

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 Brig
Fort Hood, Texas

Petitioner

) PETITION FOR RELIEF IN THE
) NATURE OF AN EXTRAORDINARY WRIT
) IN THE NATURE OF A WRIT OF
) PROHIBITION AND APPLICATION FOR
) STAY OF PROCEEDINGS

) Army Misc. Dkt. No. 20120877

) 20 September 2012

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) issue
an order prohibiting the military judge from ordering the
forcible shaving of petitioner.

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. 3

Issues

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.

Jurisdictional Statement

The jurisdictional basis for the Writ is the All Writs Act, 28 U.S.C. 1651(a), which provides this Court with the inherent authority to oversee the interlocutory actions of the inferior courts of the Army. *Cf. Noyd v. Bond*, 395 U.S. 683, 686, 695 (1969) (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"). Further, it is well-established in military law that, pursuant to the All Writs Act, 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).

While the writ should be invoked only in truly extraordinary situations, it is appropriate when a lower court's decision amounts "to a judicial usurpation of power, or . . . characteristic of an erroneous practice which is likely to recur." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (citations and internal quotation marks omitted). Here, Petitioner faces the prospect of being forcibly shaved by order of the military judge. Such an order directly violates petitioner's right to practice his faith without substantial governmental intrusion. Further, the military judge does not have the authority, under the Manual for Courts-Martial, to enforce such an order. This is especially true where petitioner's actions are a direct result of his sincerely held religious beliefs and do not constitute a disruption to the trial proceedings. As such, 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 requests that this Honorable Court grant extraordinary relief by prohibiting Colonel Gregory Gross from ordering the forcible shaving of petitioner's facial hair. Additionally, Petitioner requests that this Court stay the court-martial proceedings. Issuing a writ of prohibition is appropriate in Petitioner's case. Petitioner is a practicing Muslim and holds a sincere religious belief that his beard is a

necessary requirement when facing death. Because of his religious beliefs, Petitioner faces the prospect of being forcibly shaved by order of the military judge. Such an order directly violates Petitioner's right to practice his faith without substantial governmental intrusion. Relief in the normal course of appellate representation is insufficient in this case because Petitioner's fundamental and statutory rights to freedom of religion are immediately at issue. The military judge has ordered petitioner to be forcibly shaved prior to the start of his court-martial. In order to ensure that petitioner's rights are not violated, petitioner requests this court grant his Petition for Extraordinary Relief.

Further, given the complexity and costs associated with the litigation of a capital trial, the interests of justice compel the conclusion that it would be a waste of resources to require petitioner to await appellate review of this issue. Accordingly, without issuance of the writ, petitioner faces the prospect of being physically forced to shave his beard in contravention of his sincerely held religious beliefs.

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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KRIS POPPE
LTC, JA
Defense Counsel

CERTIFICATE OF SERVICE

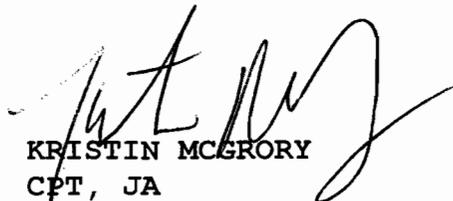
UNITED STATES v . MAJ Nidal Hasan

Army No. _____

Petition for Extraordinary Relief X

Motion _____

I certify that a copy of the foregoing was delivered
to the Court and Government Appellate Division on 20 September
2012.



KRISTIN MCGRORY

CPT, JA

Defense Appellate Division

holds a sincere religious belief that he must grow a beard. Because of his religious beliefs, Petitioner faces the prospect of being forcibly shaved by order of the military judge. Such an order directly violates Petitioner's right to practice his faith without substantial governmental intrusion.

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.

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Facts

On November 5, 2009, charges were preferred against Petitioner alleging thirty-two specifications of attempted premeditated murder and thirteen specifications of premeditated murder, in violation of Articles 80 and 118, Uniform Code of Military Justice [hereinafter UCMJ]; 10 U.S.C. §§ 880 and 918 (2008). On July 6, 2011, the Commanding General, Headquarters, Fort Hood, referred the Charges and Specifications to a trial by general court-martial with special instructions to try the case as a capital case.¹

Petitioner is a practicing Muslim and has recently had a premonition that his death is imminent. He does not wish to die without a beard as he believes this will be disrespectful to his faith and Allah. (Enclosure 2) Shortly after being placed in pretrial confinement, the Petitioner prayed an average of three hours per day. Around the time he chose to grow his beard, the Petitioner was praying on average of four hours per day. (Enclosure 9 at 5). Petitioner has discussed his premonition and reasons for growing his beard with MAJ [REDACTED] the TRADOC Imam and a member of the Defense team. MAJ [REDACTED] believes that Petitioner's desire for growing the beard is a sincere, personal religious conviction. *Id.* As a result of his religious beliefs, on 6 June 2012, Petitioner, through counsel, requested a religious accommodation exception from AR 670-1, *Wear and Appearance of Army*

¹ Enclosure 1 is a compilation of the relevant portions of the record of trial.

Uniforms and Insignias and AR 600-20-*Command Policy* paragraph 1-8 from his brigade commander to have a beard. (Enclosure 3).

On 7 June 2012, MAJ [REDACTED] Petitioner's acting commander, denied this request and directed him to be in compliance with the Army grooming standards. MAJ Hasan sought an appeal of this decision in accordance with AR 670-1 but the appeal was ultimately denied. MAJ Hasan is otherwise in compliance with AR 670-1. *Id.*

On 7 June 2012, the defense notified the military judge, by email, that petitioner would not be clean shaven for the hearing and that he would have a beard. On the same day, the military judge responded that IAW 804(e)(1), the accused and defense counsel are responsible for ensuring the accused is properly attired. He stated that he expected Petitioner to be properly attired and in compliance with AR 670-1 for the hearing. The prescribed uniform for the accused was his ACUs. (Enclosure 4).

On 8 June 2012, petitioner appeared in the proper uniform for the hearing but still had a beard. (R. at 274). The court was called to order and after accounting for the court personnel, the military judge first addressed the issue of petitioner's beard. He stated, for the record, that petitioner had a full beard and that he found that the beard was a "disruption to this trial, and in violation of RCM 804." (R. at 274). The military judge warned petitioner that if the "disruption" did not cease, he would have petitioner removed from the courtroom to watch the trial by closed circuit TV. *Id.* In response, petitioner's defense counsel argued

that petitioner's actions did not constitute a disruption under R.C.M. 804 because his actions did not materially interfere with the trial. (R. at 275). The military judge did not state how the alleged disruption materially interfered with the conduct of the proceedings but only stated that petitioner was in violation of the grooming standards in AR 670-1. (R. at 276).

On 19 June 2012, the defense renewed their objection to the military judge's order removing petitioner from the courtroom and requested the government state their position on the issue on the record. (R. at 281). The government agreed with the military judge that petitioner's appearance was a disruption because he was in violation of Army grooming standards. (R. at 282). They also argued that petitioner's belief was not sincere. Government counsel stated, "at the time the crime was committed, the accused was clean-shaven; at the article 32 hearing, multiple witnesses came in, tired to identify him, and successfully did so . . . now on the eve of trial, the accused grows a beard. We believe his motive, if anything, is to disguise himself and to thwart in-court identification at trial. *Id.* The military judge responded that the government's argument was reasonable but he "[had] **no reason to disbelieve the accused's reasons for growing the beard- that's not the issue.**" (R. at 282) (emphasis added).

In response, petitioner's counsel argued that government's assertions were not supported by the evidence and were completely contrary to the assessment of Chaplain [REDACTED] (R. at 282). They

further argued that petitioner was sitting in the proper uniform, had a fresh haircut, was adhering to the court's standard's of decorum, and has done nothing to interrupt any court proceeding or pretrial proceeding, thus he was not a disruption. (R. at 284). The military judge ultimately rejected the defense arguments and concluded 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." (R. at 287). The military judge went on to assert that petitioner has a duty to follow orders and by not shaving he was violating an order set forth in AR 670-1 which directly resulted in a disruption to the trial proceedings. *Id.* The military judge did not reflect, for the record, how the beard interfered with his ability to carry on the trial proceedings. He merely stated that petitioner was in violation of a regulation and thus his appearance was disruptive. Following his findings, the military judge ordered petitioner immediately removed from the courtroom and required the proceedings to continue without his presence. (R. at 288).

