[ANSWERING BRIEF FILED – ORAL ARGUMENT NOT YET SCHEDULED]

No. 12-5038

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EARLE A. PARTINGTON,

Plaintiff-Appellant

v.

JAMES W. HOUCK, Vice Admiral, JAGC, USN(Ret.); NANETTE M. DERENZI, Vice Admiral, JAGC, USN; ROBERT A. PORZEINSKI, Captain, JAGC, USN; ROBERT B. BLAZEWICK, Captain, JAG, USN; CHRISTOPHER N. MORIN, Captain, JAGC, USN; and UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES,

Defendant-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE DISTRICT OF COLUMBIA
(CIVIL NO. 1:10-CV-1962 (FJS))

REPLY BRIEF OF PLAINTIFF APPELLANT EARLE A PARTINGTON

Jeffrey A. Denner
Denner Pellegrino, LLP
4 Longfellow Place, 35th Floor
Boston, MA 02114
Telephone: (617) 227-2800
Facsimile: (617) 973-1562
Email: jdenner@dennerpellegrino.com

Charles W. Gittins
P.O. Box 144
Middletown, VA 22645
Telephone: (540) 662-9036
Facsimile: (540) 662-9296
Email: cgittins@aol.com

COUNSEL FOR PLAINTIFF-APPELLANT EARLE A. PARTINGTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION OF THE UNITED STATES OF AMERICA

UNITED STATES CODE

SUMMARY OF ARGUMENT

The Navy defendants have fallen back on UCMJ Art. 36 (10 U.S.C. §836) to justify the Navy's claimed disciplinary power, but that section limits jurisdiction over the persons identified in the UCMJ and Partington is not one. The Navy defendants are trying to change their position on appeal as to what constitutes the "formal complaint" against Partington, but are barred from doing so by judicial estoppels. The Navy defendants have conceded Partington's right to judicial review as to his APA claim. Partington has no meaningful remedy without the right to a Bivens claim. Although CAAF, an Article I court, is not an "agency" under the APA, it is subject to mandamus from an Article III court. Finally, the Navy defendants have made factual misrepresentation after factual misrepresentation in their answering brief, especially refusing to acknowledge that the Navy changed the verb tense of his first alleged misrepresentation and "restyled" legal arguments in the remaining as statements of fact all the while refusing to admit that Partington was clearly denied due process.

ARGUMENT

A. THE NJAG HAS NO STATUTORY AUTHORITY TO IMPOSE DISCIPLINE UPON CIVILIAN DEFENSE ATTORNEYS WHO APPEAR AT NAVAL COURTS-MARTIAL

2. The NJAG[1] does not have statutory authority to discipline Partington

The Navy defendants cite to the United States Constitution and RCM 109(a) as if the fact that the President is commander-in-chief somehow magically gives the NJAG the power to discipline *civilian* attorneys who appear before courts and boards of the naval service. The reality is that the Constitution does not grant such power. The Navy defendants also claim that RCM 109(a) grants this power to the NJAG, but it does not. The Navy defendants finally claim that UCMJ Art. 36(a)(10 U.S.C. §836(a)) grants this power, but ignored the fact that the NJAG in his May 17, 2010, letter purporting to discipline Partington relied solely on UCMJ Arts. 6 & 27 (10 U.S.C. §§806 & 827) (A.R. 66; JA____).

It is interesting that the Navy defendants in the answering brief do not quote Art. 36(a) (as Partington did in the opening brief at 26-27). Art. 36(a), the *sole* source of the President's power to prescribe regulations on the subject in issue, is *limited* to "*cases arising under this chapter* [the UCMJ] in courts-martial, military

[1] Pursuant to FRAP 43(a), the new NJAG, Vice Admiral Nanette M. DeRenzi, is added to the caption and case in place of Vice Admiral Houck (who has retired) as to the official capacity claims only. Vice Admiral Houck remains a defendant as to the *Bivens* claims.

commissions and other military tribunals, and procedures for courts of inquiry,…" [Emphasis added]. Under Art. 2(a)(10 U.S.C. §802(a)), the persons *subject to this chapter* are clearly set out,[2] not one subsection of which applies to civilian attorneys who appear in courts-martial in the United States.

