

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

NIDAL M. HASAN)	RESPONSE TO BRIEF IN SUPPORT OF
Major (O-4))	PETITION FOR RELIEF IN THE
United States Army,)	NATURE OF AN EXTRAORDINARY WRIT
Petitioner)	
)	
)	DOCKET No. ARMY MISC 20120876

 v.

United States of America

and

GREGORY GROSS

Colonel (O-6)

United States Army,

 Respondent

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

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

Statement of the Case and Facts

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

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

On 7 June 2012, defense counsel informed the military judge via email that the accused had grown a full beard and intended to maintain it while present in the courtroom. (R. at 273). During the next Article 39(a) session on 8 June 2012, the military judge addressed the issue of the accused's beard. The military judge found that "[t]he accused's appearance is a disruption to this trial, and in violation of R.C.M. 804." (R. at 274). The military judge terminated the Article 39(a), UCMJ session on 8 June 2012 due to the accused's appearance, and informed the accused that if he did not appear at the next session clean shaven, he would be removed from the courtroom. (R. at 273-74).

The military judge, at a later Article 39(a), UCMJ, session, clarified that the accused's "conduct is disrespectful. He is disobeying an order from the court; he is disobeying an order from his commander to be clean-shaven. His appearance is disruptive." (R. at 287-88). He also pointed out, in response

to argument by defense counsel, "I agree with you that the accused is not being disruptive, as in a normal case, where someone is yelling, arguing with the military judge, or civilian judge, whatever it might be. However, I disagree with your assertion in your motion that his appearance does not take away from the dignity, order and decorum of a court-martial." (R. at 287).

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

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

the accused to make a statement in his defense, which defense counsel provided on his behalf. (R. at 478-79). The defense argued that contempt was inappropriate for numerous reasons, most directly because the Army inappropriately denied his request for a religious exemption and because the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-1c (RFRA) was a defense to a contempt charge for his wearing of the beard. (R. at 479-494). The defense submitted a number of exhibits for consideration by the court, which the military judge accepted. (R. at 479). The military judge allowed defense counsel to voir dire. (R. at 479-80). The defense also requested to call MAJ (b) (6) Mr. (b) (6) and MAJ (b) (6) as witnesses and proffered them as relevant to the denial of the religious exemption. (R. at 481). The military judge denied the defense's request for the production of witnesses. (R. at 494). The military judge found that based upon his "direct witnessing [of the accused's] conduct in the actual presence of the court-martial, that [the accused] willfully disobeyed [the military judge's] order to be clean shaven when [the accused] appeared in court." (R. at 494). The military judge then held petitioner in contempt, fined him \$1,000, and offered him the opportunity to shave. (R. at 495). After petitioner refused to shave, the military judge excluded him from the courtroom. (R. at 495-96).

On 2 August 2012 the military judge again notified the accused by e-mail that if he appeared in court without having shaved, the military judge would conduct a contempt proceeding during the Article 39(a), UCMJ, session, on 3 August 2012. (R. at 542). The accused again appeared with a beard. (R. at 542). The military judge conducted a contempt proceeding in which he allowed defense counsel to present a statement on behalf of the accused. (R. at 542). The defense reiterated its prior arguments from the first contempt proceeding, which the military judge agreed to consider, and requested to call both Mr. (b) (6) and SGT (b) (6) as witnesses. (R. at 543-44). The military judge denied the request for production of witnesses and again held the accused in contempt. (R. at 545).

The same course of events led up to the contempt proceedings on 9 August 2012. (R. at 566). The defense again requested SGT (b) (6) as a witness, which was denied by the military judge. (R. at 567). The defense reiterated its previous arguments, and also objected for the first time to the court conducting the contempt proceedings apparently as a summary proceeding. (R. at 567). The military judge considered all of the prior arguments, denied the defense objections, and held the accused in contempt. (R. at 567-68).

On 14 and 15 August 2012, the military judge conducted contempt proceedings in which the accused was held to be in

contempt of court. (R. at 713-14; 772-74). The defense reiterated all of its prior arguments at each of these hearings, which the military judge considered. (R. at 713; 772).