Petitioner was allowed to view the proceedings from closed circuit television in a trailer outside the courtroom but had no physical access to his lead defense counsel. *Id.* The military judge noted that he would reconsider his ruling at every stage of

the court martial process. However, the military judge made it clear that he would only allow petitioner's presence if he were able to obtain an exception to the Army's current grooming policy. (R. at 289).

On 29 July 2012, the military judge, again, excluded petitioner from the courtroom for being in violation of the Army's grooming regulation. (R. at 376). He stated that because petitioner's request for an exception to policy was denied, petitioner's appearance must conform to all Army regulations or he risked being removed from all future proceedings. *Id.* Following this assertion, petitioner's counsel reminded the military judge that he had previously allowed petitioner's appearance to deviate from regulation when, on several occasions, petitioner wore a "beanie cap" in court due to his medical condition. (R. at 378). The military judge responded:

I'll give you my explanation for that right now. That was not a big deal to me, that the accused was wearing a beanie. It wasn't official- he shouldn't have been wearing it, but it was not that much of a disruption. It didn't matter to me that much. However, I was not going to have him sitting here in the courtroom with a beard and beanie on, so what I could do without causing too much trouble, to make sure he is in compliance with the regulations, I did.

(R. at 380). Later in the hearing the military judge stated, "I am not personally offended about him growing the beard. *I don't doubt his religious beliefs.* I put that on the record the last time. I have no reason to doubt the reason that he is growing the

beard. However, it doesn't matter. The rules are the rules . . . it is the same with personal appearance and grooming standards." (R. at 400). (emphasis added). The military judge did not provide a clear distinction as to why he considered petitioner's beard to be a disruption while his beanie cap was not.

On 25 July 2012, the military judge informed Petitioner that he would be held in contempt if he was not clean-shaven for the Article 39a proceeding. The military judge asserted, "MAJ Hasan, I am considering whether you should be held in contempt for willfully disobeying the court order to be clean shaven. . . . I will now give you the opportunity to tell me anything about whether or not you should be held in contempt." (R. at 478). In response, through his trial defense attorneys, petitioner asserted the Religious Freedom Restoration Act (RFRA) as a defense to the contempt proceedings. Specifically, Petitioner's attorneys argued that, "Major Hasan's desire to have a beard and refusal to shave is a sincerely held religious belief" and the order to shave was not a compelling government interest or the least restrictive means available to ensure compliance with the order. Additionally, petitioner's defense counsel argued that petitioner was not disrupting the proceedings. (R. at 480). In an attempt to present a defense, petitioner's counsel requested to call MAJ [REDACTED] as a witness for the defense. (R. at 481). While the military judge did provide petitioner an opportunity to speak, he refused the defense request to produce evidence at the contempt

hearing. (R. at 494).

The military judge ultimately found Petitioner in contempt and sentenced him to pay the United States a fine of one-thousand dollars. He then ordered that Petitioner be removed from the courtroom. (R. at 494). In rendering his removal order, the military judge stated, "at some point before we start, what I consider the more critical stages of the trial, I am going to force him to be shaved, if he doesn't do it voluntarily. At this point, that's my plan." The military judge qualified this statement by saying that he would have Petitioner forcibly shaved before 20 August 2012. (R. at 496).

The military judge subsequently held contempt hearings on 3, 9, 14, and 15 August 2012. (R. at 542, 566, 713, 772). The military judge qualified each proceeding as a summary contempt hearing, preventing the defense from introducing any evidence on petitioner's behalf. *Id.* In each proceeding the defense asserted RFRA as a defense to the summary contempt proceedings. The military judge rejected these arguments and found petitioner in contempt of court for violating *his* order to be clean-shaven for all trial proceedings. He stated, "I conclude beyond a reasonable doubt, that your act constituted a disturbance of the proceedings of this court, and a willful disobedience of the lawful order of the court-martial." (R. at 568). On each occasion, the military judge sentenced petitioner to the maximum sentence available- a

fine of one-thousand dollars.²

On 6 August 2012, petitioner filed a petition for extraordinary relief in the nature of a writ of prohibition with the Court of Appeals for the Armed Forces [hereinafter CAAF]. Petitioner requested that CAAF prohibit the military judge from ordering the forcible shaving of petitioner because the order violated petitioner's rights under the RFRA.

On 15 August 2012, the CAAF granted petitioner's request for a stay of proceedings and ordered the government to respond to petitioner's request for relief. On 27 August 2012, the CAAF held that petitioner's request for extraordinary relief was premature because the military judge had not issued a definitive order for petitioner to be forcibly shaved. As a result, the CAAF denied the petition without prejudice and ordered the stay to be lifted. However, the CAAF noted that

[I]f such an order [to have petitioner forcibly shaved] is given, the military judge shall address those issues raised in this writ proceedings that he has not yet had the opportunity to address on the record, including, among, other matters:

(1) whether the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006), applies in the context of **this** court-martial; and

(2) if so, what compelling interest(s), if any, are implicated **in the specific court-martial** context presented and why forcible shaving is the least restrictive means of furthering the compelling governmental interest(s) including, if relevant,

² Petitioner is currently in pretrial confinement making the imposition of confinement unavailable as a punishment.

considerations as to why an instruction to the court members, if requested by Petitioner, is not the least restrictive means **in the court-martial context**.

(emphasis added) (Enclosure 5).

On 30 August 2012, trial proceedings resumed and the military judge immediately held another summary contempt proceeding. (R. at 783). While prohibiting the defense from calling any outside witnesses, the military judge did allow petitioner to provide a statement. Petitioner set forth:

Your Honor, in the name of Almighty Allah, the most gracious, the most merciful, I am Muslim. I believe that my religion requires me to wear a beard. I am wearing a beard based on my faith. I am not trying to disrespect your authority as 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.

(R. at 785). Despite the opportunity, the military judge did not question petitioner on his statement.

Following petitioner's statement, defense counsel, again, asserted the RFRA as a defense to the contempt proceedings. The military judge summarily rejected the defense argument and ruled that petitioner was in contempt of court because, "[he] willfully disobeyed my order to be clean-shaven today . . . I conclude, beyond a reasonable doubt, that your act constituted a disturbance of the proceedings of this court, and a willful disobedience of the lawful order of the court-martial." (R. at 787). Petitioner was sentenced "to pay the United States a fine of \$1000, the

maximum authorized fine for contempt." *Id.* Prior to the contempt hearing, the military judge granted a government request for delay, until 6 September 2012, to litigate the RFRA as applied to the military judge's order to forcibly shave petitioner.

On 6 September 2012, the military judge held a session, in accordance with Article 39a, UCMJ, to determine if RFRA applied to petitioner's court-martial and, if so, did the military judge's order violate petitioner's rights under the RFRA. (R. at 814). The military judge did not exclude petitioner from this hearing but allowed him to stay and participate in the proceedings. *Id.* Petitioner sat quietly and the hearing proceeded with no interruption or disruption. (R. at 835).

In support of their argument, the defense requested the military judge consider petitioner's 30 August 2012 in-court statement and the memorandum from Chaplin [REDACTED] wherein Chaplin [REDACTED] opines that petitioner's beliefs are sincere and common throughout the Muslim religion. (R. at 822). Additionally, the defense requested the military judge consider a signed and sworn affidavit from petitioner dated 5 September 2012. *Id.* In his affidavit, petitioner maintains that being confined for two-and-half years led him to a deeper understanding of the Muslim religion and the requirement of Muslim men to wear a beard. (*Id.*; Enclosure 6). He also asserts that:

My situation has led me to make a firmer commitment to my faith, including my resolve to not shave in accordance with my understanding of Islamic requirements. I am a

paraplegic and therefore more susceptible to life-threatening illness. Further, I am convinced the authorities believe someone may try to kill me I determined that I couldn't risk death without having taken this mandatory step along a pious Islamic path. Regardless of how long I live or when I may die, I believe my faith requires me to grow a beard.

Id.

Additionally, in furtherance of the argument that petitioner's belief was sincere and not an attempt to thwart in-court identification, petitioner's counsel set forth, "[petitioner], as we put forward in Appellate Exhibit CLXXXIX, in January of this year, submitted an offer to plead guilty to this very command, where he offered to plead guilty to the charges and specifications and accept full responsibility." (R. at 822). The Petitioner also attempted to plead guilty to the all charges and specifications by challenging the constitutionality of Article 45, UCMJ, however, such a request was denied. (R. at 775-76). Petitioner's counsel then argued that, "all of these facts point to that [petitioner] is expressing a genuine and sincere religious belief by virtue of him not shaving. That burden has been met." (R. at 824).

