[ORAL ARGUMENT SCHEDULED FOR DECEMBER 12, 2012]

No. 12-5038

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EARLE A. PARTINGTON, Appellant, v. JAMES W. HOUCK, Vice Admiral, JAGC, USN, *et al.*, Appellees.	)

MOTION TO COMPEL APPELLEES JAMES W. HOUCK, NANETTE M. DERENZI, ROBERT A. PORZEINSKI AND CHRISTOPHER N. MORIN TO ANSWER PARAGRAPHS 60 – 92 OF APPELLANT'S COMPLAINT PRIOR TO ITS DECISION IN THIS CASE

Appellant Earle A. Partington ("Partington") respectfully moves this court for an order compelling Appellees James W. Houck, Nanette M. Derenzi, Robert A. Porzeinski and Christopher N. Morin (the Navy defendants[1]) the Judge Advocate General of the Navy ("NJAG") to answer paragraphs 60 – 92 of Appellant's complaint (attached as Exhibit A) prior to its decision in this case.

This motion is made pursuant to Circuit Rule 27 and Rule 27 of the Federal Rules of Appellate and is based upon the attached memorandum and the record and

[1] Defendant Blazewick was never served.

file in this appeal.

A. THE UNDERLYING ALLEGATIONS AGAINST PARTINGTON

1. BACKGROUND

On November 16, 2010, Appellant and attorney Earle A. Partington ("Partington") filed a complaint against defendants James W. Houck, Vice Admiral, JAGC, USN, Robert B. Blazewick, Captain, JAG, USN, and Christopher N. Morin, Captain JAGC, USN, in both their official and personal capacities, and the United States Court of Appeals for the Armed Forces (collectively the "navy defendants") in the United States District Court for the District of Columbia alleging four causes of action: first, lack of statutory authority to *discipline* civilian attorneys; second, denial of procedural due process in disciplining Partington; third, right of judicial review of discipline; and fourth, a *Bivens* action (R 1, JA-11-39). On February 25, 2011, without filing an answer, the defendants filed a motion for summary judgment as to the first three causes of action and to dismiss the fourth cause action (R 13-14).

On January 10, 2012, absent oral argument or any hearing, the district court granted defendants' motion for summary judgment and dismissal, and denied Partington's motion for preliminary injunction (R 40, JA-64). Judgment was entered on January 10, 2012 (R 41). Partington filed a timely notice of appeal from this judgment on February 6, 2012 (R 44, JA-10).

2. THE ALLEGATIONS

The Navy defendants never answered Appellant's complaint and thereafter argued that the charges against Partington alleged the truth of the matter without ever explaining what that truth was such that the allegations would show *how* the statements made by Partington in his brief for Toles were false. The Navy defendants further claim that "Partington's argument about the truth of his statements has nothing to do with due process" (DE 1394894). As attorney disciplinary proceedings are quasi-criminal (*See In re Ruffalo*, 390 U.S. 544 (1968)), it is proper to look to criminal cases to see if the Navy defendants' argument has merit. The Navy defendants' assertion is contrary to the holding in *Jackson v. Virginia*, 443 U.S. 307 (1979), in which it was held that it is a denial of due process to convict someone of committing an act that is not a crime.

A fair reading of the Navy record reveals that Partington's "false" statements were (and are) either materially true or legal argument, which, by definition, are neither true nor false. For example, Partington's use of the term "acquitted" was backed up by meritorious legal argument in his brief to the NMCCA (JA-248, 250, 254). There was such an infirmity of proof establishing the factual basis for the NJAG's purported discipline against Partington that the "charge sheet" as highlighted in Partington's initial complaint is proper to provide further explanation of the Navy proceeding and the Navy's actions.

> "Specification 1: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 March 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "Toles had moved for neither an acquittal nor a dismissal of these specifications."