---

[2] UCMJ Art. 2(a) provides:

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipman.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal Service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement which the United States is or may be a party to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

If Congress intended to grant disciplinary jurisdiction over civilian defense attorneys, it would have done so expressly. The fact that it has not done so is no doubt the result of a realization that serious constitutional issues would arise. See *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960). Congress could possibly vest this jurisdiction in the Court of Appeals for the Armed Forces. It is at least a court and a civilian court at that, albeit an Article I court. The fundamental principle of civilian supremacy over the military prevents it from being invested in a court staffed by military officers as the NMCCA is or a military officer as in the instant case.

The Navy defendants continue to falsely claim that Partington consented to Navy disciplinary jurisdiction[3] (AB at 22), but ignore the Navy defendants' wholesale disregard for the NAVINST they rely on. This argument is feeble.

> (12) Subject to any treaty or agreement which the United States is or may be a party to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
> (13) Individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war.

[3] The Navy defendant falsely claim that Partington "consented" to Navy disciplinary jurisdiction (AB at 22) when all he did was "agree to abide by" the JAGINST. The JAGINST contains the Navy Rules of Professional Conduct.

Further, the Navy defendants keep insisting that Partington is guilty of professional misconduct when the Navy record shows clearly he is not. They repeat this claim over and over again even though they know now and knew when they initiated action against Partington that there was no disciplinary jurisdiction over Partington and that he had ethically represented Toles, both at trial and on appeal. Their *ipse dixit* arguments, are just that, because there is *no* evidence to support their actions below and they know it.

Finally, the Navy defendants argue that if this court rules for Partington on this issue, it would leave "the Navy's ability to maintain the integrity of such proceedings at the mercy of state action, or inaction," without offering any explanation why state bar action or inactions would be so bad. State bar action or inaction is certainly better than the manifest injustice that occurred here.

B. ASSUMING NJAG HAS SUCH AUTHORITY, CIVILIAN DEFENSE ATTORNEYS HAVE A RIGHT TO PROCEDURAL DUE PROCESS IN ATTORNEY DISCIPLINARY PROCEEDINGS BROUGHT BY NJAG

2. Partington has a Fifth Amendment right to procedural due process in any attorney disciplinary hearing

From the very beginning, Partington was denied notice of the alleged truth as to the "false" statements the NJAG has alleged he made in Toles' Brief, which in result denied him his procedural due process rights. In their reply brief, the Navy defendants continue to assert that Partington was afforded all the due process

to which he was entitled. However their argument taken in its entirety is clearly illogical and wholly without merit. The information provided to Partington throughout the entire disciplinary proceedings against him by the NJAG, beginning with the NMCCA's decision, to defendant Morin's preliminary investigation, and ending with defendant Blazewick's charge sheet and subsequent report to the Rules Counsel, were collectively so lacking in necessary *prehearing* notice, that any subsequent hearing in which Partington was to properly defend himself, was made impossible.[4]

First, from a review of the decision of the NMCCA (AR 572-578, JA_____), it is apparent the court did not wish to understand Partington's argument in the Brief filed on behalf of Toles, even though his argument is clear on its face, and the NMCCA committed further errors of law. In its decision, the NMCCA interprets Partington's use of the word "acquitted," which was in quotation marks, as intended to be a statement of fact in explaining the events which took place during the hearing before the military judge. The NMCCA found Partington's *argument* to be disingenuous on this point, which is puzzling given that what Partington clearly intended was to provide following *legal argument*: he was trying to persuade the court that, when the military judge set aside Toles' pleas

[4] If this court would compel the Navy defendants, prior to oral argument, to answer paragraphs 60 – 86 of the complaint (R 1, Appendix A-3 *et seq*. to this brief), the Navy defendants' repeated misrepresentations would be exposed.

of guilty and entered findings of not guilty as to the video voyeurism charge and specifications and then subsequently found him guilty of the included offenses of disorderly conduct, the military judge dismissed the video voyeurism charge and specifications.