On 29 August 2012 the military judge again notified the defense that if the accused was not clean shaven, a contempt proceeding would occur on 30 August 2012. (R. at 784). The accused did not appear clean shaven. (R. at 784). The military judge allowed the accused to make a statement, which he did, explaining that his decision to wear a beard is based on his religious beliefs and not to disrespect the court. (R. at 785). The accused's defense counsel continued by reasserting his previous arguments highlighting RFRA as a defense, objecting to the summary nature of the contempt proceedings, and arguing that the multiple contempt holdings constitute an unreasonable multiplication of charges. (R. at 785-787). The military judge, after considering all of petitioner's current and past arguments, again held the accused in contempt. (R. at 787).

During the various contempt proceedings, the military judge described the proceedings as a summary proceeding. (R. at 483, 543, 567).

On 30 August 2012 and 6 September 2012, the convening authority approved the contempt findings and sentence for the 25 July 2012, 3, 9 and 14 August 2012 contempt proceedings, and ordered the fines executed. (Encl 10 to Petition).

Petitioner's Statement of the Issues

I.

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

II.

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

III.

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

IV.

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

V.

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

Specific Relief Sought

Petitioner requests that this Honorable Court overturn the six (6) contempt findings against petitioner, and disqualify the military judge from further participation in his court-martial.

The Government requests this Honorable Court deny the requested extraordinary relief.

Jurisdictional Statement

This Court has the discretion to entertain extraordinary writs pursuant to the All Writs Act. 28 U.S.C. 1651 (1992). The All Writs Act grants appellate courts the discretion to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* The Act requires two separate determinations: first, whether the requested writ is "in aid of" a court's jurisdiction; and second, whether the requested writ is "necessary or appropriate." *Denedo*, 66 M.J. at 119.

"The issuance of a writ under the All Writs Act is a 'drastic remedy which should only be invoked in those situations which are truly extraordinary.'" *McKinney v. Powell*, 46 M.J. 870 (Army Ct. Crim. App. 1997) (quoting *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993)). "The issuance of such writs is generally not favored as they disrupt the orderly judicial process of trial on the merits and then appeal." *McKinney*, 46 M.J. at 870.¹

As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue. First, *the party*

¹ "A writ of mandamus may seem more appropriate if the form of the order is to mandate action, and a writ of prohibition if the order is to prohibit action The requirements for obtaining both writs are the same." *United States v. Santtini*, 963 F.2d 585 (3rd Cir. 1992) (internal citations omitted).

seeking issuance of the writ must have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 381 (2004) (emphasis added) (internal quotation marks and brackets omitted) (quoting *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953); and *Ex parte Fahey*, 332 U.S. 258, 260, (1947)). Therefore, petitioner has an “extremely heavy burden” to justify the granting of a writ.²

“Petitioner must show that the complained of actions were more than ‘gross error’ and constitute a ‘judicial usurpation of power.’” *McKinney*, 46 M.J. at 870 (emphasis added) (quoting *San Antonio Express-News v. Morrow*, 44 M.J. 706, 709 (A.F. Ct. Crim. App. 1996)) (emphasis added). “The ruling or action being challenged must be ‘contrary to statute, settled case law, or valid regulation.’” *McKinney*, 46 M.J. at 870 (quoting *Evans v. Kilroy*, 33 M.J. 730, 733 (A.F. Ct. Crim. App. 1991)). Based on

² “Because of their extraordinary nature, writs are issued sparingly, and a petitioner bears an extremely heavy burden to establish a clear and indisputable entitlement to extraordinary relief.” *Dew v. United States*, 48 M.J. 639, 648 (Army Ct. Crim. App. 1997) (citing *McKinney*, 46 M.J. at 873 and *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 384, (1953)).

these principles of law, A.C.C.A. Rule 20.1 lays out the three criteria a petitioner must meet to justify the granting of an extraordinary writ:

Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. Section 1651(a) is not a matter of right, but of discretion sparingly exercised. *To justify the granting of any such writ, the petition must show that [1] the writ will be in aid of the Court's appellate jurisdiction, [2] that exceptional circumstances warrant the exercise of the Court's discretionary powers, and [3] that adequate relief cannot be obtained in any other form or from any other court.*

A.C.C.A. Rule 20.1 (emphasis and numbers added).³

The Government does not challenge the availability of review under the All Writs Act. See *United States v. Burnett*, 27 M.J. 99, 105 fn. 9 (C.M.A. 1998) (recognizing, without deciding, the potential authority for review of a contempt proceeding).