The above-referenced statement was taken out of its context and is materially true.[2] The fact that Partington used the *past perfect tense* of the compound verb "to have moved" shows that the sentence was used in a temporal context (i.e., referring to some past event prior to the motion to dismiss which was also in the past) and was not an absolute disclaimer to ever having made a motion to dismiss. Moreover, to avoid any misinterpretation of Partington's legal

[2] The Navy's allegation in specification 1 does not allege that Partington *did* not say that he moved for a dismissal *at any time* during the entire proceedings. This made no sense to Partington because, obviously, he did. If the statement is put into the context of which it appears, Partington is saying that he did not move to dismiss before the military judge dismissed the video voyeurism charge and specifications. This is an immaterial error in that he moved to dismiss after the military judge accepted the pleas but, as a result of an editing error, the last two sentences were transposed, and Partington missed the error. The point that Partington was trying to make is that he did not put either the prosecutor or the military judge on notice of the defect in the pleading until *after* the military judge accepted the pleas – the critical point for double jeopardy purposes. The fact that Partington placed his motion 15 to 20 minutes later in the same proceeding is utterly immaterial to any issue in the case. If the Navy defendants, who missed this error entirely, had called this error to Partington's attention, it would have been immediately corrected.

argument in Toles' Brief, Partington directs this court's attention to a full review of the "charge sheet" which the Navy viewed below as the "formal complaint" (JA-373-375) as it is critical on this point. Partington submits it is critical in that a thorough review of the Navy defendants' charge sheet will show that the referenced statements in specifications 1 through 13 are primarily statements of legal argument and that the few statements of fact underlying the legal arguments are materially true, and it seems illogical for the Navy to argue otherwise. As a matter of law, legal argument cannot be true or false.

> Specification 2: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "the military judge dismissed specification 2-7, 9-21, and 23 of charge IV [video voyeurism]…"

The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, such statement cannot be true or false.

> Specification 3: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "the military judge dismissed those specifications for failure to allege an offense…The issue presented is what is the effect of that dismissal."

The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, such statement cannot be true or false.

> Specification 4: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "at no time did the government request reconsideration of the dismissals of the video voyeurism specifications nor did the military judge give notice to any party that he was reconsidering his dismissals."

The above-referenced statement, to the extent that it alleges the actions of the trial counsel and the military judge, is true. To the extent that it states that the military judge dismissed the "video voyeurism" charges and specifications, it is legal argument. As a matter of law, this statement cannot be true or false.

> Specification 5: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "If the military judge intended to accept Toles' pleas to disorderly conduct under these specifications, he should not have dismissed them."

The above-referenced statement is not a statement of fact but is legal argument. As amatter of law, such statement cannot be true or false.

> Specification 6: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or

> about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "Further, the court should have objected to the dismissals if it wanted to proceed on included offenses, but it did not. The findings as to these specifications must be set aside and the government's failure to
> object to the dismissals was a waiver of any right to proceed further on them."

The above-referenced statements are not statements of fact but consist of legal argument. As a matter of law, such statement cannot be true or false.

> Specification 7: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "the charged offenses for these specifications were dismissed."

The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, such statement cannot be true or false.

> Specification 8: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "The convening authority's action should have identified the included offense for each specification as disorderly conduct…instead of quoting the original specifications…which had been dismissed."

The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, such statement cannot be true or false.

> Specification 9: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "As to the video voyeurism specifications of charge IV to which Toles pled guilty, the military judge only accepted Toles' guilty pleas to the included offenses of disorderly conduct under UCMJ Art. 134, "acquitting' him of the charged offenses of 'video voyeurism."
>
> Specification10: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "The military judge then 'acquitted' Toles of these specifications because they did not allege the charged offenses of 'video voyeurism'".
>
> Specification 11: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "The convening authority's action should have identified the included offense for each specification as disorderly conduct…instead of quoting the original specifications… which had been dismissed."

> Specification 12: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "[t]he military judge's acquittal was not an acquittal for double jeopardy purposes."