Partington argued that acquittal of Toles was in law a dismissal because it was *not* "a resolution, correct or not, of some or all of the factual elements of the offense charged," citing Supreme Court cases directly on point as authority[5]. And because no facts had been resolved, Partington argued that "the military judge's "acquittal" was not an acquittal for double jeopardy purposes" but rather, "the military judge dismissed those specifications for failure to allege an offense, a legal issue"[6] (AR 164, JA _____). Thus the issue presented in Toles' appeal concerned the "effect of that dismissal" (AR 164, JA _____).

Moreover, the NMCCA made note of that part of the Brief, which read that the appellant (Toles) "moved for neither an acquittal nor a dismissal of these specifications" (AR 575; JA ____). In so doing, the NMCCA held this to be a disingenuous statement of fact, all the while omitting that portion of Partington's statement which is of great importance. This entire portion of Partington's argument read, "Toles *had* moved for neither an acquittal nor a dismissal of these

---

[5] *Sanabria v. United States*, 437 U.S. 54, 71 (1978); *Lee v. United States*, 432 U.S. 23, 30 n.8 (1977).

[6] It has been long established in military law and acquittal on the merits is *final* and *conclusive*. *United States v. Leshon*, 1 C.M.R.(A.F.) 54,57 (B.R. 1948).

specifications" (AR 164). In this argument, Partington had used the past perfect tense[7] the compound verb "to have made" instead of the ordinary past tense in order to provide a temporal context to his quoted argument which appeared in a *timeline* paragraph.

In review of the NMCCA's decision, it appears that the court's decision was misguided and counter to present law. Regardless, the defendants interpreted the court's findings along with its opinion of Partington's *trial tactics* as being "unsavory" as a "formal" complaint, and in so doing, failed to abide by its own rules and procedures in its preliminary, then formal investigation, concerning Partington. The "complaint" about Partington's *trial tactics* shortly thereafter disappeared.

3. Partington was clearly denied procedural due process in the NJAG proceeding

The Navy defendants assert that compliance with JAGINST 5803.1C "was sufficient;" however, this is clearly not true. The NJAG failed to adhere to the provisions of JAGINST 5803.1C in that it never made a "formal complaint" within the meaning of JAGINST 5803.1C, Encl. 2, para. 4. Moreover, the transmittal letter (AR 318, JA ____) from the NMCCA did not contain the requisite information for a formal complaint, including a "complete factual statement of the

[7] In using the past perfect tense, Partington was explaining an event in the past before another event in the past (*see* Harbrace College Handbook at 87-89 (9th ed.1982)).

acts constituting the substance of the complaint as well as a description of any attempted resolution with the covered attorney concerned." *Id.* Under the circumstances, the transmittal letter should have been returned for correction, completion and resubmission, or the file should have been closed. *Id.* The lack of a formal complaint and the vagueness of the conduct complained of in the NMCCA's footnote allowed the NJAG free rein to "find" any statements they viewed as "false" which, in turn, hindered Partington's ability to make timely, meaningful responses.[8]

The Navy defendants next argue 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 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). This 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.

[8] The Navy Defendants even suggest that Partington had fair notice from defendant Blazewick's *findings* (AB at 31)!

A fair reading of the Navy record reveals that Partington's "false" statements[9] 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 (AR 158, 160, 164; JA _____). There was such an infirmity of proof establishing the factual basis for the NJAG's purported discipline against Partington that an extract of 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.[10] The fact that Partington used the past perfect tense of the

[9] Partington intends to file a motion to compel the Navy defendants to answer complaint paragraphs 60 - 92 (R1, JA ___), prior to oral argument, which deal with the legal argument in Toles' Brief.

[10] 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

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 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" (AR 218-220, JA _____) 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 all statements of fact are materially true, for which it seems illogical for the Navy to argue otherwise. As a matter of law, legal argument cannot be true or false.

The Navy defendants are trying in this court for the first time to change the document which constitutes the "formal complaint" from the charge sheet (AR

---

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.

