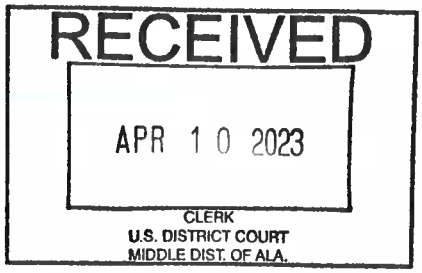
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA



CLARENCE ANDERSON III
1125 S Hwy 123
Ozark, AL 36360

Pro Se Petitioner,

v.

HONORABLE FRANK KENDALL, Secretary
United States Air Force
1670 Air Force Pentagon
Washington, D.C. 20330

CHARLES L. PLUMMER, Lt Gen
The Judge Advocate General
United States Air Force
1420 Air Force Pentagon
Washington, D.C. 20330

MARK C. NOWLAND, Lt Gen
Deputy Chief of Staff for Operations
United States Air Force
1670 Air Force Pentagon
Washington, D.C. 20330

BRIAN L. MIZER, CIV
Senior Appellate Defense Attorney
United States Air Force
1420 Air Force Pentagon
Washington, D.C. 20330

Respondents.

Civ. No. 2:23-cv-00204-MHT-JTA

PETITION AND BRIEF IN SUPPORT OF REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF IAW 28 § U.S.C 1361

Clarence Anderson III
1125 S Hwy 123
Ozark, AL 36360
(334) 663-0280
Email: clarenceanderson132@gmail.com

Pro Se Petitioner

TABLE OF CONTENTS

STATEMENT OF THE CASE

After he was convicted in a military court-martial without any physical or forensic evidence, the Petitioner, Clarence Anderson III, discovered that a key witness against him had

committed perjury. The key witness's perjury concerned that witness's romantic relationship with the alleged victim in the case (the alleged victim is the Petitioner's wife K.A.) after he was paid $100,000 by the alleged victim's mother prior to his testimony at trial. Petitioner informed Respondents of this possible fraud upon the court. In response, Respondent Lieutenant General Mark Nowland, the convening authority, ordered a post-trial hearing in which the circumstances surrounding this payment were supposed to be fully explored. In fact, in response to an official inquiry by a U.S. Congresswoman, Respondents promised that Petitioner would be able to present evidence (at a post-trial hearing) of witness tampering at his general court-martial. See Appendix 1, *Response to Congressional Inquiry*. Respondents further promised that the military judge assigned to preside over the post-trial hearing "also may rule on any motions the defense counsel submits." *Id.* (emphasis added).

Despite these promises, the military judge denied Petitioner's lawful motion and prohibited him from presenting evidence that the two key witnesses against him had perjured themselves regarding their relationship during his court-martial. In addition to refusing to allow the Petitioner to present substantive evidence of the circumstances surrounding the payment and the perjury, the military judge refused to consider Petitioner's request for a new trial, claiming it was beyond his authority in that hearing. Petitioner only subsequently discovered evidence of Respondents' promise to the Congresswoman.

The Petitioner previously filed a similar suit for declaratory and injunctive relief IAW 28 U.S.C. § 1361, the federal question jurisdictional statute in the 4th Federal District Court and his pleas were dismissed. The Respondents, not disputing that the Petitioner was harmed, disingenuously convinced that Court the Petitioner received full and fair consideration because he never raised a factual matter of a recorded phone call between the Petitioner's mother and a

key witness, at any time during his military appeals. *See* Appendix 2, *February 2020 Decision from 4th Federal District Court at 15*. The Petitioner disputed this matter of fact in a series of pro se petitions for reconsideration to the District Court showing he submitted this evidence during his military appeals a total of six times, even proving he submitted this evidence with his final petition to the Judge Advocate General (a named Respondent in this suit) pursuant to Article 73 UCMJ/10 U.S.C. § 873 (petition for a new trial). *See* Appendix 3, *Article 73 Petition for a New Trial to the Air Force Judge Advocate General at 2 and 3*.