³ Article 66(f), Uniform Code of Military Justice (UCMJ), states that "The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals" On 1 May 1996, the Judge Advocates General approved the Joint Courts of Criminal Appeals Rules of Practice and Procedure (hereinafter Joint C.C.A. Rules) (See *In Re Court Rules*, 44 M.J. at LXIII (1 May 1996)). Joint C.C.A. Rule 26 grants the Chief Judge of each service court the authority to adopt internal rules. On 31 July 2009, by order of the Chief Judge, this Court adopted its current internal rules (hereinafter A.C.C.A. Rules). This standard for granting relief under the All Writs Act is verbatim from the standard employed by the Supreme Court of the United States. Sup. Ct. R. 20.1.

Law and Argument

ISSUES I AND III.

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

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

A. Standard of Review

Under federal law, a military judge's decision to summarily punish contemptuous conduct is reviewed for an abuse of discretion. *United States v. Wilson*, 421 U.S. 309, 319, 95 S. Ct. 1802, 1808, 44 L.Ed.2d 186 (1975); *F.T.C. v. Trudeau*, 606 F.3d 382, 386 (7th Cir. 2010); *United States v. Flynt*, 756 F.2d 1352, 1362 (9th Cir. 1985).

B. Procedures for Contempt Proceedings

Article 48, UCMJ, provides that persons may be held in contempt by a court-martial for: (1) using any menacing word, sign, or gesture in the presence of the judge during the proceedings of a court-martial; (2) disturbing the proceedings of the court-martial by any riot or disorder; or (3) willfully disobeying the lawful order of the court. Article 48(a), UCMJ. Rule for Courts-Martial 809(b)(1), which implements Article 48, provides that such contempt may be punished summarily when the

conduct "is directly witnessed by the court-martial." R.C.M.
809(b)(1).

Supreme Court and Federal case law interpreting Federal Rule of Criminal Procedure 42 (the analogous provision on which R.C.M. 809(b) is based),⁴ establish that despite the misconduct being "directly witnessed by the court-martial," additional factors must be present for the use of summary procedures. Because the "[s]ummary contempt procedure represents a significant departure from the accepted standards of due process," it is "an extraordinary exercise to be undertaken only after careful consideration and with good reason." *Flynt*, 756 F.2d at 1363, citing *In re Oliver*, 333 U.S. 257, 275, 68 S. Ct. 499, 508, 92 L.Ed. 682 (1948) ("Except for a narrowly limited category of contempts, due process of law ... requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf...."); *In re Gustafson*, 650 F.2d 1017, 1022 (9th Cir. 1981).

The purpose of the summary contempt procedure involves two separate interests: (1) "the need to overcome obstructions to ongoing proceedings warrants a procedure whereby a trial judge

⁴ See R.C.M. 809(b) analysis at A21-50.

may, in a summary fashion, remedy a breakdown in the orderly operation of the judicial system;" and (2) "since the judge is personally aware of the allegedly contumacious conduct, the need for a hearing is eliminated." *Flynt*, 756 F.2d 1352, 1363, citing *United States v. Wilson*, 421 U.S. 309, 316, (1975); *United States v. Marshall*, 451 F.2d 372, 374, (9th Cir. 1971). "The availability of a swift response both stops the misconduct at hand and deters similar behavior in other cases by insuring that those tempted to engage in such behavior know that deliberate outbursts or disruption will not be allowed to go on for more than the briefest period of time." *United States v. Marshall*, 371 F.3d 42, 46 (2d Cir. 2004).

The Supreme Court has explained that summary contempt procedures are appropriate only for "charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *Pounders v. Watson*, 521 U.S. 982, 988 (1997), citing *In re Oliver*, 333 U.S. at 275.

The Supreme Court has utilized varying types of language to describe when summary contempt procedures are appropriate. In *Cooke v. United States*, the Court stated:

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

Cooke v. United States, 267 U.S. 517, 534, 45 S. Ct. 390, 394 (1925). Further, "before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice." *In re McConnell*, 370 U.S. 230, 234 (1962).

