**IN THE UNITED STATES NAVY-MARINE CORPS**
**COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br><br>Respondent,<br><br>v.<br><br>Joshua W. Sims<br>Corporal (E-4)<br>U.S. Marine Corps,<br><br>Petitioner. | **PETITION FOR EXTRAORDINARY WRITS IN THE NATURE OF MANDAMUS AND SUPPORTING BRIEF**<br><br>Case No. 2010XXXXX<br><br>Being Tried at, Marine Corps Air Station Beaufort before a General Court-Martial convened by Commander, Marine Corps Air Station Beaufort, SC. |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**

## REQUEST FOR EXPEDITED REVIEW

Petitioner Corporal Joshua W. Sims, United States Marine Corps, is presently being tried before a Military Judge, Major Robert G. Palmer, United States Marine Corps, who has had ex parte communication about a substantive issue with the Government and has refused to recuse himself. Accordingly, the Petitioner requests expedited review of this petition.

## QUESTIONS PRESENTED

**I.**

**SHOULD THE MILITARY JUDGE BE DISQUALIFIED AFTER HAVING EX PARTE COMMUNICATIONS WITH THE STAFF JUGDE ADVOCATE FOR THE CONVENING AUTHORITY, WHEREIN HE COMMUNICATED HIS INTENT TO RULE IN THE GOVERNMENT'S FAVOR ON AN M.R.E. 413 ISSUE SO THAT THE GOVERNMENT COULD BE PREPARED FOR TRIAL?**

## RELIEF REQUESTED

Corporal Joshua W. Sims respectfully requests that: (1) this Court issue a writ of mandamus ordering the issuance of an immediate stay of the proceedings, and (2) this Court issue a writ of mandamus ordering the Military Judge to recuse himself.

**Jurisdictional Basis**

This Court has jurisdiction to entertain petitions for extraordinary relief. The Supreme Court has recognized that "military appellate courts" are "empowered to issue extraordinary writs . . . in aid of [their] existing statutory jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999).[1] There is no question that Petitioner's underlying appeal falls within this Court's existing statutory jurisdiction.

Petitioner requests relief by way of extraordinary writs because he is currently being tried at a General Court-Martial before a Military Judge that not only appears to have lost his impartiality, but has actually demonstrated his bias in favor of the Government by initiating an *ex parte* communication on a substantive matter in the case. These writs are necessary to satisfy Petitioner's due process rights under the United States Constitution.

**Statement of the Facts**

[1] *See Dettinger v. United States*, 7 M.J. 216, 218-19 (C.M.A. 1979); *see also Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993).

Corporal Sims, the accused in the case, is being tried at a General Court-Martial for violations of Article 80 and Article 120, UCMJ.

During an RCM 802 conference prior to the commencement of a 39(a) session on 22 August 2010, Individual Military Counsel (IMC), Captain Chad C. Brooks, USMC, asked the Military Judge, Major Robert G. Palmer, USMC, about the expected ruling timeline for the Government's motion to admit MRE 413 evidence because the Defense needed to prepare its trial strategy and this ruling was very important for witness requests and the like.

The Military Judge responded by saying that he was going to rule in the Government's favor, his reasons why, and disclosed a phone call that he had made to the Government on Thursday or Friday of the prior week ($19^{th}$ or $20^{th}$ of August 2010) to the Government to give TC a "heads up" that he was likely going to be ruling in the Government's favor on a motion and that they should plan for the logistical support of producing the witness at the Court-Martial.

Captain Albert Evans, USMC, the Trial Counsel (TC), indicated that he was aware of the phone call and believed that it had occurred on 20 August 2010. Trial was scheduled to begin on 30 August 2010.

The Military Judge granted the Defense a brief recess after the conclusion of the RCM 802 conference. When the Court

reconvened, the Military Judge summarized the RCM 802 conference with additions from both IMC and TC. At the conclusion of the RCM 802 summary, IMC indicated that he would like to Voir Dire the Military Judge about the *ex parte* communication, which the Military Judged granted.

The Military Judge articulated that he called Major Valerie C. Danyluk, USMC, in order to ascertain whether the Government had or had not withdrawn its MRE 413 motion. He further articulated that there was some confusion on his part about this issue because he had found a note indicating that the motion had been withdrawn in his files, but that he had a similar case wherein a similar MRE 413 motion was at issue.

The Military Judge went on to describe that the phone call took place from his hotel room in Nevada while he was TAD, he did not have access to his work computer, and that he called Major Danyluk because her phone number was one of two that he knew from memory.

The Military Judge continued by describing the phone call as beginning with approximately 30 seconds during which time he articulated the issue to Major Danyluk; she then departed her office to obtain the requested information from TC; and, finally returned about one minute later to inform him that the motion was still before the court.

The office of Detailed Defense Counsel, Captain Matthew Schonfeld, USMC (DDC), is on the same floor of the same building as Major Danyluk's office.