Unfortunately, in disputing this fact proving that the Respondents' were untruthful and the Court erred on this factual matter, the Petitioner was unsuccessfully able to appeal the court's decision because he untimely filed his intent to appeal. *See* Appendix 5, *Decision from 4th Federal Court of Appeals*. The 4th Federal District Court never resolved the merits of the Petitioner's case i.e. if the Respondent's violated discovery laws, if the Respondent's misapplied court martial rules post-authentication of the record, or if the Respondents lied to Congress on authorities granted to the judge at the post-trail hearing. Furthermore, the Petitioner has included a new party in this suit that was not included in his suit to the 4th Federal District Court. Since the 4th Federal District never resolved the merits of the Petitioner's case, and because the Petitioner is introducing a new party in this suit, the Petitioner is *not* barred to litigate these matters before this Court due to res judicata or the doctrine of collateral estoppel.

I. PREFATORY STATEMENT

1. On April 22, 2015, Petitioner was convicted at a General Court-Martial on allegations related to sexual assault and other related charges of his ex-wife, K.A., based on the testimony of K.A. and impeached testimony of her minor son C.B. without any physical or forensic evidence and with testimony at trial from civilian law enforcement officials stating there was

no additional evidence that Petitioner committed a crime. The Petitioner was never arrested by civilian law enforcement officials nor the military prior to his conviction.

2. Central to the credibility of K.A. was the fact that no meaningful evidence of K.A.'s motive to fabricate connected to a new relationship was permitted into evidence due to testimony at pretrial motions offered by K.A. that could have been impeached with evidence discovered only after the conclusion of the trial.
3. By all accounts, the mother of K.A.—Petitioner's ex-wife and the purported victim of the charged crimes—paid a key witness $100,000 before that witness testified against the Petitioner. The witness, J.M., was K.A.'s then-lover and the father of her child. The $100,000 transfer ostensibly was so that J.M. could renovate his home to better accommodate K.A. and their unborn child. However, before trial and after the renovations were finally complete, K.A. lived with J.M. for a grand total of one day immediately preceding the Article 32 Investigation hearing in the case before she inexplicably moved out and suddenly broke off their engagement.
4. Post-trial, and upon learning about the payment, the Petitioner's mother contacted her (and Petitioner's) U.S. Congresswoman, the Hon. Martha Roby (R-Ala.), who in turn contacted Respondents through an official Congressional inquiry. Respondents promised Rep. Roby that Petitioner would get a chance to present this evidence of witness tampering at a post-trial hearing. However, the military judge presiding over that hearing—the same military judge who presided over Petitioner's court-martial—stymied Petitioner's attempts to present relevant and material evidence, ultimately denying him a reasonable opportunity to gather sufficient evidence or petition for a new trial.

5. The military, and the Air Force specifically, have been plagued by scandals and public outcry on the unfair treatment of its black service members coupled with outcry regarding their handling of sexual assault cases, leading to prosecution of cases even where probable cause is not found at preliminary hearings.[1] Around the same time as allegations were made in this case, the Judge Advocate General of the Air Force was cited for pushing unlawful guidance to all Air Force attorneys and judges that "victims are to be believed and their cases referred to trial." *United States v. Wright*, 75 M.J. 501, 503 (A.F.Ct. Crim. App. Jan. 13, 2015).

6. Petitioner hereby moves this Court to Issue an order dismissing all charges with prejudice or direct the Respondents to order the Petitioner a new trial so he can fully and effectively present evidence of witness tampering, prosecutorial misconduct, and evidence suppression at his general court-martial that Respondents previously promised Congress it would give him. Petitioner also seeks award of court costs pursuant to 5 U.S.C § 504, and any other appropriate relief.

II. JURISDICTION

7. This court has jurisdiction to entertain Petitioner's collateral attack to his court martial convictions under 28 U.S.C. § 1331, the federal question jurisdictional statute. In *Schlesinger v. Councilman*,420 U.S. 738 (1975), the Supreme Court held that an individual could collaterally challenge a court-martial conviction through an action for declaratory or injunctive relief using the federal question statute as the basis for jurisdiction. *Id.* At 748-753. Since then, at least two circuit courts have held that a plaintiff may bring a non-habeas collateral challenge to a court martial conviction under § 1331. *Allen v. U.S. Air Force*, 603

[1] *See generally, United States v. Boyce*,76 M.J. 242 (C.A.A.F. 2017); United States v. Barry, 78 M.J. 70 (C.A.A.F. Sep. 5, 2018); *United States v. Vargas*, No. ACM 38991, 2018 CCA LEXIS 137 (A.F.Ct. Crim. App. Mar. 15, 2018) (unpublished).