The Court has also described the use of summary procedures as being limited to "exceptional circumstances . . . such as acts threatening the judge or disrupting a hearing or obstructing court proceedings." *Harris v. United States*, 382 U.S. 162, 164 (1965), citing *Brown v. United States*, 359 U.S. 41, 54 (dissenting opinion).

Federal courts have recognized that there are a number of circumstances that militate against the use of summary contempt procedures. These include: (1) where the misconduct occurs before trial (see *Harris*, 382 U.S. at 164-65 (summary contempt procedures not appropriate for refusal to testify during grand

jury proceedings); cf *Wilson*, 421 U.S. at 318-319

(distinguishing *Harris* because the misconduct in *Harris* occurred pre-trial and did not actually disrupt the "trial."); (2) where there is a potential defense to the misconduct (*Flynt*, 756 F.2d at 1364-66 (where there is a "substantial issue" as to the criminal responsibility of the contemnor, summary proceedings are inappropriate)); *Rollerson v. United States*, 343 F.2d 269 (D.C. Cir. 1964) (same); and (3) where the misconduct does not actually disrupt the proceedings (*United States v. Moschiano*, 695 F.2d 236 (7th Cir. 1982)).

However, a number of circuits have found summary contempt appropriate in situations where the misconduct is directly and egregiously insulting of the court itself, even though a literal "obstruction of justice" did not occur. See *Marshall*, 371 F.3d at 47-48 ("a verbal attack can be so unnecessary and so insulting to judicial authority as to constitute, without prior warning, contempt."); *In re Sealed Case*, 627 F.3d 1235, 1238 (D.C. Cir. 2010) ("[a]n outburst of foul language directed at the court is intolerable misbehavior in the courtroom . . . [s]uch conduct is inherently disruptive."); *Gordon v. United States*, 592 F.2d 1215, 1217 (1st Cir. 1979) ("Although the line between insult and obstruction is difficult to discern, there is a point at which mere words are so offensive and so unnecessary that their very utterance creates a delay which is an obstruction of

justice."); *United States v. Seale*, 461 F.2d 345, 370 (7th Cir. 1972) ("at some point disrespect and insult become actual and material obstruction . . . the very delay of the proceedings occasioned by a disrespectful outburst or other misbehavior may be sufficient to constitute a material obstruction.").

While military courts have not had occasion to address the contours of when summary disposition under R.C.M. 809(b)(1) is appropriate, the then Court of Military Appeals cited favorably Colonel Winthrop's explanation of the "disorders" which might justify contempt:

[Disorder] is construed as implying more than a mere irregularity, and as importing disorder so rude and pronounced as to amount to a positive intrusion upon and interruption of the proceedings of the court. The more familiar examples of such a disorder and disturbance as are held to be contemplated by the Article are—assaults committed upon members, or upon persons connected with the court or properly before it; altercations between counsel or spectators; drunken or indecent conduct; loud and continued conversation; any noise or confusion which prevents the court from hearing the testimony; any shouting, cheering, or other expression of applause or disapprobation, especially if repeated after being checked;; contumelious or otherwise disrespectful language, addressed to the court or a member or the judge advocate, of so intemperate a character as to derange the proceedings, especially if persisted in after a warning from the court.

Burnett, 27 M.J. at 105, quoting W. Winthrop, *Military Law and Precedents* 307 (2d ed. 1920 Reprint).

However, in any review of the appropriateness of summary contempt procedures in a court-martial, special consideration must be given to the unique attributes and requirements of the military. As the Supreme Court has previously recognized, "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Moreover, in *Parker v. Levy*, the Supreme Court elaborated on the unique requirements needed for an effective military:

In *In re Grimley*, 137 U.S. 147, 153, 11 S.Ct. 54, 34 L.Ed. 636 (1890), the Court observed: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." More recently we noted that "the military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby*, 345 U.S. 83, 94, 73 S.Ct. 534, 97 L.Ed. 842 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty...." *Burns v. Wilson*, 346 U.S. 137, 140, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953) (plurality opinion). We have also recognized that a military officer holds a particular position of responsibility and command in the Armed Forces....