Contrary to the defense's position, the government argued that petitioner's belief was not sincere because he was trying to thwart in-court identifications. (R. at 826). As part of their argument the government included the transcript of 13 witnesses from the Article 32, UCMJ hearing. *Id.* The government argued

that eleven of the witnesses were able to easily identify the accused. However, two of the witnesses requested that petitioner remove his PT cap prior to the in-court identification. (R. at 827). Once removed, the witnesses were quickly able to identify petitioner. *Id.* The government also argued that petitioner's belief was not sincere because he allegedly attempted to align himself with the mujahadeen.³ (R. at 828). In support of this theory, the government requested the military judge consider a transcript of a phone call between petitioner and a reporter from the Al-Jazeera newspaper. (R. at 828). Throughout the statement to Al-Jazeera, petitioner makes numerous references to the Islamic faith. In particular, petitioner begins and ends his statement by paying homage to "Allah." (Enclosure 7).

In response to both arguments, the military judge set forth, "If I would only consider the affidavit, I'd say that you have met your burden- if I only considered the affidavit. However, the government has introduced evidence that says, well, it is just as likely that he is growing the beard for these other reasons." (R. at 830-31). In his oral ruling the judge did not make any mention of whether the petitioner had established a sincerely held religious belief. (R. at 386). Instead, the judge held "the defense has not demonstrated that requiring the accused to shave, or forcibly shaving the accused, substantially burdens his exercise of religion." *Id.* However, in his written findings, the

³ The mujahadeen are Islamic religiously individuals engaged in jihad.

military judge ultimately concluded that the defense did not prove the sincerity of petitioner's belief; if the petitioner did have a sincerely held belief it *would* be substantially burdened; the government's interests were compelling; and his order was the least restrictive means of enforcing those interests. (Enclosure 8). In The military judge wrote:

Based on all the evidence, 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. For example, the evidence suggests it is equally likely the accused's refusal to shave is an action of defiance toward the U.S. Army and the Court; or was done to frustrate his in-court identification

Id.

The military judge also noted that, assuming *arguendo*, the accused did demonstrate he is growing a beard as a result of his sincerely held beliefs three compelling interests existed to justify his order. Those compelling interests were: (1) the military interest in maintaining good and discipline; (2) the order and decorum of the court-martial; and (3) preventing petitioner from thwarting the in-court identifications. *Id.* He held, "an instruction to the court-members will not further the compelling interests of the Army or this Court. Forcibly shaving the accused is the only means to accomplish those compelling interests." *Id.* The military judge did not state why an instruction would not accomplish these interests. The military judge then ordered the forcible shaving of petitioner. *Id.*

On 19 September 2012, the Petitioner requested that the military judge reconsider his findings. (Enclosure 9). The Petitioner requested that Judge Gross revise his ruling to find the Petitioner's decision to grow a beard based upon a sincerely held religious belief. In support of this, the defense submitted an affidavit from a defense paralegal who examined logs of the petitioner's daily activity at Bell County Jail where he is held in pretrial confinement. The defense paralegal observed that around the time MAJ Hasan chose to grow his beard, he was praying on average of over four hours per day, an hour more than when he first arrived at Bell County Jail and a half-hour more than the months prior to his growing of the beard. *Id.* Such religious activity provides context for the Petitioner's religious decision to begin growing a beard. The defense also submitted an affidavit from the petitioner where he explained his religious motivation for choosing not to sign the non-disclosure agreement referenced by the military judge in his order to forcibly shave the Petitioner. (Enclosure 9 at 6-7). In this petition, the petitioner explained:

Since being ordered into pre-trial confinement, through the study of the Qu'ran, the hadiths, and discussions with two Imams, I have learned much about the importance as a Muslim of strictly keeping our covenants (promises). One of many examples illustrating this point in the Qu'ran is Surah al 'Isra', 17:34: ". . . and fulfill the promise; surely (every) promise shall be questioned about." . . . Because of what I have learned and what I believe about the teachings of Islam, I am wary of entering into express covenants. It

is important to me, in my desire to live my life as a faithful Muslim and abide by the requirements of Islam, to avoid potential entanglements that may cause me to stumble once again. . . . I have no intention of revealing any of the materials covered by the protective orders to anyone not involved in my defense, but I am very concerned about entering into an express written covenant mandated by the Military Judge. . . . I feel that it is safer to not enter into express covenants unless absolutely necessary. While I would like access to the protected material, I do not believe it is necessary as I already want to take responsibility for my actions and plead guilty.

Id. Such evidence not only explains the petitioner's decision not to sign the agreement, but is also evidence of the petitioner's religiosity. Finally, the defense submitted notice of MAJ Hasan's intent to plead guilty to the maximum extent allowed by the military judge, thus taking responsibility for his actions removing identity as an issue in the proceedings thus eliminating need for in court identification. (Enclosure 9 at 8-9).

As of the time of filing, the petitioner's counsel have not received a ruling from the military judge on the request for reconsideration. On 14 September 2012, the judge ordered the defense to file its petition with this Court no later than 20 September 2012. While the defense has pointed out to the military judge that while this Court's rules don't specify a time for filing a petition for an extraordinary writ, CAAF rule 19(d) encourages filing as soon as possible and "no later than 20 days after the petitioner learns of the action complained of." In an

attempt to comply with Judge Gross' order, the petitioner is filing this brief at this time.

Standard of Review

A court exercises de novo review on the "ultimate determination as to whether the RFRA has been violated." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F. 3d 1170 (10th Cir. 2003). Factual findings underlying the legal conclusions are reviewed for clear error. *United States v. Hardman*, 297 F.3d 1116, 1120 (10th Cir.2002).

Sincerity of one's religious beliefs "is a factual matter," and so, "as with historical and other underlying factual determinations, we defer to the district court's findings, reversing only if those findings are clearly erroneous." *United States v. Meyers*, 95 F.3d 1474, 1482 (10th Cir. 1996); see also *United States v. Seeger*, 380 U.S. 163, 165 (1965) (sincerity of beliefs is "a question of fact"); *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir.1990) (reviewing district court's sincerity finding for clear error). A Court reviews de novo the definitions as to what constitutes a substantial burden and what constitutes a religious belief, and the ultimate determination as to whether the Act has been violated in either of those respects. *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996).

Whether a governmental interest is compelling, under RFRA, is a question of law. *Hardman*, 297 F.3d at 1127. Additionally, RFRA's least-restrictive-means test is an issue of law because the

statute explicitly calls for the application of prior First Amendment doctrine. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (citing 42 U.S.C. § 2000bb(b)(1)). In First Amendment cases, application of the least-restrictive-means test to a given set of facts is well understood to be a question of law. *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1249 (10th Cir.2000); *United States v. Doe*, 968 F.2d 86, 88 (D.C.Cir.1992) (“Whether the regulation meets the ‘narrowly tailored’ requirement is of course a question of law.”).

Law

a. The Religious Freedom Restoration Act

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that neutral laws of general applicability that nonetheless burden the exercise of religion would be subject only to rational-basis scrutiny under the First Amendment, rather than the heightened scrutiny it had applied in previous cases. In response, Congress passed the RFRA, which sought “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1).

Specifically, RFRA provides that the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.

Notwithstanding this, the government may substantially burden a person's exercise of religion if it demonstrates that application of the burden to the person is (1) is in furtherance of a compelling governmental interest; and it (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1. As such, the RFRA authorizes any "person whose religious exercise has been burdened" in violation of the statute to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." 42 U.S.C. § 2000bb-1(c).

To adjudicate a claim under RFRA, a court will apply a burden-shifting analysis. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). First, the individual asserting the RFRA as a claim or defense must demonstrate that the government substantially burdened his or her sincere exercise of religion. *Id.*; 42 U.S.C. § 2000bb-1(a), (c). Then, if this prima facie case is established, the burdens of evidence and persuasion shift to the government to demonstrate that the burden imposed on an individual's exercise of religion "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that government interest." 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3).

b. The applicability of RFRA to the military

RFRA applies to the military, which presumably includes courts-martial, since there is no indication to the contrary.

