasan for violating his order and would certainly have concluded that Judge Gross had an implied bias towards MAJ Hasan in the contempt proceedings. Therefore, it was reversible error for Judge Gross to not disqualify himself as the presiding judge over all of the contempt proceedings.

Accordingly, Petitioner requests this court to issue an order vacating the contempt findings and sentences and prohibiting Judge Gross from presiding over any subsequent contempt proceedings. As further relief, based on Judge Gross's continuing actions further demonstrating actual and perceived bias, Petitioner renews his petition that the Court issue a Writ ordering the removal of Judge Gross as the military judge in Petitioner's court-martial and order the appointment of a new military judge to preside over Petitioner's trial.[10]

[10] Petitioner request the Court to consider Petitioner's petition in this regard filed at C.A.A.F. on 18 July 2012. (Enclosure 15).

V.

WHETHER R.C.M. 809 UNCONSTITUTIONALLY VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (U.S. 1976). The Supreme Court has consistently held that "some form of hearing is required before an individual is finally deprived of a property interest. . . . The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. The fundamental requirement of due process is the opportunity to be heard "at a *meaningful time* and in a *meaningful manner*." *Id.* (*emphasis added*) (Internal citations and quotations omitted).

Due process is typically examined on a sliding scale where the amount of process due is based upon the context of the deprivation. "It has been said . . . that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (U.S. 1972) (reversed on other grounds). "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance representing a profound attitude of fairness, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the

strength of the democratic faith which we profess." *Ingraham v. Wright*, 430 U.S. 651, 675 (U.S. 1977) (quoting *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)).

Within the criminal proceeding context, and in the context of contempt proceedings, due process has required that "one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." *In re Oliver*, 333 U.S. at 275.

As mentioned above, due process requires an opportunity to be heard "at a *meaningful time* and in a *meaningful manner*." *Mathews*, 424 U.S. at 332. Importantly, *Mathews* requires the opportunity to be heard before the deprivation. However, in certain circumstances courts have also recognized a post-deprivation opportunity to be heard. See *Hudson v. Palmer*, 468, U.S. 517, (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981) (reversed in part on other grounds, See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 501 FN9 (2007) (Justice Alito, Scalia, Kennedy, and Thomas concurring). Such a right to post-deprivation due process has been found to exist when no due process (or meaningful opportunity to be heard) has been afforded prior to the deprivation. See *Hudson*, 468, U.S. 517 (destruction of an inmates' property during

a shakedown search); *Parratt*, 451 U.S. 527 (loss of an inmates' property due to negligence).

Keeping in mind that due process requires a meaningful opportunity to be heard prior to the deprivation, occasionally, the necessity of quick action by the state or the impracticality of providing pre-deprivation due process could subrogate this necessity with post-deprivation process.[11] *See Id.; Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The Supreme Court in *Hudson* explained, "either the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . [satisfies] the requirements of procedural due process." *Id.* (*quoting Parratt v. Taylor*, 451 U.S. 527 (1981)).

With respect to the deprivation of *property*, courts have consistently held that a deprivation of property is not a violation of due process if there is a post-deprivation remedy.

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[11] This general rule was established by the Supreme Court in an examination of a number of previous Supreme Court decisions where it determined that the necessity of quick action by the state or the impracticality of providing any meaningful pre-deprivation process required a post-deprivation right to due process. *Parratt*, 451 U.S. at 539 *citing*: *North American cold Storage Co v. Chicago*, 211 U.S. 306 (1908); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 549 (1950); *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Corn Exchange Bank v. Coler*, 280 U.S. 218 (1930) *McKay v. McInnes*, 279 U.S. 820 (1929); *Coffin Brother & Co v. Bennett*, 277 U.S. 29 (1928); *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

Hudson, 468, U.S. 517. Importantly, this post deprivation remedy must be *meaningful*. *Id.* at 531-33. Specifically, the deprivation of property within the context of due process rests on the opportunity to be heard in a *meaningful* manner. As explained in *Hudson*, "[f]or . . . deprivations of property . . . the state's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy." *Id.* Further, in *Parratt*, the Supreme Court held that the Due Process Clause is not violated if an individual deprived of property is made available "a *meaningful* post-deprivation remedy." *Parratt*, 451 U.S. at 543-44. (*emphasis added*).

Hudson and *Parratt* both exemplify the occasional necessity of quick action by the state and the occasional impracticality of providing pre-deprivation due process. The necessity of quick state action in *Hudson* and *Parratt* is not dissimilar from the occasional judicial need to hold summary contempt proceedings as discussed in *In re Oliver* and *Cooke*. As the Supreme Court explained in *Cooke*, in limited circumstances summary contempt proceedings are necessary in certain circumstances where, in order to "preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbances or violence or physical obstruction or disrespect to the court when appearing in open court." *Cooke v. United States*, 267 U.S. at 536. As further explained in *In re Oliver*, summary contempt proceedings are necessary "where immediate punishment is essential

to prevent demoralization of the court's authority before the public." *In re Oliver*, 333 U.S. at 274-76. Thus, the circumstances requiring the deprivation of property through a conviction and sentence at a summary contempt proceeding are akin to those where there is a necessity of quick state action and the impracticality of pre-deprivation due process.