218-220; JA__), which was their position in the navy proceeding, to the NMCCA opinion (AR 572-578; JA__). This change of position is barred by judicial/administrative estoppel. As held in *Konstantinidis v. Chen*, 200 U.S.App.D.C. 69, 74-75, 626 F.2d 933, 938-39 (1980):

> Judicial estoppel operates to prevent a party from insulting a court through improper use of judicial machinery. Thus the concept's underlying rationale is that a party should not be allowed to convince unconscionably one judicial body to adopt factual contentions, only to tell another judicial body that those contentions were false.[11]

In *Donovan v. U.S. Postal Serv*., 530 F.Supp. 894, 902 (D.D.C.1981), the district court of the District of Columbia further stated:

> "Judicial estoppel "precludes a party from taking a position inconsistent with one previously taken with respect to the same facts in an earlier litigation...."[12]
>
> "Its purpose is to prohibit litigants from "playing 'fast and loose,'"[13] or "blow(ing) hot and cold,"[14] with the courts, and is designed to "protect the integrity of the courts and the judicial process."[15]

---

[11] *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 484, 562 P.2d 360, 364 (1977); *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 709 (Tex.Civ.App.1979). *See also*, *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Exotics Hawaii-Kona, Inc. v. E.I. Dupont de Nemours & Co.*, 104 Haw. 358, 90 P.3d 250 (2004).

[12] *Himel v. Continental Ill. Natl. Bank*, 596 F.2d 205, 210-211 (7th Cir.1979), quoting from *In re Yarn Processing Patent Validity Litig.*, 498 F.2d 271, 279 (5th Cir.1974), *cert. denied*,419 U.S. 1057 (1974).

[13] *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir.1953). *Roxas v. Marcos*, 89 Haw. 91, 969 P.2d 1209.

[14] *Ronson Corp. v. Aktiengesellschaft*, 375 F.Supp. 628, 630 (S.D.N.Y.1974)

[15] *United Va. Bank v. Saul Real Estate*, 641 F.2d 185, 190 (4th Cir.1981), quoting from *Duplan Corp. v. Deering Milliken, Inc*., 397 F.Supp. 1146, 1177-79 (D.S.C.1975).

The Navy defendants cannot now claim for the first time that the NMCCA opinion is the formal complaint when Partington requested a "formal complaint" from defendant Blazewick, and defendant Blazewick in turn, provided him with the charge sheet. (AR 218-220, JA__) If the Navy defendants contend they faithfully followed their own provisions set forth under JAGINST 5803.1C, they should be estopped from thereafter taking the position the NMCCA footnote qualified as a formal complaint under the requirements set forth in JAGINST 5803.1C, Encl. 2, para. 4, discussed above. All the elements of judicial estoppel have been met in this case.

As noted in the amicus brief (DE 1391411), a lawyer facing suspension by a district court is entitled to procedural due process, although by definition a federal court cannot be the only court in which a lawyer is admitted. *Id*. at 8 citing *In re Franco*, 410 F.3d 39, 40 (1st Cir.2005). Partington is a licensed attorney in good standing before his current bars and has all the qualifications to appear before the naval courts (RCM 502(d)(3)(A)).[16] Given these reasons, Partington is entitled to procedural due process under the circumstances. Partington further adopts the amicus brief proffered by the ACLU in support of his denial of due process claim.

[16] The defendants claim that Partington's concerns about further discipline is just "speculative." Government counsel had to know that when the D.C. Bar reciprocally disciplined Partington, discipline from this court was inevitable. In fact, both this court and the Supreme Court of Oregon have reciprocal discipline pending, but both this court and the Supreme Court of Oregon have stayed proceedings. See Appendix at A-1 and A-2.