417 U.S. 733, 743 (1974). "The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of *immediate compliance with military*

procedures and orders must be virtually reflex with no time for debate or reflection." *Chappell v. Wallace*, 462 U.S. 296, 300, (1983) (emphasis added).

In light of these particular military interests, the summary contempt power is "vital to personal liberty, and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals." *Ex Parte Terry*, 128 U.S. 289, 307 (1888).

What is apparent from the case law is that beyond the misconduct occurring entirely within the presence of the court, two additional factors must be present to justify recourse to the summary contempt procedures: (1) an instant or immediate response is required to address the misconduct; and (2) the misconduct must cause an actual obstruction of justice or actually disrupt the trial itself. Where the misconduct is directed specifically at the court and is so offensive, unnecessary, and egregious, the misconduct is inherently disruptive.

Where any one of these factors is not present, "due process of law . . . requires that the accused should be advised of the

charges and have a reasonable opportunity to meet them by way of defense or explanation." *Cooke*, 267 U.S. at 537; see also *Harris*, 382 U.S. at 167 ("Rule 42(b) prescribes the procedural regularity for all contempts in the federal regime except those unusual situations envisioned by Rule 42(a) where instant action is necessary to protect the judicial institution itself.") "[T]his includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Id.* R.C.M. 809(b)(2) provides this level of due process.

C. Petitioner was Afforded Full Due Process

Whether summary proceedings would have been appropriate in this case is not at issue, because the record makes clear that the military judge provided petitioner with the due process requirements of R.C.M. 809(b)(2). See *United States v. United Mine Workers*, 330 U.S. 258 (1947); *United States v. Onu*, 730 F.2d 253, 256-57 (5th Cir. 1984) ("The circuit courts have since adhered to the doctrine that, absent prejudice or unfairness, failure to follow Rule 42(b) will not result in reversal of a contempt judgment."), citing *Hopkins v. Jarvis*, 648 F.2d 981 (5th Cir. 1981); *F.T.C. v. Gladstone*, 450 F.2d 913 (5th Cir. 1971); *Wolfe v. Coleman*, 681 F.2d 1302 (11th Cir. 1982). In *Onu*, the 5th Circuit upheld the petitioner's contempt

conviction, despite the court improperly utilizing the summary procedures, because petitioner "did have notice in fact and an opportunity to be heard . . . [t]he court read [him] the essential facts constituting criminal contempt and informed him that the charge was criminal contempt." *Onu*, 730 F.2d at 257.

In this case, petitioner was placed on actual notice before each contempt proceeding that the military judge was going to conduct a contempt hearing. (R. at 478, 542, 566, 772, 784). At each of those contempt hearings the military judge gave the accused and his counsel the opportunity to present a statement to the court explaining why contempt was not appropriate. (R. at 478, 542, 566, 713, 772, 784-85). Defense counsel provided a number of lengthy arguments to the military judge, and the accused provided a personal statement himself on 30 August 2012. (R. at 785). The accused submitted a number of exhibits, all of which the military judge accepted at face value. (R. at 479). The accused was permitted to assert a number of defenses, including the Religious Freedom Restoration Act (RFRA), which the military judge considered at each contempt proceeding. (See, e.g., R. at 484-94). The defense counsel even agreed that the first contempt proceeding "seems more of a hearing than just a summary disposition of contempt." (R. at 480). At every contempt proceeding, the military judge considered all prior arguments made by defense counsel when reaching his decision.

The only thing the military judge precluded the accused from doing during the contempt hearings was to call witnesses. However, all of the witnesses proffered by the accused related solely to the issue of the Army's denial of his exception to policy, an administrative issue not within the purview of the military judge. See, e.g., *Clinton v. Goldsmith*, 526 U.S. 529 (1999). The propriety of the Department of the Army's denial of a request for an exception was irrelevant to the contempt proceeding. Therefore, none of the proffered witnesses were relevant in the context of the contempt proceedings, as it was undisputed that the accused was not provided with approval to wear a beard. As a result, the military judge was not required as a matter of due process to allow petitioner to call the proffered witnesses in the contempt hearings.