F.3d 423, 430 (8th Cir. 2010) ("[I]t is clear that § 1331 provides us with subject matter jurisdiction to review [the plaintiff's] challenge to the court-martial proceedings…"); *U.S. ex rel New v. Rumsfeld*, 448 F.3d 403, 406 (D.D.Cir. 2006) ("[T]he district court had subject matter jurisdiction to hear [the plaintiff's] collateral attack under § 1331…"). *Luke v. United States*, 942 F. Supp. 2d 154, 162 (D.D.C. 2013) ("Collateral attacks on court-martial proceedings are not confined to habeas petitions.")

8. Thus, federal question jurisdiction under 28 U.S.C § 1331 is the appropriate avenue for Petitioner to seek collateral review of his concluded court-martial proceeding, and this Court thereby has subject matter jurisdiction to review Petitioner's claim.

III. VENUE

9. Venue is proper under 28 U.S.C. § 1391(e). This is an action against officers and agencies of the United States in their official capacities, brought in the district where the plaintiff who was harmed resides. Respondent the Honorable Frank Kendall is sued in his official capacity as the Secretary of the Air Force which is a United States federal agency. Respondent Lieutenant General Charles L. Plummer is sued in his official capacity as the Judge Advocate General of the Air Force—the office empowered by Article 73, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 873, to grant petitions for new trial for individuals convicted in military courts-martial. The record will show that the Air Force Judge Advocate General denied the Petitioner's Article 73 request for a new trial, whereas the Petitioner disclosed evidence of a recorded phone call. However, when Petitioner sued in the 4th Federal District Court, the Respondent's disingenuously misled that Court and said the Petitioner never submitted evidence of the recorded phone call to the Judge Advocate General or at any level during his military appeals. *See again* Appendix 2, *February 2020 Decision from 4th Federal*

District Court at 15. See again Appendix 3, *Article 73 Petition for a New Trial to the Air Force Judge Advocate General at 2 and 3, and* Appendix 4, *Judge Advocate General of the Air Force Memo Acknowledging the Petitioner Submitted the Evidence During His Military Appeals*. Respondent Lt Gen Mark C. Nowland is sued in his official capacity as the convening authority ultimately responsible for approving Petitioner's military conviction and, by extension, the individual who was initially ultimately responsible for granting the type of new trial or post-trial hearing requested by Petitioner here. Mr. Brian Mizer represented the Petitioner during his appeals.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

10. Petitioner has exhausted all of his administrative remedies. Upon learning of the potential fraud perpetuated upon the court-martial, Petitioner sought—and was granted—a post-trial hearing, which was held on December 14, 2015. During the post-trial hearing, Petitioner's counsel sought a new trial on the basis that K.A. and J.M.—who by then had a child together—had perjured themselves during Petitioner's court-martial. The military judge held that such request was beyond the scope of the post-trial hearing into the circumstances surrounding the payment of money to the witness, and determined he had no authority to grant a new trial, thus terminated the proceedings. Petitioner was not allowed to fully address the circumstances surrounding the perjury in correlation to the $100,000 payment to a key witness in his case, related to the beginning of the relationship and the potential impeachment by bias and prior inconsistent statements that should have been presented to the finder of fact.
11. Per the judge's guidance at the post-trial hearing, the petitioner then asked the convening authority (Respondent Nowland) to either grant a new trial or order a second post-trial

hearing. The convening authority denied these requests, and approved the findings and sentence as adjudged.

12. Petitioner then timely appealed to the Air Force Court of Criminal Appeals (A.F.C.C.A). Among the issues Petitioner raised on appeal was the denial of his request for a second post-trial hearing or a new trial based on the post-conviction information that J.M. had been paid $100,000 by K.A.'s mother. On May 31, 2017, the Air Force court denied Petitioner's appeal. *United States v. Anderson*, ACM No. 39023 (A.F. Ct. Crim. App., 31 May 2017).
13. The Petitioner then timely filed a petition for review with the U.S. Court of Appeals for the Armed Forces (C.A.A.F.). On August 18, 2017, the C.A.A.F. denied the petition. *United States v. Anderson*, USCA Dkt. No. 17-0429/AF (C.A.A.F., 18 August 2017).
14. In addition to his direct appellate review, Petitioner sought recourse via a petition for a new trial. The petition initially was denied by the A.F.C.C.A. The Petitioner then filed a petition for a new trial to the C.A.A.F. The appeal was denied by the C.A.A.F. on October 11, 2017. *United States v. Anderson*, USCA Dkt. No. 17-0429/AF (C.A.A.F., October 11, 2017) Petitioner asked the C.A.A.F. to reconsider its denial, which it declined to do.
15. Petitioner then submitted an Article 67 Petition to the Judge Advocate General of the Air Force, requesting Respondent to certify these same issues to the C.A.A.F. on January 9, 2018. The Respondent denied the Article 67 Petition from the Petitioner on February 14, 2018.
16. Petitioner then submitted the aforementioned Article 73 Petition to the Judge Advocate General of the Air Force, requesting the Respondent grant the Petitioner a new trial on February 20, 2018. The Respondent denied this petition on May 17, 2018.