In their answering brief, the Navy defendants argue that Partington's license to practice before naval courts and boards is not an entitlement and amounts to nothing more than an "expectation", an expectation which is insufficient to assert as a property right, citing *Roth v. King*, 371 U.S.App.D.C. 254, 449 F.3d 1272 (2006) (AB at 27). However, the facts in *Roth* were quite distinct from those in this appeal. In *Roth*, a class of family lawyers excluded from an appointment counsel list asserted they had a property interest in thereafter receiving appointments, which they were not receiving. In deciding that no property interest existed, the court in *Roth* explained that "inclusion on a list merely indicated that a lawyer was interested in receiving appointments - it did not guarantee appointment. In short, no member of the bar could claim entitlement to appointments" (*Id*. at 1285). This case is wholly distinct from the facts in *Roth* in that Partington is a civilian defense attorney who represents clients then who hire him to appear before naval courts and boards as Partington is an attorney. At that point, an attorney-client relationship comes into existence, and both Partington and his client then have a right to appear before naval courts and boards as Partington is an attorney. The client's rights arise under the Sixth Amendment. Partington's right arises from his right to practice his profession. Partington seeks nothing from the government here except the right given him to appear pursuant to RCH 502(d)(3)(A) to vindicate the client's sixth amendment right to counsel.

C. THE ACTIONS OF NJAG AND CAAF ARE AGENCY ACTIONS SUBJECT TO REVIEW UNDER THE APA OR, ALTERNATIVELY, ARE SUBJECT TO MANDAMUS REVIEW

2. 5 U.S.C. §702 provides for jurisdiction to review the actions of NJAG

Partington adopts the argument contained in the amicus brief.

3. The actions of NJAG are subject to mandamus review

With regard to the Court of Appeals for the Armed Forces ("CAAF"), CAAF claims that is not subject to a writ in the nature of mandamus because Partington does not meet the criteria for mandamus. Appellees Brief at 44. What is the criteria?

1. Right is Clear and Indisputable.

The Navy defendants ran a bogus and illegal disciplinary proceeding. They made bogus findings and sent them to Partington's state and territorial bars in order to have Partington reciprocally disciplined, which discipline is still ongoing (see Appendix). On the Navy Administrative Record, there is no evidence whatsoever of any misconduct by Partington. The Navy does repeatedly misrepresent to this court the record and that there is evidence to support the Navy findgins which there is no such evidence. As noted already, Partington had and has a clear right not to be convicted of ethical violations for which he is clearly not guilty.

2. The NJAG had a Duty to Act

It is beyond dispute that the NJAG has a duty not to approve a subordinates fingings or misconduct when there is no evidence to support the findings. The NJAG cannot say otherwise.

3. There is No Other Appropriate Remedy

When the CAAF disciplined Partington (without a hearing), there was and still is no right to have that discipline reviewed by court or body. Partington had absolutely no remedy other than mandamus. Thus, the criteria is met, accepting that there is not relief under the Administrative Procedures Act. 5 U.S.C. §702.

D. PARTINGTON HAS A CLAIM FOR BIVENS DAMAGES AGAINST THE INDIVIDUAL NAVY DEFENDANTS FOR THEIR ACTIONS

2. Partington has a claim for *Bivens* damages

The real issue here, as the Navy defendants appear to recognize (AB at 49-50), special factors in this case mandate that Partington have a *Bivens* remedy. The sixth amendment right to counsel lurks behind every aspect of this case.[17] Regardless of how this court rules, this case is about an attack by the Navy defendants on an effective defense counsel who has won too many cases at Pearl Harbor and who has repeatedly embarrassed the Navy. In the Navy view, he has to

[17] Partington has no standing to directly raise the sixth amendment issue, but that issue *must* be considered by this court in determining if a *Bivens* remedy exists or not.

be stopped, and the Navy responded with an illegal and concocted disciplinary action with the Navy defendants knowing full well they were acting illegally.

What the Navy defendants want this court to endorse is this. The Navy can harass civilian defense attorneys by bogus disciplinary actions thereby inhibiting both civilian and military defense counsel from aggressively representing their military clients and embarrassing the military as Partington has done. As the client is the *only* person who has standing to raise the sixth amendment issue, the military can let effective civilian defense counsel represent his or her *first* client and then attack counsel as was done here in order to intimidate him or her from effective representation of future clients. This court cannot tolerate this kind of illegal conduct. Only a *Bivens* remedy can prevent that. This Sixth Amendment cannot be so fragile so as to permit its evasion as in the instant case. Disciplinary and injunctive relief would be a hollow remedy because the military could bring bogus disciplinary proceedings against the most effective civilian defense attorneys on a case by case basis.