The Supreme Court in *Cooke*, *In re Oliver*, and *Ex parte Terry*, recognized the substantial infringement of due process when summary contempt proceedings are held. Specifically, prior to the court's deprivation of property via a summary contempt proceeding, an accused is not afforded the pre-deprivation assistance of counsel, the pre-deprivation right to offer testimony, and the pre-deprivation right to examine witnesses against him. In essence, *Cooke* and *In re Oliver* establish an exception to the pre-deprivation right to due process when the misconduct necessitating summary contempt occurs "in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court are actually observed by the court." *In re Oliver*, 333 U.S. at 274-76. This is in essence the same requirement for summary contempt proceedings established in R.C.M. 809(b)(1).

As discussed in Issue I, the Supreme Court also recognized, however, "such departure from the accepted standards of due process was capable of grave abuses, and for that reason [*Ex parte Terry*] gave no encouragement to [the expansion of summary contempt

powers] beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise. . . ." *Id.* at 274. These same risks exist when a state deprives an individual of property without pre-deprivation due process. Thus, when a deprivation occurs without due process, there is a requirement for post-deprivation due process and a post-deprivation opportunity to be heard at a *meaningful time* and in a *meaningful manner.* Therefore, some opportunity for post-deprivation due process must constitutionally exist when an individual is deprived of property in a summary contempt proceeding.

The Petitioner's case is a prime example of why such post-deprivation due process is necessary. In the case of MAJ Hasan, he was found guilty in a summary contempt proceeding six separate times for refusing to obey the military judge's order to shave; which Judge Gross personally witnessed and deemed disruptive. At each of the summary contempt proceedings, MAJ Hasan was afforded the opportunity to make a statement. He was not afforded the opportunity to have counsel represent him at a hearing because the judge determined that the proceeding was not a hearing. Further, MAJ Hasan was denied the opportunity to call witnesses and present evidence. Thus MAJ Hasan was denied *traditional* due process as explained by *Cooke*. What MAJ Hasan did do, though his attorneys that represented him in the Court-Martial, was attempt to assert the RFRA as a defense at the contempt proceeding.

Despite the Petitioner's assertion of the RFRA as a defense, the military judge immediately, and without comment, found the Petitioner guilty of contempt six separate times. The military judge did not question the Petitioner about his religious beliefs, did not ask questions about the RFRA, and did not conduct a RFRA analysis on the record. The military judge simply found the Petitioner guilty of contempt. Such facts indicate that even though an opportunity to make a statement was afforded to the Petitioner, such an opportunity did not amount to a *meaningful* opportunity to be heard. As discussed in Issue I, the military judge's decision to hold summary contempt proceedings instead of a formal hearing and his disregard for the Petitioner's defense under the RFRA amount to an abuse of the summary contempt proceedings described in *Ex parte Terry*. Ultimately, the result is the erroneous deprivation of the Petitioner's property without pre-deprivation due process.[12]

Regardless, as mentioned above, a post-deprivation due process right has been found to exist when no due process (or meaningful opportunity to be heard) has been afforded prior to the deprivation. See *Hudson*, 468, U.S. 517. Thus the Petitioner, in this case, must be afforded a post-deprivation opportunity to be heard at a *meaningful time* in a *meaningful manner*. Because RCM 809(d) did not afford the Petitioner such an opportunity, those

[12] The Petitioner's property in this case is $1,000.00, the fine imposed by the military judge at each proceeding.

provisions are unconstitutional as a violation of the Petitioner's due process as applied in this case.

R.C.M 809(d) requires that upon completion of a contempt proceeding, the record shall be forwarded to the convening authority for review. "[T]he convening authority may approve or disapprove all or part of the sentence. The action of the convening authority is not subject to further review or appeal." *Id.* While the convening authority can approve or disapprove all or part of the sentence, there is no requirement that the convening authority consider matters submitted by the accused as comparatively required by Art. 60, U.C.M.J. and implemented through R.C.M. 1105(b). R.C.M. 809(d) does not create an opportunity for the Petitioner to submit matters to the convening authority, and in this case no such opportunity was afforded to MAJ Hasan. Even though the convening authority can disapprove the findings and sentence under the rule, the Petitioner is not afforded an opportunity to be heard at a *meaningful time* and in a *meaningful manner*. Because the Petitioner did not have the opportunity to submit matters to the convening authority and for those matters to be considered, the Petitioner could not meaningfully assert his defense under the RFRA. R.C.M 809(d) further prohibits review or appeal of any conviction or sentence resulting from a contempt proceeding. Any reading of R.C.M. 809(d) preventing this court from reviewing the contempt proceedings would not only run contrary to this court's statutory authority

under the All Writs Act, but would also constitute a profound violation of due process.