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). Further, the RFRA applies to military regulations. Section three of the RFRA states, "[t]his Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." *Id.* at §2000bb(3). This makes it clear that the Government (which includes the military and the military judge) must have a compelling interest to restrict the exercise of religion.

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). Therefore, it is clear that the RFRA applies in the context of courts-martial, and that the military judge must have a compelling governmental interest in order to restrict petitioner's free exercise of his religious practices.

Argument

a. Petitioner's wearing of a beard is based on a sincerely held religious belief.

A "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 (2nd Cir. 1984). It "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." *Id.* Outlining factors that indicate insincerity, the Second Circuit noted that "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief ... or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind the veil of religious doctrine." *Id.*, citing *International Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir.1981).

In his findings, the military judge's concluded that petitioner did not meet his initial burden of proving his belief was sincere because:

based on all of the evidence it is equally likely the accused [grew] the beard at this time for purely secular reasons and is using his religious beliefs as a cover. For example, the evidence suggests it is equally likely the accused's refusal to shave is an act of defiance toward the U.S. Army and the Court; or was done to frustrate his in-court identification.

(Enclosure 8).

However, these findings are clearly erroneous because they are mistakenly made and without support in the record. See *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1263 (10th Cir.2008)

("In determining if an individual's belief is sincere, a higher court may only disturb a lower court's finding of insincerity "if the court's finding is without factual support in the record or if, after reviewing all the evidence, [the higher court is] left with a definite and firm conviction that a mistake has been made."). In fact, all evidence, introduced by both the defense and the government, establishes that petitioner is a devout Muslim who believes that his beard is a religious requirement, and that it is necessary in facing his belief that he has an impending death.

Contrary to the military judge's findings, petitioner's counsel introduced ample evidence to establish petitioner's sincere belief. In support of their case, the defense introduced a signed and sworn affidavit by petitioner dated 5 September 2012. (R. at 822). In this affidavit, petitioner explains that, while being confined for the last two and half years, he has gained a wider understanding of the Islamic faith and the importance of not shaving the beard by a Muslim male. (R. at 822). Such a wider understanding has been gained through over three hours, on average, of prayer per day after being placed into pretrial confinement, and over four hours of prayer, on average, around the time that he began growing the beard. The petitioner states in this context, "recently, through many months of study, prayer and reflection I have found the strength of faith and courage not to shave my beard and to face the consequences." (Enclosure 6).

This is clear evidence that the only motivation for the petitioner's beard is his religious beliefs.

As further evidence of the petitioners' sincerely held belief that he must grow a beard, the defense requested that the military judge consider petitioner's 30 August 2012 in-court statement in which he informed the military judge that he "believes [his] religion requires [him] to wear a beard" (R. at 785) and the memorandum by Chaplain [REDACTED] attesting to the sincerity of petitioner's beliefs regarding his refusal to shave. (Enclosure 2). Even though the military judge had an opportunity to cross-examine petitioner on his 30 August statement and/or ask questions to assess the petitioner's credibility, he did not take this opportunity. (R. at 785). Despite the military judge being well aware of the petitioner's assertion of the RFRA as defense - because he first asserted this defense nearly a month before at the contempt hearing on 25 July 2012 and at every subsequent hearing - the military judge chose not to examine the basis for the petitioner's beliefs on 30 August despite finally having the opportunity do so after the petitioner made a statement in open court. This is clear evidence that the military judge did not dispute the sincerity of the petitioner's religious beliefs until he was forced to defend his position upon the issuance of the C.A.A.F order on 15 August 2012.

In *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012), the Eight Circuit found Ali's in-court statement sufficient to

establish sincerity. Ali stated that, in her refusal 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 made a statement very similar to the petitioner's and 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. Like the petitioner's statement, her statement was made from the defense table in the context of a contempt proceeding. Unlike the petitioner, Ali did not even have anyone of religious authority attest to the sincerity of her beliefs. 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 defense not only offered petitioner's in-court statement, but also a signed and sworn affidavit by petitioner (Enclosure 6) and a memorandum submitted by Chaplain [REDACTED] attesting to petitioner's sincerity. (Enclosure 2). The defense even offered the significant number of hours the petitioner spent in prayer each day as overwhelming evidence that

he is a religiously motivated individual. The petitioner's religiosity is especially apparent around the time he began growing the beard where he was praying, on average, of over four hours per day. (Enclosure 9 at 5). This is significantly more evidence than was required in *Ali* to establish sincerity.

Further, the military judge clearly erred when he wrote, "the only evidence supporting the accused's assertion . . . is his affidavit, dated 5 September 2012. . . and an affidavit from TRADOC Imam MAJ [REDACTED] [REDACTED] (Enclosure 8). The military judge's findings clearly reflect that he erroneously failed to consider petitioner's 30 August in-court statement, or the fact that he had the opportunity to cross-examine petitioner on his religious beliefs and assess his credibility, but chose not to do so. (R. at 785). The military judge's failure to consider and give any weight to this evidence is clear error.

Further, since the military judge tied his compelling interest to that of the Army's, the military judge failed to consider all of the evidence from the petitioner's religious accommodation request. Specifically, the military judge failed to consider or give any weight to the Army's silence on the sincerity of the petitioner's religious beliefs. (Enclosure 3 at 3). Specifically, when [REDACTED] [REDACTED] the U.S. Army Deputy G-1, disapproved the petitioner's religious accommodation request, he did not list the absence of a sincerely held religious belief as a

basis for denying the request.⁴ By ignoring such evidence, the military judge clearly erred in his failure to consider all the evidence surrounding the petitioner's sincerely held religious belief. *Id.*

Further, when evaluating the evidence presented by the defense on the issue of sincerity, the military judge replicated the exact error made by the trial court in *Ali*. Like the judge in *Ali*, the military judge examined why the petitioner refused to shave but chose not to submit evidence related to whether he adhered to other religiously required grooming habits in Islam, such as plucking hair under the armpits and shaving the pubes. (Enclosure 8 at 5). This is clear error since *Ali* prohibits the military judge from evaluating the sincerity of the petitioner's religious beliefs based upon what Islam may require, or the religious practice of other Muslims. The military judge must refrain from examining how the petitioner chooses to exercise his religious beliefs or what beliefs the Petitioner chooses to exercise. The military judge should have exclusively focused on whether the petitioner's religious beliefs about his beard were sincere. Any comparison of accused religious beliefs and practices about his beard with the petitioner's religious beliefs and practices about armpit hair and pubes is unconstitutional. The judge's failure to limit himself to such an analysis is clearly erroneous and reversible on this basis alone.

⁴ The only stated reason for Mr. ████████ denial was a compelling government interest of military necessity. (Enclosure 3 at 3).

Simply put, the military judge failed to properly consider the evidence and also failed to consider *all* of the evidence set forth by the defense. The military judge then held the defense to higher standard of production than has been required from the circuit courts. As such, his findings are clearly erroneous on this point.

The military judge also erroneously determined that the evidence indicated that petitioner had ulterior motives in growing his beard. In support of this finding, the military judge suggests that the Petitioner's refusal to shave is an act of defiance towards the U.S. Army and the Court or to thwart eyewitness identification at trial. (Enclsosure 8). The military judge then supports this assertion by pointing to "the accused's statement to Al-Jazeera; his refusal to sign the non-disclosure agreement; and the difficulty eyewitnesses had identifying the accused while he wore a hat at the Article 32 hearing." *Id.* However, when closely reviewing these pieces of evidence, it is clear they do not support the military judge's ultimate conclusion.

First, the military judge's assertion that the petitioner is attempting to defy the U.S. Army and the Court is not substantiated by any evidence. In fact, all of the petitioner's actions lead to the exact opposite conclusion. For example, while the petitioner did begin growing a beard, he did not simply show up in court, unannounced, with a beard. Through his counsel, the

petitioner gave the court notice of his religious practice. (Enclosure 4). After giving such notice, the petitioner sought to comply with Army Regulation 670-1 by submitting a religious accommodation request in order to reconcile his religious beliefs with the military uniform requirements. (Enclosure 3). Further, between the article 32 hearing and all of the court-martial hearings, the petitioner has made twenty-eight courtroom appearances. Despite the abundance of opportunity during all those court hearings, the petitioner has not once acted in any fashion to defy the Army or the Court. He has sat quietly at the counsel table, interacted with his counsel, and participated in the proceedings without any disruption or delay whatsoever. This evidence clearly shows that the petitioner has had every chance to defy the U.S. Army or the Court, however, he has not done so and is not attempting to do so by growing a beard. The actions of the petitioner clearly indicate that his sincere religious beliefs are the only motivation for growing a beard. Therefore, this assertion by the military judge is clear error.