17. Finally, the Petitioner submitted these matters for relief to the Air Force Board of Correction of Military Records (AFBCMR), who has authorities to correct a wrongful court martial conviction. The AFBCMR also denied the Petitioner's requests in February 2019, stating it had no authority to vacate Petitioner's conviction.

18. Petitioner now has no other adequate remedy available for the harm he seeks to redress.

V. PARTIES

19. Petitioner, Clarence Anderson III, resides at 1125 S Hwy 123, Ozark, AL, 36360.

20. Respondents—Honorable Frank Kendall, Lt Gen Charles Plummer, Lt Gen Mark Nowland, Mr. Brian Mizer—all are assigned to, and work at, the Pentagon, which is located in Arlington, Virginia. Importantly, Respondent Nowland is the individual who, in his official capacity, responded to the U.S. Congresswoman and who denied Petitioner's request for a new trial or a second post-trial hearing (after the military judge specifically instructed Petitioner to ask Respondent Nowland to order an additional hearing). As the harm Petitioner seeks to redress began with decision by individuals who work for the Department of the Air Force, an agency within the United States.

VI. FACTS AND PROCEDURAL HISTORY

21. Petitioner was convicted at a general court-martial in 2015 for offenses involving his then-wife, K.A. Two of the offenses arise from a single incident of alleged sexual assault, involving the purported rubbing of the breasts and digital penetration of K.A. The sexual offenses allegedly occurred on September 1, 2013. These allegations were reported by K.A. to the Air Force officials in mid-September 2013, four days *after* Petitioner called the police to report he had been struck by K.A. This affray occurred amidst an argument about whether K.A. was having an affair with J.M. Notably, K.A. never reported to civilian law

enforcement officials on scene that she was sexually assaulted weeks prior when the Petitioner reported she had struck him, and the police refused to arrest or charge Petitioner for any of the crimes which his wife later reported to Air Force officials. The Florida District Attorney also declined to prosecute the Petitioner.

22. With no forensic evidence or direct eyewitnesses to the alleged sexual assault, the Government's case depended entirely on K.A.'s credibility. Prior to the trial on the merits, Petitioner filed a motion in limine to explore on the record whether K.A. indeed had an affair with J.M. and, if so, when that affair began. Petitioner theorized that, at the time of the delayed allegation, K.A. was motivated to lie about a sexual assault in order to both (1) gain leverage in their contentious divorce and child-custody battle and (2) deflect attention from her romantic interest in and adulterous behavior with J.M. Around the same time, K.A., violated federal law and bribed Petitioner by offering to forego her testimony in the court martial in exchange for Petitioner agreeing to give K.A. custody of their child. Petitioner declined the offer from K.A. and presented this evidence on direct appeal.

23. At a pretrial hearing held pursuant to Military Rule of Evidence 412 (which is virtually identical to Federal Rule of Evidence 412), K.A. and J.M. testified that their relationship did not begin until the time of her divorce from the Petitioner, roughly 6-8 months *after* Petitioner allegedly committed the offenses against K.A. As a result of this timeline, the military judge ruled that evidence of the romantic relationship between K.A. and her paramour was irrelevant and immaterial, and therefore inadmissible. The military judge also sealed the testimony presented during the M.R.E. 412 hearing, as well as the transcript of the same.

24. A month after the trial, Petitioner's mother recorded two phone calls with J.M. During the calls, J.M. admitted his sexual relationship with K.A. had started much sooner than what he and K.A. had claimed under oath during the pretrial M.R.E. 412 hearing—and that the romantic relationship had begun as early as a month before the alleged September 1, 2013 incident while K.A. was still residing with and married to the Petitioner giving rise to the charges against him. J.M. then dropped another significant revelation that shortly before trial, K.A.'s mother had given him $10,000. K.A. later testified under oath at the post-trial hearing that her mother actually had given J.M. *$100,000* before he testified in Petitioner's court-martial.