Specifications 9, 10, 11, and 12 allege that Partington violated Rule 3.3 by knowingly making false statements of fact. The common falsehood alleged among them is Partington'sasserting in the Brief that the military judge had "acquitted" the accused of the "video voyeurism". Specifically, the specifications allege that the following statements, all taken directly from the Argument portion of the Brief, were false:

Specification 9 provides: "As to the 'video voyeurism' specification of charge IV to which Toles pled guilty, the military judge only accepted Toles' guilty pleas to the included offenses of disorderly conduct under UCMJ Art. 134 (10 U.S.C. §934), 'acquitting' him of the charged offenses of 'video voyeurism.'" The statement, to the extent that it alleges the actions of the military judge, is true. To the extent that it states that the military judge "acquitted" Toles, it is legal argument. As a matter of law, this statement cannot be true or false.

Specification 10 provides: "The military judge then 'acquitted' Toles of these specifications because they did not allege the charged offenses of "video

voyeurism" (record at 278)." This statement is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

Specification 11 provides: "The military judge then ruled that he had 'acquitted' Toles of these specifications." This statement is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

Specification 12 provides: "[t]he military judge's acquittal was not an acquittal for double jeopardy purposes." This statement is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

> Specification 13: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 March 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: "The military judge below, after Toles had entered his guilty pleas and had them accepted, ruled that the video voyeurism specifications (specifications 2 through 23 of Charge IV) did not allege that offense because of the failure of the government to allege that the offense had
> been committed in the special maritime and territorial jurisdictions of the United States, an element of 18 U.S.C. § 1801."

Specification 13 alleges that Partington violated Rule 3.3 in that the defense's assertion in the Brief that the military judge had dismissed the "video voyeurism" specifications for failure to state an offense was also allegedly false.

The above-referenced statement in specification 13 is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

> **Violation of Rule 3.1 of the Rules of Professional Conduct (JAGINST 5803.1C)**
> Specification: In that Earle A. Partington, Esq., did, at or near Washington Navy Yard, Washington, D.C., on or about 23 march 2007, submit an appellate brief to the Navy-Marine Corps Court of Criminal Appeals on behalf of petitioner [Stewart Toles] in the case of United States v. Toles, and made the following statement therein, knowing it to be false, to wit: the false statements identified in specifications 1 through 13 of Charge I.

The final specification against Partington alleges a violation of Rule 3.1 based upon Partington having asserted issues in the Brief that he knew were not true or meritorious: namely, his assertions identified in the first twelve specifications against him.

B. THE NAVY DEFENDANTS ARGUMENTS AS SET FORTH HERE IN PARTINGTON'S REPLY BRIEF ARE FILLED WITH MISREPRESENTATION AFTER MISREPRESENTATION

This case is very disturbing in that it is fundamentally about the *truth*. The Navy charged Partington with making a number of factually false statements in the Brief in *United States v. Toles*. He was *not* charged with misleading the NMCCA or anyone else. He was not charged with a meritless legal argument. He was *not* charged with anything else. Since Partington filed this action in the district court, the Navy defendants and government counsel have responded with a barrage of factual misrepresentations and bad faith legal arguments to support the Navy

defendants' bogus action against him. All Partington seeks is a fair hearing, but the response of the Navy defendants is to do the very things Partington was wrongly charged with. This court should issue an order to show cause to the Navy defendants and government counsel as to why they should not be sanctioned for their individual and collective misconduct.

All of the charges arise out of essentially two statements made by Partington in the argument portion of Toles' brief. The first statement is that "Toles *had moved* for neither an acquittal nor a dismissal of [the video voyeurism charges and specifications]" (Emphasis added). An examination of the Navy record shows that the Navy defendants refused to acknowledge that Partington used the past perfect tense of the compound verb "to have moved." Nowhere did Partington state that "Toles *did* not move" using the past tense, yet the Navy defendants ignored this *critical* distinction and implicitly found that Partington was guilty because apparently the Navy defendants could look in his mind and determine that he really meant to misrepresent by using the past tense instead of the past perfect tense. One can search the Navy record in vain for *any* recognition that Partington used the past perfect tense.