Further, it is clear that the accused's proffered defense under RFRA had no merit. While the military judge did not issue specific findings as to why RFRA did not serve as a defense to the contempt proceedings, the facts and legal analysis underlying the military judge's subsequent ruling regarding RFRA's applicability to the forced shave order apply equally to the contempt findings. Consequently, petitioner's proffered RFRA defense to the contempt charges is meritless.⁵

⁵ A detailed discussion concerning the military judge's ruling regarding RFRA is filed with the companion writ, *Hasan v. Gross*, ARMY MISC No. 20120877, filed contemporaneously herewith.

Based on the foregoing, regardless of the classification used by the military judge, petitioner was afforded full due process under R.C.M. 809(b)(2). Therefore, petitioner is not entitled to relief.

ISSUE II

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

A. Standard of Review

"Unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004); *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012).

B. Unreasonable Multiplication of Charges

While the military judge did not make actual findings concerning petitioner's unreasonable multiplication of charges defense, it is clear that petitioner's argument is unsupported by case law or the record. In order to find an unreasonable multiplication of charges, courts look to five non-exclusive factors: (1) Did the accused object at trial; (2) Is each charge and specification aimed at distinctly separate criminal acts; (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality; (4) Does the number of charges and specifications unreasonably increase the

appellant's punitive exposure; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

The most closely analogous offense under the UCMJ for which petitioner was convicted for contempt is Article 90, UCMJ.⁶ The key element for this offense is that "the accused willfully disobeyed the lawful command." Manual for Courts-Martial, part IV, para. 14.b.(2)(d) (2012 ed.) [hereinafter MCM]. In this case, while there was in essence a single, "standing order" by virtue of AR 670-1, R.C.M. 804(e)(1), and the military judge himself ordered petitioner to appear in court in the proper uniform, the analysis must focus on petitioner's intentional violation of those orders. For each hearing at issue in this case (including 12 separate Article 39(a), UCMJ, sessions where the accused appeared out of uniform with a beard, spanning an almost 3 month time period), the accused made the intentional and willful decision to appear in court not in the proper uniform. Each time he appeared in court not in the proper uniform was therefore a separate criminal act, and should be punished separately.

⁶ See, e.g., *United States v. Burnett*, 27 M.J. at 108 (Cox. J, dissenting) (pointing out that Article 89, 90, 91, 133, and 134, UCMJ, are available to prosecute contemnors in lieu of Article 48, UCMJ).

This case is similar to that of *United States v. Negron*.

There, the accused had been diagnosed with HIV and had been ordered to inform his partners of that diagnosis. *Negron*, 28 M.J. 775, 776 (A.C.M.R. 1989). Contrary to that order, the accused engaged in sexual activity on two separate occasions within a two week time period with the same individual and did not inform her of his condition. *Id.* He was charged separately for both instances, convicted, and argued on appeal that the findings were multiplicitious. *Id.* at 779. The Court disagreed because "a week elapsed between the two unwarned intimacies during which appellant had ample opportunity to reconsider and abandon, rather than repeat, his criminal course of conduct." *Id.* at 779, citing *United States v. Abendschein*, 19 M.J. 619 (A.C.M.R. 1984), *pet. denied*, 21 M.J. 84 (C.M.A. 1985); see also *United States v. Ali* 682 F.3d 705 (8th Cir. 2012) (accused found in contempt for multiple violations of a standing order to rise, some occurring on the same day).

Just as the accused in *Negron*, petitioner has had ample opportunity between each Article 39(a), UCMJ session⁷ to "reconsider and abandon, rather than repeat, his criminal course of conduct." *Negron*, 28 M.J. at 779. Because he intentionally chose to arrive to each separate session of the court out of the

⁷ The average time between the eleven hearings was approximately 8 days, with four instances being over 10 days.

proper uniform, he was properly subjected to individual penalties for each violation of the order.

ISSUE IV.

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

A. Standard of Review

A military judge's decision to summarily punish contemptuous conduct is reviewed for an abuse of discretion. *United States v. Wilson*, 421 U.S. 309, 319, (1975); *F.T.C. v. Trudeau*, 606 F.3d 382, 386 (7th Cir. 2010); *United States v. Flynt*, 756 F.2d 1352, 1362 (9th Cir. 1985).