25. In the military justice system, a party may move for a post-trial hearing to address certain issues—such as the existence of newly discovered evidence. *See* 10 U.S.C. § 839(a); Rule for Courts-Martial (R.C.M.) 1102(b)(2) and 1102(d) (2012). On September 15, 2015, the Petitioner moved for a post-trial hearing to investigate the circumstances of the payment to J.M. The convening authority, Respondent Nowland, ordered the hearing "to address the circumstances regarding a $10,000 payment made to Mr. [J.M.], a witness who testified during a pre-trial motion hearing, by Ms. [K.H.], the mother of the victim in this case." *See* Appendix 6, *Post-Trial Hearing Transcript* at 9.

26. It was at this post-trial hearing K.A. testified that there was an exchange of money, but disclosed that the amount given to J.M. was actually *$100,000. Id.* at 33. K.A. insisted, however, that her mother had transferred the money directly to J.M. to pay for renovations to his home. *Id.* at 30. According to K.A., she and J.M. intended to live in J.M.'s home once they married, and they would thereafter repay her mother together. *Id.* K.A. testified she may have personally contributed just $20 to the renovation. *Id.* at 32.

27. K.A. was asked why her mother had wired money to J.M.'s account rather than directly paying the renovation contractor. *Id.* K.A. replied that her mother's bank was out of town and that it was easier to pay a third party (J.M.) than paying the renovation contractor directly. *Id.* at 90. K.A. did not know if the couple's agreement with her mother had been reduced to writing, just as she could not remember the amount of her mortgage payment, car payment, auto loans, or credit-card payments. *Id.* at 17, 36. K.A. also still could not remember exactly when her romantic relationship with J.M. began. *Id.* at 25, 50-54.

28. Unlike K.A., J.M.'s memory had improved since the trial, however. He testified, although never conceding that the relationship began in August of 2013 as he had in the recorded phone call with Petitioner's mother, that, at the very latest, he and K.A. were dating by November or December 2013. *Id.* at 105. He added that he and K.A. began discussing marriage and, by the end of the summer of 2014, they were living together in the Petitioner's former home. *Id.* at 105-06. J.M. said he and K.A. lived in the Petitioner's former home because J.M.'s house was being remodeled, and that they planned to move in together when the renovations were complete. *Id.* at 107.

29. Importantly, J.M. denied that he and K.A. ever planned to repay the $100,000. *Id.* at 116. He testified, "My understanding is it was a gift" and added that the money was not loaned because, as a school teacher, he "could never afford that kind of money." *Id.*

30. Once the renovations were complete, K.A. spent a total of just one night in the house. After an argument, K.A. moved out the next day. *Id.* at 121. According to J.M., he and K.A. did not speak again until February 2015. *Id.* at 122-23. Perhaps not coincidentally, February 2015 is when J.M. testified, at the M.R.E. 412 hearing in Petitioner's court-martial, that his

sexual relationship with K.A. did not start until her divorce from the Petitioner in the spring of 2014, which was 6-8 months after the alleged incident between the Petitioner and K.A.

31. During the post-trial hearing, K.A. confirmed her relationship with J.M. ended a few nights after moving into the renovated home. *Id.* at 49. When asked in October 2015 why their engagement was called off, she offered a familiar answer: "I don't know why. I don't know—I don't know why." *Id.* at 28. She also could not remember the last time she had spoken with J.M. *Id.* at 40.

32. With J.M. still on the stand during the post-trial hearing, Petitioner sought to elicit additional testimony covered in the M.R.E. 412 hearing in this case—specifically, that J.M. and K.A. had offered drastically different stories about the nature of their romantic relationship. *Id.* at 124. The military judge, however, prohibited Petitioner's attorneys from confronting the witnesses on this new timeline—and even barred Petitioner from proffering what questions the attorneys wished to ask. Rather than allow Petitioner to establish any objections on the record, the military judge went off the record and insisted the parties discuss the matter in a conference held pursuant to R.C.M. 802.[2] *Id.* at 128-29. When Petitioner's attorneys repeatedly insisted that they be allowed to make the record with a proffer, even in a closed hearing for purposes of Military Rule of Evidence 412, the military judge refused to allow them to do so. *Id.* at 128-29, 135-36, 155-56, 159-60, 164. The military judge ruled that he would not "entertain follow-on motions or subsequent motions as part of this post-trial 39(a)