Second, petitioner's statement to Al-Jazeera does not contradict petitioner's position that he has a sincere religious belief. On the contrary, the statement bolsters this proposition. Throughout the entire statement, petitioner makes numerous references to "Allah," the "Koran," and "faith." (Enclosure 8). He states, "I was deceived by the pomp and glitter of our temporary earthly existence . . . chasing after and competing for

artificial achievements of the worldly life . . . but then . . . Almighty Allah intervened . . . he saved me, he guided me." *Id.* While petitioner does make reference to the Mujahadeen, he is asking that the "Almighty Allah" forgive them for their mistakes. In the context of the petitioner's beard, this statement is therefore evidence of his religiosity. Further, at no point in the statement does the Petitioner indicate that he was going to grow a beard as an act of defiance towards the U.S. Army and the Court. What the statement does indicate is that the petitioner finds his religion to be highly important. Whether the petitioner's religious beliefs may be disagreeable to some does not mean they are insincere. As such, the statement is not evidence of the insincerity of the petitioner's religious beliefs *about his beard* or evidence of any ulterior motive to defy the Army or the Court. As such, this assertion by the military judge is clear error.

Third, there is simply no indication in the record that petitioner intended to be disruptive or disrespectful when he refused to sign the non-disclosure agreement. The refusal to sign happened in March 2012, well before the issue of a beard ever came before the judge. Petitioner simply refused to sign the agreement and the military judge moved on without questioning petitioner on his reasons for refusing to sign. In fact, after petitioner refused to sign the non-disclosure agreement, the military judge, put on the record, several months later, that he had no reason to

doubt petitioner's reasons for not shaving his beard. The timing of this statement is significant as it indicates the military judge found the petitioner's beliefs to be sincere despite the refusal to sign the non-disclosure agreement.

Additionally, the protective order was not raised by the Government as a reason to question sincerity - it was raised for the very first time by the military judge in his written findings on the issue of sincerity. The defense was unable to counter the military judge's assertion in court as they had no notice that the military judge would consider this evidence as a factor in determining sincerity. However, upon the consideration of this evidence by the military judge, the petitioner submitted to the military judge a sworn affidavit explaining his religious basis for not signing the non-disclosure agreement. (Enclosure 9 at 6-7). This affidavit highlights the importance the petitioner places on his religious belief.

Lastly, there is no evidence that petitioner is growing a beard to avoid eyewitness identification. The only evidence the judge relies on is an unreasonable inference that reaches back nearly two years, when "two witnesses had difficulty identifying the accused at the Article 32 hearing because he wore a cap." The military judge ignores the fact that no evidence was produced to show that petitioner wore the cap to avoid identification. Rather, the evidence reflects that petitioner wore the cap as a result of his medical condition and willingly removed it upon

request. Petitioner's civilian defense counsel referenced the need to monitor the heat in the room (p. 67 of Gov's submission), and the IO referenced on the record special considerations for petitioner's care (p. 81 of Gov submission). Neither the IO nor the government made an issue of the cap or blanket on the record. The military judge also fails to acknowledge that he himself was aware that Major Hasan wore the cap for medical reasons (R. at 379). There is no factual basis to now invert what is in the record to somehow suggest the cap is indicative of an identification issue. Additionally, the military judge fails to acknowledge the thirteen witnesses who positively identified petitioner with absolutely no trouble or hesitation.

Most importantly, however, is that that in his initial ruling, military judge failed to consider or reflect the fact that the petitioner has attempted to plead guilty to the charged offenses. The fact is, had the petitioner's offer to plead guilty been accepted, it would have eliminated any issue of identity. Further, the petitioner attempted to challenge the constitutionality of Article 45 UCMJ, so that he could plead guilty without a plea agreement. (R. at 775, AE CXLVII). This is clear evidence that the petitioner is not trying to thwart identification, and instead is attempting to take responsibility as the person who actually committed the alleged offenses, as he believes his religion requires. *Id.* Further, as an enclosure to his request for reconsideration, the petitioner submitted notice

of his intent to plead guilty to the maximum extent allowed by the military judge. This is indisputable evidence that the petitioner is attempting to identify as the person responsible for the charged offenses.

As the Article 45 motion shows, the petitioner is attempting to plead guilty for religious reasons. The petitioner's religious basis for attempting to do so is another example of the religious motivation behind his actions and decisions. Such evidence strongly supports the petitioner's assertion that he has a sincerely held religious belief where he must refrain from shaving. Therefore, the assertion by the military judge that the Petitioner is attempting to thwart his identity is clear error.

After closely reviewing all of the evidence in this case, it is apparent the military judge's findings are not supported by the record and are thus, clearly erroneous. The military judge failed to consider all of the evidence related to the petitioner's sincerely held belief that he must grow a beard. The military judge failed to give appropriate weight to evidence that the petitioner has a sincerely held religious belief. The military judge weighted the petitioner's religious practices in a manner prohibited by previous jurisprudence. Further, the military judge failed to consider all of the evidence when he found that by growing a beard the petitioner was attempting to defy the U.S. Army and the Court. Such findings are clearly erroneous and must be reversed.

Further, when the military judge conducted his analysis, he found the evidence of the petitioner's sincerely held religious belief to be equal in weight to evidence to the contrary. The military judge's assessment of the petitioner's sincerely held religious beliefs were clearly erroneous. Therefore, this court should find that the petitioner holds a sincerely held religious belief that he must refrain from shaving.

b. The military judge's order substantially burdens Petitioner's sincerely held religious beliefs.

"A a person claiming that a governmental policy or action violates his right to exercise his religion freely must establish that the action substantially burdens his sincerely held religious belief." *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir.1997). In the First Amendment context, "[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.'" *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)). In contrast, the RFRA 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); 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); see also *Love v. Reed*, 216 F.3d 682, 689 (8th Cir.2000) (holding that a rule imposes a substantial burden on the free exercise of religion when it provides "no consistent and dependable way" to observe a religious practice)

As stated, *supra*, petitioner is a practicing Muslim and believes that he is required, by the Islamic faith, to wear a beard. (Enclosure 2). While petitioner only recently observed this tenant of his faith, he explains that this is based on a deeper understanding and firmer commitment to his faith which was garnered by intensive study and prayer during his two and half years of confinement. (Enclosure 6, 9 at 5-6). He provides, "I determined that I cannot risk death without having taken this mandatory step along a pious Islamic path. Regardless of how long I live or when I may die, I believe that my faith requires me to grow a beard." *Id.* The military judge's order to have petitioner forcibly shaved would cause petitioner to refrain from this

practice in its entirety and therefore imposes, a substantial burden, if not more, on his sincerely held religious beliefs.

In *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir.1996), the second circuit determined that a substantial burden existed where the state "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." Jolly brought suit after being held "in medical keeplock" for refusing a shot mandated by his confinement facility. The court held, "the choice here presented by the state—either submitting to the test or adhering to one's beliefs and enduring medical keeplock—itself constitutes a substantial burden . . . we find that the plaintiff has made the required showing of a substantial burden—and indeed would have done so even if he had spent only a short period of time in keeplock or had been immediately coerced into taking the PPD test."

In this case, the petitioner is not even being afforded a real choice in a manner similar to *Jolly*. In this instance, the military judge's order completely negates any ability the petitioner has of exercising his religious beliefs. The petitioner cannot exercise his sincerely held religious belief that he must grow a beard.

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 forcibly shaved by order of the military judge for demonstrably adhering to his religious belief. The situation

amounts an act of coercion by government where if the petitioner submits to the Courts' demand that violate his religious beliefs and shave, then the daily physical assaults will stop. Therefore, an order requiring the petitioner to act in violation of his sincerely held religious belief, or face involuntary enforcement of that order, clearly and substantially burdens his free exercise of religion. *Ali*, 682 F.3d at 711.

Finally, in his ruling on 12 September 2012, the military judge concedes that his order would have the effect of substantially burdening the petitioner's sincerely held religious beliefs.

c. The military judge's order does not serve a compelling governmental interest.