In sum, MAJ Hasan was denied the opportunity to assert his defense under the RFRA prior to being deprived of his property. He was not given the opportunity to assert the defense for consideration by the convening authority. Further, if read literally, MAJ Hasan would be deprived of the opportunity to raise the defense upon appeal. As a result of these circumstances, MAJ Hasan was deprived of his property on four (soon to be six) separate occasions without the opportunity to be heard at a *meaningful time* and in a *meaningful manner*. Further, MAJ Hasan would be denied pre-deprivation due process and post-deprivation due process. Therefore, MAJ Hasan would be unconstitutionally deprived of his property without due process.

The deprivation of Petitioner's due process becomes further evident when the circumstances surrounding his summary contempt proceedings are compared to similar proceedings held in federal court. Should this court to look to the federal district courts through the lens of Article 36, U.C.M.J., this court would recognize that every federal conviction, including a summary contempt conviction, is subject to appellate review under 28 USC § 1291. Thus even in federal district court a contemnor who does not receive pre-deprivation due process is afforded post-deprivation due process through appellate review.

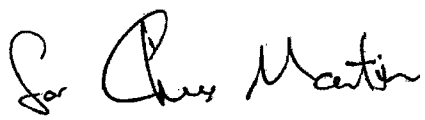
Turning back to our system of military justice, every single finding of guilt at a Special or General Court-Martial is subject to review by the convening authority. R.C.M. 1105. Those who are convicted with a sentence meeting a particular threshold receive post conviction due process through appellate review. R.C.M. 1201. Those whose sentence is below the threshold have their cases reviewed by The Judge Advocate General. *Id.* Even convictions at a summary court-martial are afforded post-conviction due process where an accused can request review by The Judge Advocate General. R.C.M. 1306(d). Under R.C.M. 809(d), the deprivation of any opportunity to be heard at a *meaningful time* in a *meaningful manner* unconstitutionally deprives MAJ Hasan of due process.

At no point was MAJ Hasan able to raise the RFRA as defense to contempt. He was unable to raise this defense at a *meaningful time* and in a *meaningful manner* in front of the military judge during the actual contempt proceedings. He was unable to raise the defense at a *meaningful time* and in a *meaningful manner* in front of the convening authority. Further, he was unable to raise the defense at a *meaningful time* and in a *meaningful manner* through traditional appellate review. Moreover, unlike summary contempt proceedings in federal district court and every other offense under the U.C.M.J., MAJ Hasan was deprived of appellate review. Because MAJ Hasan was deprived of his property under R.C.M. 809(d) without any opportunity to be heard at a *meaningful*

time and in a *meaningful manner*, he was unconstitutionally deprived of his property without due process.

Relief Sought

Petitioner requests that this Court issue an order vacating his contempt rulings and staying further court-martial proceedings during the pendency of the litigation of his Petitions before this and superior courts. Further, based on Judge Gross's continuing actions further demonstrating actual and perceived bias, Petitioner renews his petition that the Court issue a Writ ordering the removal of Judge Gross as the presiding judge over the contempt proceedings, and granting further relief by ordering the removal of the military judge in Petitioner's court-martial.



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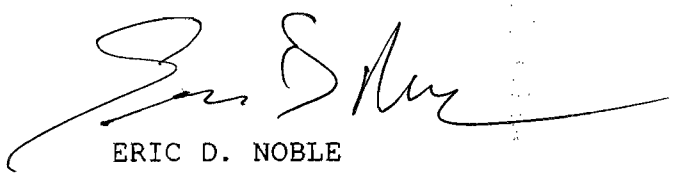

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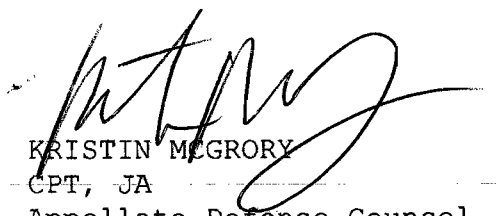

KRISTIN MCGRORY
CPT, JA
Appellate Defense Counsel

CERTIFICATE OF SERVICE

UNITED STATES v . MAJ Nidal Hasan

Army No. _____

Brief in Support of Petition for Extraordinary Relief___X___

Motion_____

In accordance with Rule 20.2(a), I certify that the original and two copies were delivered to the Court and the Government Appellate Division on 19 September 2012.

KRISTIN MCGRORY
CPT, JA
Defense Appellate Division