B. Appropriateness of Military Judge Presiding Over Contempt Proceedings

The Supreme Court long ago announced the general principle that "where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place." *Cooke v. United States*, 267 U.S. 517, 539 (1925). The Court of Appeals for the D.C. Circuit, after a detailed review of the primary Supreme Court precedent concerning summary contempt proceedings, summarized in detail the three situations which would generally call for the recusal of a judge as factfinder for a contempt hearing: (1)

when he has become personally embroiled with the alleged
contemnor; (2) when he has been attacked in such a way that the
personal feelings of a normal judge might reasonably be expected
to have been affected; or (3) where he has adopted an adversary
posture with respect to the alleged contemnor. *United States v.*
Meyer, 462 F.2d 827, 842 (D.C. Cir. 1972), citing *Offut v.*
United States, 348 U.S. 11 (1954); *Mayberry v. Pennsylvania*, 400
U.S. 455, (1971); *In re Murchison*, 349 U.S. 133 (1955); *Johnson*
v. Mississippi, 403 U.S. 212 (1971).

Here, the accused made clear in his personal statement to
the court on 30 August 2012 that he was "not trying to
disrespect your authority as military judge." (R. at 785). The
military judge also made clear on the record that he is "not
personally offended about [the accused] growing the beard." (R.
at 400).

There is no evidence that the accused's growing of the
beard was meant as a personal attack or affront against the
military judge himself. Further, the military judge did not
interpret it as such. Consequently, the military judge was not
required to recuse himself from the contempt proceedings, and
did not abuse his discretion in choosing not to do so.

The remainder of petitioner's arguments concerning the
permanent recusal of the military judge are nothing more than a
restatement of their arguments made before both this Honorable

Court and CAAF, both of which were summarily rejected. See *Hasan v. Gross*, ARMY MISC 20120667 (Army Ct. Crim. App. 10 July 2012) (Order); *Hasan v. Gross*, Docket No. 12-8029/AR (C.A.A.F. 10 August 2012) (Order). There is no need for this matter to be re-litigated.

ISSUE V.

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

Petitioner's argument concerning R.C.M. 809 is moot because he has appropriately filed a writ under the All Writs Act. If petitioner prevails on his underlying arguments, this Court will be authorized to order a remedy. Consequently, he has not been denied appellate review of the contempt findings.⁸

⁸ Petitioner clearly has no statutory right to appeal under Articles 66 or 67, UCMJ. *Barnett*, 27 M.J. at 105; see also *United States v. Politte*, 63 M.J. 24, 25 (C.A.A.F. 2006) ("a Court of Criminal Appeals can only review cases within its statutory jurisdiction."). Article 69(b), UCMJ, on the other hand, could arguably provide a means for appeal to petitioner. Because petitioner has not yet filed an appeal pursuant to Article 69(b), UCMJ, and had the appeal denied due to R.C.M. 809(d), the issue as to whether the President's promulgation conflicts with the UCMJ is not yet ripe, and need not be decided at this time.

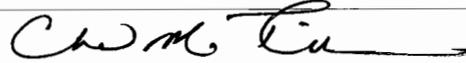
Conclusion

WHEREFORE, the Government respectfully requests this

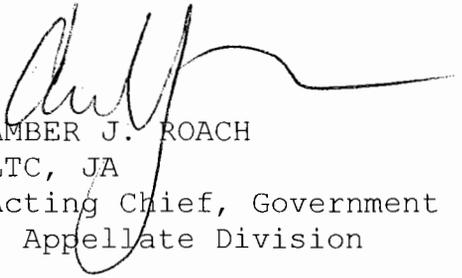
Honorable Court deny petitioner's requested relief.



KENNETH W. BORGNINO
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Appellate Attorney,
Government Appellate Division



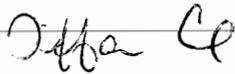
CHAD M. FISHER
CPT, JA
Branch Chief,
Government Appellate Division



AMBER J. ROACH
LTC, JA
Acting Chief, Government
Appellate Division

CERTIFICATE OF SERVICE AND FILING

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


ANGELA RIDDICK
Supervisory Paralegal Specialist
Government Appellate Division