As required by the Court of Appeals for the Armed Forces in *Hasan v. Gross*, USCA Dkt. No. 12-8032/AR, 15 August 2012, if Judge Gross found that the RFRA applies in the context of a court-martial, then Judge was required to indicate "what compelling interest(s), if any, are implicated *in the specific court-martial context presented*. *Id.*

In his ruling on RFRA, the military judge found that the Army's compelling interest and the court-martial's compelling interest are intertwined and cannot be separated. (Enclosure 8 at 6). Judge Gross found that the military has expressed a compelling interest in maintaining good order and discipline, and that based upon this compelling interest along with military

necessity, unit cohesion and morale, the Deputy Chief of Staff, G-1, Mr. [REDACTED] denied the Petitioner's request for religious exception to wear a beard. For all intensive purposes, Judge Gross intertwines his interest with Mr. [REDACTED] and then extends Mr. [REDACTED] significant deference. (Enclosure 8 at 6).

In the court-martial specific context, Judge Gross identified the compelling interest of in-court identification. However, the Judge noted that the issue is not currently ripe. Further, in his conclusion, and without any analysis of the application to the court-martial specific context, the military judge summarily and in a conclusory fashion cited the dignity, order, and decorum of the courtroom as compelling interests.

In this case, the military judge has made an arbitrary decision on whether the Petitioner's beard is disruptive. He is merely basing his decision upon the Army's arbitrary evaluation of the petitioner's religious accommodation request. Because the Army did not properly evaluate the petitioner's religious accommodation request, the determination in this case should instead rest upon whether there is a compelling interest specific to the court-martial context where the military judge has the authority to order the accused forcibly shaven within the framework of the RFRA, and whether the beard is a disruption to the court proceedings under R.C.M. 804. Thus, in this case, because the petitioner's beard did not amount to a disruption of the dignity of the proceedings (as discussed in the previous

section), the military judge has no compelling interest to forcibly shave the petitioner and restrict his religious exercise.

While this Honorable Court does not have the ability to review administrative decisions under *Clinton v. Goldsmith*, 526 U.S. 529 (1999), the Court can review the denial of the petitioner's religious accommodation request because the Military Judge has tied his compelling interest to that of the Army's and would have allowed the petitioner to be present in the courtroom with a beard, and would not order him forcibly shaved, if an exception had been granted by the Department of the Army. Had the Army properly adjudicated petitioner's request and not applied the Department of Defense factors arbitrarily and capriciously, his religious accommodation request would have been approved and the Military Judge would not be in a position to order the physical assault of a paraplegic seeking to practice his deeply held religious beliefs. The "purposes of RFRA are to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." (Respondent's Brief at 20) (internal citations omitted). The application of the RFRA 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). Further, it is clear that RFRA applies to military regulations. Section three of RFRA states,

"[t]his Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." *Id.* at §2000bb(3). The military judge conceded that the RFRA applies in the court-martial context. As such, the Government and military judge must have a compelling interest to restrict the Petitioner's exercise of religion.

The military judge references the U.S. Senate report, which suggests that the Court to give significant deference to the military's determination of what is, and what is not a compelling interest. However, the military judge does not address 10 U.S.C. §774, which was enacted six years earlier in 1987. There is no indication whatsoever that the RFRA was an invalidation of 10 U.S.C. §774. 10 U.S.C. §774 states that "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force." *Id.* The general rule does not apply, however, in two circumstances, (1) if it is determined "that the wearing of the item would interfere with the performance of the member's military duties," or (2) if it is determined "that the item of apparel is not neat and conservative." *Id.* The statute directs the armed forces to "prescribe regulations concerning the wearing of religious apparel by members of the armed forces. . . ." *Id.*

In response to 10 U.S.C. §774, in 1988 the Department of Defense issued Instruction Number 1300.17. This instruction,

amended in 2009, establishes, in paragraph 3, the definition of what is to be considered "neat and conservative." Id. In paragraph 4, the instruction outlines the military considerations that must be balanced with a religious accommodation request. Id. Given that these factors are explicitly listed, they are the general interests that should be afforded deference, and they are the *military interests* that should be considered, under RFRA, in determining whether they are compelling as applied to the petitioner's request. The factors stated in the Instruction are: adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline. Further, Army Regulation 600-20, paragraph 5-6(a) identifies additional factors that may be considered in religious accommodation requests. These include: unit readiness, individual readiness, unit cohesion, morale, discipline, safety and/or health. Id.⁵

██████████ the Acting Deputy Chief of Staff, G-1, indicated that he considered all of the factors in AR 600-20, and found that the military necessity and interests of discipline, unit cohesion, and morale were the only factors requiring denial. Given that Mr. ██████████ specifically articulated the *military interests* requiring the restriction of Petitioner's religious practice, and that the military judge adopted those interests, it should then only be these factors that are examined when determining if they are

⁵ Presumably each of these fall within one of the five categories articulated in DODI 1300.17, though safety and/or health seem outside the prescribed areas. However, that determination is ancillary to this case.

compelling when applied to the Petitioner and the military judge's order to have him forcibly shaved. (Enclosure 3).

The RFRA requires an individualized application when balancing a government interest against the individual's religious exercise who is asserting the claim under RFRA.⁶ See *United States v. Ali*, 682 F.3d 705, 711 (8th Cir. 2012); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d. Cir. 1999), *cert. denied*, 528 U.S. 817. In Petitioner's case this balancing was done by Mr. [REDACTED]. However, the application of the factors by Mr. [REDACTED] was arbitrary and capricious. . Comparatively, when the Army approved CPT Kalsi's request for a beard, uncut hair, and turban in keeping with the tenets of his Sikh faith, the Army explicitly stated, "[b]ased on the facts of your individual case . . . I am granting your appeal." (Enclosure 10). Later in that same approval memorandum, the approving authority circled the word "your." *Id.* This shows that the Government is arbitrarily and capriciously restricting the practice of religion in some cases and not others. Further, the fact that the government is granting exceptions to the regulation

⁶ The processes established under AR 670-1 and AR 600-20 itself lends support to the proposition that the RFRA requires an individualized analysis when determining if a compelling government interest exists and requires the approval of a religious accommodation request. Were the government interest so strong as to blanketly outweigh any individual's religious exercise, the government could have established rules for the wear of religious apparel such as beards, yarmulke, jewelry, etc. Because an individualized exception process has been established, an individualized analysis in this case is required.

undermines the entire argument pertaining to the interest of good order and discipline.

As explained in *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 38 (D.D.C. 2002), "The state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or safety." *Id. citing* S. Rep. No. 103-111, at 10 (1993). In the Petitioner's case all the Government and military judge have done is simply list factors and apply them in a conclusory fashion to the denial of a religious accommodation request. Because such a misapplication occurred, no deference should be given to the Army's stated compelling interest. Rather, this is evidence that the Government does not have a compelling interest, especially as applied to Petitioner's circumstances.

The Department of the Army's manner of application clearly undercuts any argument that the factors listed, as applied to the Petitioner, are compelling. In this case the circumstances are: the Petitioner is in pretrial confinement in a county jail, he lives in solitary confinement, his only public appearance is where he is flown by military helicopter to the courtroom where the courthouse is surrounded by 180 stacked shipping containers and where armed guards surround the courthouse with automatic rifles. Under these circumstances the Petitioner has developed the premonition of his early death and has thus grown a beard based upon his religious beliefs. Applied to these facts, the military

interests of "discipline, unit cohesion, and morale" are simply not compelling. Further, Petitioner has proffered the testimony of his unit's First Sergeant, (the production was denied by the military judge), who would testify that Petitioner's beard has not adversely impacted the morale, discipline, or cohesion of the unit. In sum, there is simply no compelling government interest in forcibly shaving the Petitioner.

As applied to the Military Judge's apparent assertion that he would allow the Petitioner to have a beard in the courtroom if the Army granted an exception (or, presumably, there was a medical exception or health justification), this is exactly the distinction without a difference that a federal appeals court found constitutionally suspect in light of the Free Exercise Clause. See *Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d 359. Such a distinction without a difference itself is an indication that there is no compelling interest in the court-martial context by having the Petitioner clean shaven in order to maintain the dignity, order, and decorum of the courtroom.