The fact is that Partington used the past perfect tense, not the past tense, because he wanted the NMCCA to understand what really happened. What is disconcerting is that the NMCCA, in its opinion, omitted the verb "had" in its

quote of what Partington said changing the meaning from the past perfect tense to the past tense. The Navy defendants then ran with that and never looked back. They refuse to acknowledge the critical distinction in the readings of the past and perfect tenses, especially as it was used in a *timeline* paragraph. They continue to misrepresent in this court the clear meaning of what Partington said.

While the past tense refers to past events right up to the present, the past perfect tense refers to an event in the past *prior* to another event in the past (*see* Harbrace College Handbook at 87-89 (9th ed.1982). The Navy defendants refuse to acknowledge or even mention this critical distinction and hope this court will be misled into believing that Partington's materially *true* statement is really a false statement because it is not what Partington really said, but what they claim he really meant to say. It is just not credible that these senior Navy attorneys with all their education did not understand what Partington *actually* said.[3] There is a difference between the Navy defendants' refusal to admit what Partington really said and an *express* misrepresentation of what he said.[4] This court cannot tolerate

[3] By failing to allege the supposed truth in the charges against Partington, he would have no way of knowing prior to the hearing that the Navy defendants were changing the tense of the compound verb "to have moved."

[4] It is particularly disturbing concerning the role the NMCCA played in this bogus action against Partington. The answering brief of the Navy in the Toles' appeal raised none of the matters that the NMCCA did. The NMCCA gave no notice to Partington before attacking him. In its opinion, it omitted the "had" from the quote in its opinion starting things rolling along this road to misstating the tense Partington used in the Brief. The NMCCA even suggested ineffective assistance

this kind of misrepresentation from these defendants, all of whom are experienced attorneys who have to have known better.

All the remaining charges (except the last) arise out of the legal arguments made by Partington as to the military judge's statement that he was entering not guilty findings on the record as to the video voyeurism charge and specifications - a statement that the Navy defendants admit was made by the military judge (AB at 42). The Navy defendants disingenuously argue that "whether a judge has acquitted a defendant of certain offenses is not a legal argument; it is a fact with legal implications" (OB at 41). This statement is patently false. What the judge actually said (i.e. the actual words used) is a statement of fact. The legal effect of the judge's words is a question of law subject to argument. As no party disputes what the military judge actually said, any discussion of what the legal effect was of those words is by definition legal argument.

The Navy defendants are blatantly arguing, in bad faith that they can declare legal argument *made in the argument portion of a brief* to be a fact and discipline a lawyer for a statement that is clearly not factual. This runs counter to a defense

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of counsel by Partington and the court disposed of that even thought the NMCCA had no standing to do so. *Chocallo v. Bureau of Hearings and Appeals*, 548 F.Supp. 1349 (E.D.Pa.1982), *aff'd*, 716 F.2d 889 (3d Cir.), *cert. denied*, 464 U.S. 983 (1983) (judge has no standing to assert ineffective assistance); *United States v. Gauthier*, 34 M.J. 595 (A.C.M.R.1992) (wife of accused has no standing to assert ineffective assistance.) This conduct by the NMCCA raises serious question whether the military courts or the military itself could be trusted to fairly administer discipline to *civilian* attorneys.

attorney's sixth amendment duty to this client and the holding of the Supreme Court in *McCoy*, *supra*. Even worse, the Navy defendants argue (AB at 41) that "it is undisputed that the military judge did not acquit [Toles] of the [video voyeurism charges and specifically, Partington's] statement is false and misleading and not saved by Partington's use of quotation marks." It is most certainly disputed as to what *legal* effect the military judge's findings of not guilty had, it was a key *legal* argument in Toles' appeal. The quoted statement is a material misrepresentation of an underlying fact by the Navy defendants.