The Military Judge confirmed that he was aware at the time of the call that there was, currently before the court, a motion to compel production of witnesses as well as a motion to disqualify Major Danyluk from the case.

The Military Judge confirmed that while he would normally tell the Government to inform the Defense of such an issue, he had no specific recollection that he did so in this instance.

Additionally, the Military Judge indicated that while Major Danyluk was in her office and had access to her global phone list, he did not request the phone number of either IMC or DDC.

No member of the Defense Team was informed of the impending ruling from the Military Judge prior to the hearing on 22 August 2010.

At the 39(a) session held on 22 August 2010, IMC orally motioned on the record that the Military Judge be disqualified or recuse himself from the case. This oral motion was supplemented in writing on 23 August 2010.

The Military Judge called for a second 39(a) session on 24 August 2010 in order to continue hearing motions in the case. At this hearing, the Military Judge denied the Defense's motion for disqualification/recusal, and placed findings of fact and

conclusions of law on the record, but did not issue his ruling in writing to the parties.

**Necessity of the Requested Writs**

Petitioner's request for writs should be granted because he has no other adequate means to obtain meaningful relief from being tried before a Military Judge who has demonstrated bias against him. Because Petitioner is not entitled to review under Article 66 at this time, he will be harmed in a way that is not correctable by appellate courts except through the requested extraordinary writs. It is "both necessary and appropriate" to resolve "disqualification issues" via petitions for extraordinary relief rather than in the normal course of appeals "to ensure that judges do not adjudicate cases that they have no statutory power to hear, and virtually every circuit has so held." *In re School Asbestos Litigation*, 977 F.2d 764, 776 (3d Cir. 1992).

Because disqualification issues requires military judges to serve as arbiters of their own impartiality - and the appearance of their own impartiality – truly neutral review by disinterested appellate judges through petitions for extraordinary relief is necessary and appropriate. In *Bauman v. United States Dist. Court*, the Ninth Circuit Court of Appeals identified five factors relevant to the question of

whether an extraordinary writ was warranted.[2] They are: (1) whether the petitioner has no other adequate means to obtain the relief desired; (2) whether the petitioner will be damaged in a way not correctable on appeal; (3) whether the challenged action is clearly erroneous as a matter of law; (4) whether the challenged action is an often repeated error or manifests a persistent disregard for the law; and (5) whether the challenged action presents a new and important problem or issue of first impression.[3] These factors have not expressly been adopted by the Court of Appeals for the Armed Forces, but it has "granted or denied writs based upon equivalent conditions."[4] Application of these factors show that Petitioner's request for extraordinary writs should be granted.

**A. Petitioner has no other meaningful recourse and will be harmed in a way not correctable on review.**

Petitioner has no means of direct appeal to this Court. Article 66 of the UCMJ provides for a direct appeal to this Court only in cases involving a punitive discharge or confinement in excess of one year.[5] Petitioner is currently being tried before the Military Judge and is not entitled to

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[2] *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)(citations omitted).
[3] *Id.*
[4] Captain Patrick B. Grant, *Extraordinary Relief: A Primer for Trial Practioners*, 2008-NOV Army Law 30, 33 (2008) (citing as examples *Loving v. United States*, 62 M.J. 235, 247-48 (C.A.A.F. 2005)(first factor); *Chapel v. United States*, 21 M.J. 687 (C.M.R. 1985)(second factor); *Kreutzer v. United States*, 60 M.J. 453 (C.A.A.F 2005)(third factor); *Berta v. United States*, 9 M.J. 390, 392 (C.M.A. 1980)(third factor)).
[5] 10 U.S.C. § 866(b)(1).

regular, post-conviction appellate review. The Petitioner has exhausted all other avenues of recourse for this issue by making the recusal, which was denied, at trial.

The Military Judge has demonstrated actual bias by his *ex parte* communication with the Staff Judge Advocate, and ostensibly the trial counsel prosecuting the case, about a substantive issue in the case. To allow the case to be tried before this same Military Judge cannot be corrected on regular appellate review because the Petitioner will have lost his one and only chance to have a trial before a fair and impartial judge.

Therefore, this Court should issue a writ of mandamus to stay the proceeding and prevent any further prejudice to the Petitioner.

**B. The Military Judge's refusal to recuse himself is clearly erroneous as a matter of law.**

Rule for Court-Martial 902(a) states that, "a Military Judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." MCM (2008 Ed.).

"Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." *U.S. v. Quintanilla*, 56 MJ 37, 78 (CAAF 2001) (quoting *U.S. v. Kinchelow*, 14 MJ 40, 50 (CMA

1982)). The *Quintanilla* court, citing *Liljeburg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), further articulated that actual bias need not be established because the appearance standard is designed to enhance public confidence in the judicial system. *Id.* The court in *Quintanilla* considered seven factors: (1) the nature of the communication; (2) the circumstances under which it was made; (3) what the judge did as a result of the *ex parte* communication; (4) whether it adversely affected a party who has standing to complain; (5) whether the complaining party may have consented to the communication being made *ex parte*; (6) whether the party who claims to have been adversely affected by the *ex parte* communication objected in a timely manner; and, (7) whether the party seeking disqualification properly preserved its objection. *Id.*

"A military judge's *ex parte* contact with counsel does not necessitate recusal under the court-martial rule governing the disqualification of military judges, particularly if the record shows that the communication did not involve substantive issues or evidence of favoritism for one side, but an *ex parte* communication which might have the effect or give the appearance of granting undue advantage to one party cannot be condoned; the same holds true when considering the propriety of *ex parte* contact between a military judge and a staff judge

advocate. R.C.M. 902(a)." *U.S. v. Greatting*, 66 MJ 226, 230 (CAAF 2008).

In the present case, all of the *Quintanilla* factors for recusal are met. The Military Judge had an *ex parte* communication with the Staff Judge Advocate for the Convening Authority in this case, which ultimately was conveyed to TC. This took place without the consent of the Defense having been sought, or given. The communication concerned an enormously important issue in the case, the Military Judge's ruling on a motion by the Government on the admissibility of MRE 413 evidence. The Military Judge stated in his own words that he, "wanted to give the Government a 'heads up' regarding his likely ruling on the issue," so that they could be prepared for it logistically.

This statement by the Military Judge is evidence of his bias toward the Government's case by showing that he was concerned only with the Government's preparation for trial, even if only being logistically prepared for trial.[6] No consideration was given to the Defense's strategic and logistical preparation for trial. The *ex parte* communication occurred approximately twelve days before trial. This gave the Government a 72 hour head start against the Defense on trial strategy, and has therefore prejudiced the accused by giving

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[6] Note also that the ex parte communication at issue clearly violates Rules 2.2 and 2.9, Canon 2, ABA Model Code of Judicial Conduct.

the Government notice of the admission of certain evidence that substantially impacts the Defense's strategy considerations for its case in chief. In short, the Defense was placed at a strategic and tactical disadvantage with respect to our ability to prepare for trial.[7]

The communication is made worse by circumstances surrounding the statement and its disclosure. There was both a Defense Motion to Compel Witness Production, as well as a Defense Motion to Disqualify the Staff Judge Advocate (Major Danyluk), pending before the Court, and known to the Military Judge at the time of the communication.

The pending witness production motion worsens the appearance because the Military Judge had no legitimate reason to contact the Government on a witness logistical issue given that we were addressing witness production issues at the next 39(a) session, only three days away.

And the pending motion to disqualify the SJA worsens the appearance because it looks to any outside viewer that the Military Judge, a fellow Major in the Marine Corps, contacted Major Danyluk, the SJA, to have an "off-line" conversation about the disqualification motion. It is also worth noting that Major Danyluk is a former military judge, which cannot be

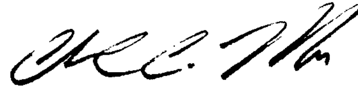
[7] It is worth noting that while a continuance may remedy the prejudicial effects of the communication, it certainly does not remove the appearance of bias and lack of impartiality on the part of the Military Judge. Moreover, it appears from the communication that bias is actually present.

overlooked when applying the *Quintanilla* appearance standard to the facts in this case. Further, the *ex parte* communication was not revealed *sua sponte* by the Military Judge; it was only disclosed after IMC inquired as to the status of the ruling on the issue because it was of such paramount importance to the strategy and preparation of the Defense's case.

Corporal Sims has standing to complain of this *ex parte* communication, and is clearly did so in a timely fashion as this motion was made orally, on the record the same day that the issue arose, and supplemented the oral motion in writing the following day. The Military Judge's explanation that he called the SJA because it was one of two phone numbers that he knew is simply insufficient given that during voir dire it was made clear that he could have simply asked for TC's, IMC's and DDC's to convey equally his future ruling to all parties. This did not happen. The Military Judge chose to contact the Government *ex parte* and give them advanced notice of his ruling on a substantive issue in the case. This clearly creates the appearance of an off-line discussion with a fellow Marine Major, and former military judge, about a pending motion to disqualify her before the court.

**Conclusion**

Petitioner prays that this Court grant his petition for writs of mandamus and order appropriate relief.



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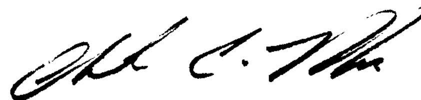
**Appendix**

**Unedited Draft Copy of 22 August 2010 Motions Hearing**

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing petition was delivered to the Navy-Marine Corps Court of Criminal Appeals, and that a copy was delivered to Appellate Government Division, and the Trial Counsel and the military judge in this case on 26 August 2010.



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