The military judge suggests that he has a compelling interest in requiring the Petitioner to appear clean shaven so that the dignity, order, and decorum of the courtroom can be maintained. (Enclosure 8 at 7). What the military judge omits is any analysis of why a beard must be shaven in order to maintain the dignity, order, and decorum of the courtroom. Like Mr. [REDACTED] denial, the military judge simply makes a conclusory statement without any

application or explanatory rationale. As stated earlier, such a conclusory statement is insufficient under *Gartrell*, 191 F. Supp. 2d at 38. The fact of the matter is, the petitioner has been in court with a beard for six separate contempt hearings and an over hour-long RFRA hearing. At no point has his beard caused a disruption to the proceedings. The military judge has specifically acknowledged on numerous occasions that Petitioner has sat quietly and intently throughout the proceedings, has not caused a delay or interruption, and, aside from his facial hair, Petitioner is in the appropriate uniform for the court-martial proceedings. Moreover, the military judge has even stated on the record that he is not "personally offended" by the beard. (R. at 399). This is further evidence that the military judge does not have a compelling interest to order the Petitioner forcibly shaved and cannot prohibit the Petitioner's religious exercise protected by RFRA as applied to the facts of this case.

There is no valid compelling interest in preventing a disruption in the traditional sense or to the dignity of the proceedings since the military judge has concluded under R.C.M. 804 that a beard *would not* be disruptive and/or disrespectful if the Army granted an exception, but *is* disruptive and/or disrespectful without such an exception. The underlying justification does not change the outcome - either the beard is disruptive, or it is not. Indeed the military judge has explicitly stated that "the beard is not a disruption in the

traditional sense." (R. at 287). In this case, and in this court-martial context, the Petitioner and his beard are clearly not disruptive. Such an arbitrary determination of whether the Petitioner's deeply held religious beliefs are disruptive clearly indicates that there is no compelling interest in ordering the Petitioner to be forcibly shaved.

Further, the military judge has stated that he has a compelling interest in prohibiting the Petitioner from thwarting in-court identification. However, any compelling interest that may exist is not yet ripe since the Petitioner has not yet entered pleas, and witnesses have not yet failed to identify the petitioner, who will be the only parapalegic at the defense table. Further, the Petitioner has submitted notice of intent to plead guilty to unpremeditated murder. If such a plea is accepted there will be no compelling interest whatsoever since the Petitioner will have conceded to committing the alleged crimes. Even if the Petitioner's plea is not accepted, no such compelling interest will exist until a witness fails to identify the Petitioner. At that point, a witness' failure to identify the Petitioner must be placed into context with any previous in-court identifications at the court-martial, since the value of such evidence is diminished through multiple in-court identifications. Regardless, this issue is not yet ripe and the court should not yet consider this interest at this time.

As such, a compelling interest does not exist in this case where Petitioner has not caused a disruption to the court proceedings, in this court-martial context, and military necessity is not at issue.

d. The military judge's order to forcibly shave the Petitioner is not the least restrictive means of enforcing a compelling government interest.⁷

As required by the Court of Appeals for the Armed Forces in *Hasan v. Gross*, USCA Dkt. No. 12-8032/AR, 15 August 2012, if Judge Gross found that the RFRA applies in the context of a court-martial and there was a compelling government interest, then the military judge was required explain "why an instruction to the court members . . . is not the least restrictive means in the court-martial context. Id.

As explained in *Callahan v. Woods*, 736 F.2d 1269, 1272-73 (9th Cir. 1984):

The government must shoulder a heavy burden to defend a regulation affecting religious actions. . . . Balancing an individual's religious interest against such [concern of government] will inevitably make the former look unimportant. It is therefore the 'least restrictive means' inquiry which is the critical aspect of the free exercise analysis. This prong forces us to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction. *If the compelling state goal can be accomplished despite the exception of a particular individual, then a regulation which*

⁷ The Petitioner does not concede that there is a compelling government interest as applied to the exercise of his religious beliefs.

denies an exemption is not the least restrictive means of furthering the state interest.

Id. (*emphasis added*) (internal citations omitted). Within the scope of this case, there are previous examples of exceptions to AR 670-1. (Enclosure 10). The approval of CPT Kalsi's beard request and the frequent authorization to grow beards for medical reasons both serve as examples where a compelling government interest could be accomplished despite an individual exemption to grow a beard. This demonstrates that under *Callahan*, the regulation itself is not the least restrictive means of accomplishing a compelling government interest. *Callahan* 736 F.2d 1272-73. Instead, the proper analysis requires looking at the particular facts of the Petitioner's case, as jurisprudence requires, in determining if prohibiting the Petitioner's religious exercise via a forcible shave is the least restrictive means of furthering a compelling interest *in the court-martial context*.

In this court-martial, the Petitioner has grown a beard as a result of his deeply held religious beliefs. An order to have a physically disabled accused held down, against his will, and shaved *on a daily basis* is not the least restrictive means available to enforce the military judge's order. An order to have the Petitioner forcibly shaved against his will is not only a physical assault; it is also the daily use of physical force to alter the course of his religious practice protected by the RFRA and First Amendment.

Within the spectrum of means available to advance the interest of decorum in the courtroom, a forcible shave is simply not the least restrictive means available. The military judge has alternatives in this case other than forcible shaving. Most notably, the military judge can formulate an instruction to the panel ensuring the preservation of courtroom décor. A narrowly tailored instruction would allow the Court to account for Petitioner's sincerely held religious beliefs and would also allow for the orderly processing of Petitioner's trial. Thus, forcible shaving is unreasonable and unnecessary.

Despite the order from the Court of Appeals for the Armed Forces, Judge Gross made no attempt to explain why a limiting instruction is not the least restrictive means in the court-martial context. Like his conclusions on compelling interest, Judge Gross simply makes a conclusory statement that a limiting instruction is not the least restrictive means. As stated earlier, such conclusory statements are inadequate. *Gartrell*, 191 F. Supp. 2d at 38. The fact is, a limiting instruction is the least restrictive means and the military judge failed to address this point as required by the C.A.A.F. who cited *United States v. West*, 12 C.M.A. 670, 675 (1962).

As such, the least restrictive means to advance a compelling interest in this court-martial context is a limiting instruction to the panel.

e. Petitioner's wearing of a beard is not a disruption to the Court-Martial proceedings.

In the military judge's 12 September 2012 order, Judge Gross concluded that the Petitioner's appearance in violation of AR 670-1 was a disruption to the dignity, order, and decorum of the court-martial. (Enclosure 8 at, 2, 6). Judge Gross reasoned that the Petitioner's mere courtroom presence out-of-uniform was disrespectful, disruptive, and sufficient justification to order the daily physical assault of the Petitioner via a forcible shaving under the auspices of R.C.M. 804. Such a conclusion is error and an extreme exaggeration of the authority possessed by the military judge to address his concerns with the Petitioner's beard.

Petitioner's wearing of facial hair is not a disruption to the Court-Martial proceedings because his actions are not "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on." *Illinois v. Allen*, 397 U.S. 337, 341 (1970). The military judge has specifically acknowledged on numerous occasions that Petitioner has sat quietly and intently throughout the proceedings, has not caused a delay or interruption, and, aside from his facial hair, Petitioner is in the appropriate uniform for the court-martial proceedings. (SJA 39). The military judge has not at any time alleged that the court-martial proceedings cannot continue in an orderly fashion if Petitioner continues to wear facial hair. For this reason,

Petitioner's case is clearly distinguishable from *Illinois v. Allen*.

In *Allen*, the Supreme Court upheld a judge's decision to remove Allen from the courtroom after several disruptive outbursts. Most notably, *Allen*, "started to argue with the judge in a most abusive and disrespectful manner. . . . He terminated his remarks by saying 'when I go out for lunchtime, you're (the judge) going to be a corpse here.' At that point he tore the file which his attorney had and threw the papers on the floor." *Id.* at 339. Following several warnings by the judge to temper his behavior, Allen was ultimately removed from the courtroom after "[h]e continued to talk back to the judge, saying, 'there's not going to be no trial . . . and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial'" *Id.*

Recognizing the sixth amendment right to be present at trial, the Supreme Court found that this right could be lost if an accused "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id.* at 342. The Court went on to state that an accused cannot "be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. . . . the citadels of justice, their proceedings cannot and must not be infected with the sort of

scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case." *Id.* at 346.