Likewise, it is clear from Toles' Brief that the word "acquitted" was in quotation marks because Partington was *arguing* that the *legal* effect of the military judge's findings of not guilty was that the acquittal was, as a matter of law, a dismissal. Additionally, the Navy defendants have no compunction about outright factual misrepresentations.

The factual misrepresentations by the Navy defendants do not stop there. They go on to claim that the military judge *clearly* misspoke - clear to whom, no one knows for sure because *no one* from the Navy ever spoke to Toles' military counsel to ask how this defense team viewed the military judge's findings of not guilty. The Navy defendants can point to nowhere in the Navy record where the military judge ever set aside his findings of not guilty, findings made on the record in accordance with military practice (see Partington Aff't, R 24-1, JA-485).

All the Navy defendants can do is point to later in the proceedings when the military judge stated that he had entered pleas of not guilty (AB at 42). The Navy defendants falsely claim that the military judge corrected himself as to his supposed error in entering not guilty findings (AB at 42 n. 20, JA-1000-1001). However, at no time did the military judge ever set aside his formal entry of findings of not guilty as to the video voyeursim charge and specifications. The Navy defendants cannot point to anywhere in the Navy record where he did. There is no doubt that the military judge entered pleas of not guilty prior to entering findings of not guilty. The fact that he later accurately stated that he had earlier entered pleas in no way means did not *also* enter findings of not guilty. Before a military judge's entered findings, there must be pleas. There is nothing inconsistent in the military judge's later statements about having entered pleas of not guilty. Finally, it makes no difference what the military judge said later in the proceeding. He *never* set aside his findings of not guilty *on the record*. Partington was constitutionally obligated to argue that the findings of not guilty had *legal* effect under *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 442 (1988).

Not only does *McCoy* support Partington, but Partington's October 26, 2008, letter to the Navy in this matter (JA-279-280) has an appropriate extract:

> "The first statement that I engaged in "unsavory tactics" [in the NMCCA opinion] shows a profound lack of

understanding by the panel of the ethical duties of defense counsel. As set forth in J.W. Hall, Jr., Professional Responsibility in Criminal Defense Practice at 340 3d [ed.] 1996):

As one court pithily described the duty of zealous advocacy:

It is the essence of our adversary system that each litigant have the assistance of a lawyer who is prepared, if it be appropriate, *to defy hell on his or her client's behalf.*

To many, the lawyer is a mere extension of the will of the client. The client wishes to pursue certain ends but is without technical, legal skills. The lawyer provides these skills. He is in a sense a conduit through which the client pursues his ends. *The lawyer at once is both highly partisan and completely neutral. He aggressively pursues the ends of his client, yet remains personally indifferent to those ends.*

A lawyer is and must be the ultimate advocate. He speaks for and in the interest of his client. He seizes every fair advantage available to his client. *And when his client is on the ropes, his lawyer, standing alone, if need be, is that one person who, in the interest of his client, skillfully defies the state, the opposing litigant, or whoever threatens. The lawyer is prepared to stand against the forces of hell though others see that as his client's just dessert.* He assures all adversaries, in the vernacular of the streets, "You may get my client but you've got to come through me first."

If the lawyer is to perform these vital functions, he must be unfettered, he must in the course of his advocacy be indulged freedom from prior restraints, *even when he skates close to the edge*.

. . .

We regard the lawyer's right and responsibility of zealous advocacy on behalf of his client among the most precious forms of speech. As such we would pretermit advance enforcement of the canons of ethics and place

> faith in the integrity of most of our quasi-criminal [ethics] complaints procedures. . . . Plagiarizing Judge Learned Hand, to many this is and alsways will be folly; but upon it we have staked our all.[15] [Emphasis added.]
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>
> [15]*Thorton v. Breland*, 441 So. 2d 1348, 1350-51 (Miss.1983), citing Judge Hand in *U.S. v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y.1943)."

The Navy defendants continue their attack on Partington (AB at 7-8) by noting that in 2009 Partington did not acknowledge the immaterial minor error he did make in the Brief (*see* OB at 16 n. 9). They omit to admit that by refusing to tell Partington what the alleged truth was as to each charge, Partington like the Navy at the time was unaware of the error.