It is particularly disconcerting that the military officers in this case are the most senior lawyer in the Navy and very senior subordinates. They had to know what they were doing to Partington was illegal and wrong, but they did not care. Stopping Partington from embarrassing the Navy in the future was all that mattered. This court must give Partington and other civilian defense counsel an

effective remedy - a *Bivens* claim. Otherwise, the military will just continue with this kind of bogus action. The ultimate losers in that case will be our brave men and women in uniform who will be unable to find effective representation because of fear of the kind of substantial harassment Partington has had to endure. However, Partington understands that as the district court never addressed this issue on the merits it may be appropriate to remand this issue for the district court to develop appellate review.

F. THE NAVY DEFENDANTS' ANSWERING BRIEF IS 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. 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.

As described above, 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.[18] There is a difference between the Navy defendants' refusal to admit what Partington really said and an *express* misrepresentation of what he said.[19] This court cannot tolerate

[18] 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."

[19] 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 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

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 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

---

whether the military courts or the military itself could be trusted to fairly administer discipline to *civilian* attorneys.

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__). 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__). 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 (AR 196-197, JA ____) 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.]

> [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 (AR 241-242, 243-244, 245, 246-247, 248-249; JA__, __,__,__,__).

CONCLUSION

For the foregoing reasons, Partington respectfully requests that this court reverse the district court's judgment of January 10, 2012, in *Partington v. Houck*, 840 F.Supp.2d 236 (D.D.C.2012), and remand for further proceedings.[20]

[20] Errata for Opening Brief:

DATED: October 9, 2012.

EARLE A. PARTINGTON
Plaintiff-Appellant

By his attorneys,

/s/ JEFFREY A. DENNER
Jeffrey A. Denner

/s/ CHARLES W. GITTINS
Charles W. Gittins

/s/ EARLE A. PARTINGTON
Earle A. Partington, Plaintiff-Appellant

---

1. In the Table of Cases and at page 38, the underlined portion of the following citation is incorrect - *United States v. Alvey*, 1 C.M.R. (A.F.) *463* (B.R. 1949). The spot citation (OB at 38) is correct.

2. At page 15, n. 8, third line from the bottom, the word "jurisdictions" should read "jurisdiction".

3. At page 25, line 6, the last word in the line “not” should be deleted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2012, the foregoing Plaintiff-Appellant's Reply Brief was served via this Court's Electronic Case Filing System.

Jeffrey A. Denner

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-8511 **September Term, 2012**

Sup. Ct. Haw. SCAD-11-0000162

Filed On: October 4, 2012 [1397993]

In re: Earle Arthur Partington,

Respondent

ORDER

Upon consideration of respondent's response to the court's order to show cause filed August 31, 2012, and motion to stay proceedings, it is

ORDERED that this matter be held in abeyance pending further order of the court.

Respondent is directed to file a motion to govern future proceedings in this matter within 30 days of this court's disposition of No. 12-5038, Partington v. Houck.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Mark A. Butler
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF OREGON

In Re:

Complaint as to the Conduct of

EARLE A. PARTINGTON, OSB Bar #691361,
Accused.

Oregon State Bar
1251, 1265

S060387

ORDER HOLDING RECIPROCAL DISCIPLINE PROCEEDING IN ABEYANCE

The accused's motion to defer this matter pending the outcome of civil litigation is granted as follows. The SPRB's recommendation of reciprocal discipline is held in abeyance pending final resolution of the accused's pending civil action in *Partington v. Houck* (United States District Court for the District of Columbia No. 1:10-CV-1962-FJS) (currently on appeal to the United States Court of Appeals for the District of Columbia Circuit, Case No. 12-5038). The parties are directed to notify this court within 28 days after *Partington v. Houck* has been finally resolved.

10/4/2012
9:48:25 AM
THOMAS A. BALMER
CHIEF JUSTICE, SUPREME COURT

c: Earle A Partington
Susan Roedl Cournoyer

kag

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