Contrary to the position set forth by the military judge, Petitioner's wearing of facial hair, for religious reasons, simply does not constitute the type of disruption contemplated by the *Allen* Court. Unlike *Allen*, Petitioner has not acted in a manner which disrupts the "orderly progress" of his trial. *Id.* Aside from his beard, Petitioner has continually abided by the rules of court and has sat quietly and intently throughout all proceedings. (R. at 284). 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. As such, his actions cannot be deemed to be disruptive under *Illinois v. Allen*.

Further, the six contempt hearings and the RFRA hearing on 6 September 2012, serve as the strongest evidence that the Petitioner's facial hair is not disruptive. In no less than six contempt hearings and a RFRA hearing where the Petitioner was in court for over an hour, the Petitioner has been in the courtroom with his beard and there has been no disruption or disturbance to the proceedings. Despite the Petitioner's objection to the proceedings through counsel, the military judge, trial counsel, defense counsel, and Petitioner all participated in the proceedings without any disruption.

Moreover, while the *Manual for Courts-Martial* [hereinafter M.C.M.] does not specifically define the term "disruption," Rule for Court-Martial [hereinafter R.C.M.] 804(c)(2) was "based on" the holdings of *Illinois v. Allen*. See R.C.M. 804(c)(2) analysis at A21-46. Thus, a disruption under the Rules for Courts-Martial is conduct which interferes with the orderly progress of a *Court-Martial*. See R.C.M. 804(c)(2) discussion ("in order to justify removal from the proceedings, the accused's behavior should be of such a nature as to materially interfere with the conduct of the proceedings.") Merely being in violation of an Army grooming regulation does not interfere with the orderly progress of the proceedings, and therefore Petitioner's conduct does not constitute a disruption under the Rules for Courts-Martial.⁸ While petitioner recognizes that "loud outbursts" are not the only means of disrupting trial proceedings, to constitute a disruption the action must interfere with the orderly progress of the Court-Martial and here, it does not.

The military judge points to a court-martial as a special context in which special needs arise. (Enclosure 8 at 6). Despite this assertion, Judge Gross does not explain how the court-martial context and the actions of the Petitioner distinguish this case from clear Supreme Court precedent. This is

⁸ Article 48, UCMJ, and R.C.M. 809 seem to apply the same requirement for contempt proceedings. Article 48(a)(2) provides that a military judge may punish for contempt any person who "disturbs the proceedings of the court-martial, court, or military commission by any riot or disorder."

because in this case, the court-martial context does not necessitate a differentiation. Within the context of facial hair in a court-martial, there is no difference in the disruption caused if the facial hair is worn for religious reasons or worn for medical reasons based upon a medical exception to AR 670-1. Either the facial hair is so disruptive that the proceedings cannot continue, or it is not. In this case it is not disruptive. When the person with facial hair sits quietly for over an hour most recently in court without creating ANY disturbance, the conclusion that must be drawn is that the court-martial context is not a special context where the proceedings cannot continue without the accused being properly shorn.

As the military judge has acknowledged, aside from his beard, Petitioner has appeared in court at the appropriate times, in the appropriate uniform, with the appropriate demeanor. His actions have not evidenced intent to "disrupt the orderly proceedings of the court." *Gentile*, 1 M.J. at 70. Including the Article 32 hearing, the Petitioner has been made 28 courtroom appearances. Despite the abundance of opportunity, not once has the Petitioner acted in any fashion which disrupts the proceedings, with or without a beard.

Because Petitioner's wearing of facial hair does not constitute a disruption, as intended by *Illinois v. Allen* and the Rules for Courts-Martial, the military judge cannot order his forcible shaving.

f. The military judge does not have the authority to order
Petitioner forcibly shaved under Rule For Court Martial 804.

The authority of the military judge to enforce court orders is not limitless. See *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988) (A military judge may not conduct contempt proceedings in the presence of the members); *United States v. Williams*, 23 M.J. 362 (C.M.A. 1987) (the military judge's order to abide by the local court rules cannot conflict with the rules set forth in the M.C.M.); *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988) (the military judge cannot reserve his ruling on a motion for a finding of not guilty until after the members have returned their findings); and *United States v. Chisholm*, 58 M.J. 733 (Army Ct. Crim. App. 2003) (a military judge may direct dates for completion, order an accused released from confinement, or set aside the findings and sentence for post-trial processing delays). While a military judge may use his contempt powers to enforce order within the courtroom, the use of physical restraint is reserved only for those cases in which the accused's actions amount to a complete disruption to the trial proceedings.⁹ The military judge's authority does not extend to ordering a disabled accused to be held down against his will and forcibly shaved. Regardless of whether the Petitioner has a valid claim under the RFRA, no such remedy is available under R.C.M. 804.

⁹ While Petitioner acknowledges that the military judge may use his contempt power to maintain order within the courtroom, Petitioner does not concede that his actions amount to a disruption or a situation where contempt is warranted.

In *Allen*, the Supreme Court noted that a judge has three ways of dealing with an "obstreperous accused like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Allen*, 397 U.S. at 344. However, the court noted that the use of physical enforcement, even when dealing with the most disruptive accused, "is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* As such, physical restraint should be reserved for the rare case in which it is the only way to ensure the orderly and fair processing of court proceedings. Here, the military judge does not have the authority to physically enforce his order regardless of whether the Petitioner's conduct is disruptive.

In this endeavor, the Military Judge seems to elevate the discussion portion of R.C.M. 804(e) to a binding status. However, the discussion to the Rules for Courts-Martial are not binding or persuasive. "The discussion accompanying the Rules for Courts-Martial, while in the [M.C.M.] is not part of the presidentially-prescribed portion of the MCM. The MCM expressly states that it consists of its 'preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures. Absent from the list [is] the discussion accompanying the Preamble, the Rules for Courts-Martial, and the

Punitive Articles." *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005) (Gierke, C.J. Concurring).

Thus, while R.C.M. 804 does provide the military judge with the authority to dictate the appropriate uniform for trial, it does not provide him with the authority to physically enforce *this* order. See *Allen*, 397 U.S. at 344. See also, *Gentile*, 1 M.J. at 71.¹⁰

Even if this Honorable Court were to determine that Petitioner's actions amount to a disruption, forcible shaving is not the appropriate remedy in this case. By ordering the Petitioner forcibly shaved, the military judge assumes that forcibly holding down a physically disabled accused, putting a razor to his face, and shaving him against his will and religious beliefs is "akin to, and no more invasive than, the military judge's authority to restrain a disruptive accused." This could not be further from the truth. In this case, Petitioner has a grown a beard out of a strict adherence to his religious beliefs. He has not grown a beard to be disruptive or defiant to the court-martial proceedings. The purpose of "binding and gagging," as set forth in *Allen*, is to balance the constitutional right of the accused to be present at his trial with the concern for the orderly and timely processing of trials. *Allen*, 397 U.S. at 344-46. The *Allen* Court determined that in some cases "binding and

¹⁰ Here, the military judge cannot physically compel Petitioner to shave his facial hair because, as the military judge has acknowledged, the conduct does not disrupt the proceedings.

gagging" may be the most reasonable means to achieve that balance. *Id.* A physical assault via a forcible shaving is well beyond the remedy discussed in *Allen*.

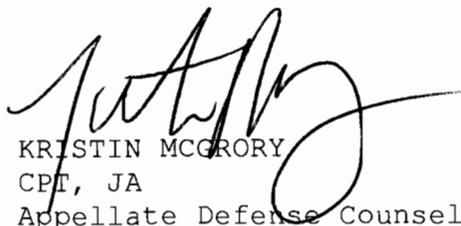
Here, the forcible shaving of Petitioner, against his will, on a daily basis, is completely unreasonable because the military judge could continue to exclude the Petitioner from the courtroom, continue to hold contempt proceedings, or could issue an appropriate instruction.

Relief Sought

Petitioner respectfully requests that this Honorable Court issue a stay in the proceedings pending a decision of this Court on this petition and issue a Writ prohibiting the military judge from ordering the forcible shaving of petitioner.



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CERTIFICATE OF SERVICE

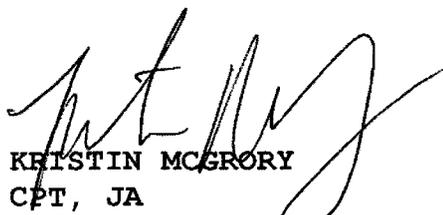
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Army No. _____

Brief in Support of Petition for Extraordinary Relief X

Motion _____

I certify that a copy of the foregoing was delivered
to the Court and Government Appellate Division on 20 September
2012.



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