The Navy defendants praise themselves as the paragons of justice with just how wonderful they were to Partington and how unreasonable he was (AB at 55). As to Partington's claim that he was entitled to the presumption of innocence in any disciplinary proceeding, they claim that Partington did not prove that he was not afforded the presumption (AB at 36) as if he could prove a negative. It is a fundamental principle of evidence that the burden of producing is on the party alleging the affirmative of an issue. *Gushiken v. Shell Oil Co.* 35 Haw. 402, 421 (1940). The burden is on the defendants to establish that Partington was afforded the presumption as well as the other attributes of due process.

The Navy defendants also criticize Partington for only citing a California case for the rule that Partington was entitled to a presumption of innocence (AB at

36). The District of Columbia, Oregon, and Hawaii each have essentially the same rule. *See In re Jordan*, 295 Or. 142, 665 P.2d 341 (1983) (the accused in a disciplinary proceeding is entitled to a presumption that he is innocent of the charge and the charges in a disciplinary proceeding must be proved by clear and convincing evidence), *In re Trask*, 46 Haw. 404, 380 P.2d 751 (1963) (charge against attorney who is accused of unprofessional conduct must be established by preponderance of evidence), *In re Thorup*, 432 A.2d 1221, 1225 (D.C.1981) (the burden of proving the charges rests with Bar Counsel and factual findings must be supported by clear and convincing evidence).

The Navy defendants also try to mislead this court by noting (AB at 36) that Partington was informed of the standard of proof for the prehearing proceedings as if this is an issue in this case. It is not and never has been; the issue presented in this case is what was the standard of proof *for the hearing*, something which defendant Blazewick refused to tell Partington when he refused to answer Partington's multiple requests to be informed of necessary procedures at the hearing (JA-396-397,398-399, 400, 401-402, 403-404).

The point Partington is seeking to make here is that the Navy defendants have been less than truthful with this court. By forcing them to answer the relevant paragraphs of the complaint at this time, an injustice to Partington will be avoided and the sanctionable conduct of these appellees and government counsel will be

exposed. If this case is remanded as it must be, these defendants will have to answer the complaint so there is no prejudice in requiring an answer now. Further, an answer now will avoid a potential fraud upon the court.

CONCLUSION

For the foregoing reasons, Partington respectfully requests that this court compel the appellees to answer paragraphs 60 – 92 of appellants complaint prior to its decision in this case.

DATED: November 28, 2012

Respectfully submitted,
EARLE A. PARTINGTON,
Plaintiff-Appellant

By his Attorney,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of November, 2012, the foregoing Appellant's Motion to Compel was served via this Court's Electronic Case Filing System.

/s/ JEFFREY A. DENNER
Jeffrey A. Denner

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

EARLE A. PARTINGTON **1330 PACIFIC TOWER** **1001 BISHOP STREET** **HONOLULU, HI, 96813,** **Plaintiff,** **v.** **VICE ADMIRAL JAMES W. HOUCK, JAGC, USN** **1322 PATTERSON AVE. SUITE 3000** **WASHINGTON NAVY YARD, D.C. 20374,** **and** **CAPTAIN ROBERT A. PORZEINSKI, JAGC, USN** **1322 PATTERSON AVE. SUITE 3000** **WASHINGTON NAVY YARD, D.C. 20374,** **and** **CAPTAIN ROBERT B. BLAZEWICK, JAG, USN** **REGIONAL LEGAL SERVICE OFFICE** **850 WILLAMETTE ST.** **PEARL HARBOR, HI 96860,** **and** **CAPTAIN C. N. MORIN, JAGC, USN** **1322 PATTERSON AVE. SUITE 3000** **WASHINGTON NAVY YARD, D.C. 20374,** **and** **UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES** **450 E. STREET N.W.** **WASHINGTON, DC 20442,** **Defendants.**	**Civil Action No.:**

COMPLAINT FOR DAMAGES, DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I. INTRODUCTION

By this action, attorney Earle A. Partington ("Partington") seeks, *inter alia*, the review of a decision by the Judge Advocate General of the United States Navy ("NJAG") purporting to suspend him from the practice of law in any and all proceedings conducted under the auspices of the NJAG (i.e., those involving Navy and Marine Corps personnel). This decision was based upon a recommendation made by the Commanding Officer of the Navy's Trial Service Office, Pearl Harbor, Hawaii, following an "ethics investigation" conducted against Partington. Throughout the course of this so-called investigation, which was undertaken without statutory authority, the defendants violated the NJAG's internal procedures and Partington was denied his due process right to adequately defend himself against amorphous and clearly retaliatory "charges".

More disturbingly, there appears to have been an overarching plan by the NJAG to intimidate and pressure Partington, and other civilian and perhaps detailed military defense counsel, to refrain from zealously, professionally, and effectively delivering to their clients competent legal counsel which comports with and protects vital constitutional rights. In essence, the NJAG's effort to silence Partington via a sham "ethics investigation" is intended to, and most emphatically does create an atmosphere of intimidation and fear, especially among civilian defense counsel, who pursue a vigorous defense of their clients in court-martial proceedings. These improper actions have violated Partington's rights under, *inter alia*, the 5th Amendment to the United States Constitution and have damaged him significantly. As a direct result of the improper action taken against Partington by the NJAG, the United States Court of Appeals for

the NJAG the jurisdiction to regulate the conduct of civilian defense attorneys before Navy courts-martial.

58. Pursuant to its notification of Partington to the ethics investigation against him, the Rules Counsel provided Partington, for the first time, with a list of violations of Rule 3.3 which he was alleged to have committed, as set forth in fourteen different specifications.

59. Specifications 1, 2, 3, 4, 5, 6, 7, and 8 allege that Partington violated Rule 3.3 by knowingly making false statements. The common putative factual falsehoods are Partington's assertion in the Brief that the military judge had dismissed the "video voyeurism" charges and specifications.

60. Specifically, the specifications allege that the following statement, taken directly from the Brief, was false: Specification 1: "Toles had moved for neither an acquittal nor a dismissal of these specifications."

61. The above-referenced statement was taken out of context and, albeit inaccurate, was not inaccurate for the reason stated by defendant Blazewick in his findings. However, it was not made with the knowledge that it was "false." The inaccuracy was, in fact, an editing error and the statement in question was not intended to go at the end of the paragraph in which it appeared.

62. Any inaccuracies in the Brief were not material to any issue on appeal.

63. Specification 2 provides: "(t)he military judge dismissed specification 2-7, 9-21, and 23 of charge IV ["video voyeurism"]…"

64. The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, such statement cannot be true or false.

65. Specification 3 provides: "the military judge dismissed those specifications for failure to allege an offense… The issue presented is what is the effect of that dismissal."

66. The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, such statement cannot be true or false.

67. Specification 4 provides: "at no time did the government request reconsideration of the dismissals of the "video voyeurism" specifications nor did the military judge give notice to any party that he was reconsidering his dismissals."

68. The above-referenced statement, to the extent that it alleges the actions of the trial counsel and the military judge, is true. To the extent that it states that the military judge dismissed the "video voyeurism" charges and specifications, it is legal argument. As a matter of law, this statement cannot be true or false.

69. Specification 5 provides: "If the military judge intended to accept Toles' pleas to disorderly conduct under these specifications, he should not have dismissed them."

70. The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

71. Specification 6 provides: "Further, the court [sic] should have objected to the dismissals if it wanted to proceed on included offenses, but it did not. The findings as to these specifications must be set aside and the government's failure to object to the dismissals was a waiver of any right to proceed further on them."

72. The above-referenced statements are not statements of fact but consist of legal argument. As a matter of law, these statements cannot be true or false.

73. Specification 7 provides: "the charged offenses for these specifications were dismissed."

74. The above-referenced statement is not statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

75. Specification 8 provides: "The convening authority's action should have identified the included offense for each specification as disorderly conduct… instead of quoting the original specifications… which had been dismissed."

76. The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

77. Specifications 9, 10, 11, and 12 also allege that Partington violated Rule 3.3 by knowingly making false statements of fact. The common falsehood alleged among them is Partington's assertion in the Brief that the military judge had "acquitted" the accused of the "video voyeurism". Specifically, the specifications allege that the following statements, all taken directly from the Brief, were false:

78. Specification 9 provides: "As to the 'video voyeurism' specification of charge IV to which Toles pled guilty, the military judge only accepted Toles' guilty pleas to the included offenses of disorderly conduct under UCMJ Art. 134, 'acquitting' him of the charged offenses of 'video voyeurism.'"

79. The above-referenced statement, to the extent that it alleges the actions of the military judge, is true. To the extent that it states that the military judge "acquitted" Toles, it is legal argument. As a matter of law, this statement cannot be true or false.

80. Specification 10 provides: "The military judge then 'acquitted' Toles of these specifications because they did not allege the charged offenses of "video voyeurism" (record at 278)."

81. The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

82. Specification 11 provides: "The military judge then ruled that he had 'acquitted' Toles of these specifications."

83. The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

84. Specification 12 provides: "[t]he military judge's acquittal was not an acquittal for double jeopardy purposes."

85. The above-referenced statement is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

86. Specification 13 alleges that Partington violated Rule 3.3 in that the defense's assertion in the Brief that the military judge had dismissed the "video voyeurism" specifications for failure to state an offense was also allegedly false. Specifically, it provides: "The military judge, after Toles had entered his guilty pleas and had them accepted, ruled that the "video voyeurism" specifications (specifications 2 through 23 of Charge IV) did not allege that offense because of the failure of the government to allege that the offense had been committed in the special maritime and territorial jurisdiction of the United States, an element of 18 U.S.C. §1801."

87. The above-referenced statement in specification 13 is not a statement of fact but is legal argument. As a matter of law, this statement cannot be true or false.

88. The final specification against Partington alleges a violation of Rule 3.1 based upon Partington having asserted issues in the Brief that he knew were not true or meritorious: namely, his assertions identified in the first twelve specifications against him.

89. Significantly, each specification cited against Partington came from the Argument section of the Brief and concerned his legal argument that the military judge had *de jure* dismissed the "video voyeurism" charges and specifications. Even a cursory reading of the

alleged false statements reveals that all but one of them are points of argument, not factual statements.

90. The specifications set forth against Partington went well beyond four statements identified by the NMCCA in its opinion. More fundamentally, none of the specifications alleged against Partington stated in any manner how they were false (or, as to each specification, what the 'true" statement should be).

91. Inasmuch as the statements were made in the context of legal argument, a failure on the part of the NJAG to specify how they were false, or could be false, or, alternatively, what the objective "truth" was, rendered it impossible for Partington to provide a meaningful response.

92. Despite repeated, written requests, attached as Exhibits E through M from Partington to obtain such information, defendant Blazewick steadfastly refused to provide it.

93. At no point in defendant Blazewick' s October 30, 2009, letter to Partington, nor in any subsequent correspondence, did defendant Blazewick inform Partington that the outcome of the ethics investigation could result in the NJAG taking disciplinary action against Partington.

94. Out of frustration at his inability to obtain the information he needed to defend himself, Partington ultimately refused to cooperate further with the investigation and so notified defendant Blazewick in writing.

95. On or about February 22, 2010, defendant Blazewick completed his investigation. On information and belief, despite having the authority to do so, defendant Blazewick did not interview any of the participants in Toles' trial, nor the members of the appellate panel of the NMCCA that heard Toles' appeal. Significantly, on information and belief, he did not interview any of the detailed military defense attorneys who served with Partington and again, who were