---

[2] Under Rule for Court-Martial 802, "the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial." As the discussion to the rule makes clear, "[t]he purpose of such conference is to inform the military judge of anticipated issues and to expeditiously resolve matters on which the parties can agree, *not to litigate or decide contested issues*." *Id.* (emphasis added). Further, R.C.M. 802(c) states that "[n]o party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial."

session." *Id.* at 175. He explained that he believed follow-on motions to be "outside the scope of this post-trial 39(a) session," and directed Petitioner's attorneys to file a second motion for a new Article 39(a) session with the Respondent to address defense motions related to a motion for a new trial and perjury committed during the M.R.E. 412 hearing. *Id.* at 177.

33. Petitioner followed the military judge's instructions and requested a second post-trial hearing. Before action was taken on this request, J.M. submitted a letter to all reviewing authorities admitting that he and K.A. were dating and had engaged in sexual intercourse by November 2013—which differed substantially from his testimony at Petitioner's court-martial, though he never admitted to what he told Petitioner's mother that the relationship began in August 2013, while K.A. was still married and living with the Petitioner. Despite this evidence—and despite the military judge's direction that Petitioner move for a second post-trial hearing—Respondent Nowland denied Petitioner's request.

Congressional Inquiry

34. Before his post-trial hearing in 2015, Petitioner had contacted his Congresswoman, Rep. Roby. He informed her of the newly discovered evidence that J.M. had been paid $10,000 by K.A.'s mother, and Petitioner asked Rep. Roby for help to bring this newly discovered evidence to the attention of Air Force officials.

35. In response, Major General (Maj Gen) Thomas W. Bergeson, Respondent Kendall's Legislative Liaison, informed Rep. Roby that the convening authority had ordered a post-trial hearing in the Petitioner's case. *See* Appendix 1.

36. Maj Gen Bergeson explained that "[t]his hearing will take testimony and evidence to determine if this post-trial information impacted the validity of the court martial results. The

military judge also may rule on *any* motions the defense counsel submits." *Id.* (emphasis added). Of course, this is not what happened at Petitioner's post-trial hearing, as the military judge prohibited the defense from even raising additional motions because he said he was not authorized to do so.

37. Maj Gen Bergeson's response to Rep. Roby was not provided by the government to the Petitioner before the post-trial hearing was held. In fact, Petitioner did not discover the response—or the promise it contained—until *after* the post-trial hearing concluded and after Respondent Nowland had affirmed the Petitioner's conviction.

38. Based on the discovery of the response to Rep. Roby, Petitioner—through counsel Brian Mizer—filed a pro se petition for a new trial to the C.A.A.F. *See* Appendix 7, *Petition for a New Trial to CAAF.* The request was denied by the C.A.A.F. Petitioner unsuccessfully sought relief to the Judge Advocate General of the Air Force, exhausting his administrative remedies.

VII. CAUSE OF ACTION

39. Petitioner seeks declaratory and injunctive relief under 28 U.S.C. § 1331. Sanford v. United States, 586 F.3d 28, 31 (D.C. Cir. 2009) provides the standard of review applicable to "collateral attacks on court-martial proceedings by persons who are not in custody."

40. In *Sanford*, the Court explained, "This court has recognized that the standard of review in non-custodial collateral attacks on court-martial proceedings is 'tangled.'" *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 406, 371 U.S. App. D.C. 107 (D.C. Cir. 2006) ("*New II*"). Two lines of precedent are relevant: the first deals with the "full and fair consideration" standard that applies for habeas review of courts-martial, and the second deals with the "void" standard that applies to collateral attacks on court-martial proceedings by persons who

are not in custody. The court in *New II*, which was faced, as here, with a non-custodial plaintiff, attempted a synthesis of the two standards, looking primarily to the military courts' analyses of the merits of the plaintiff's claim. Because the first standard ("full and fair consideration") is, if anything, less deferential than the second ("void"), the court observed that a claim that fails the former *a fortiori* fails the latter. *Id.* at 408. In that situation, the court did not need to address how much more deference, if any, was due to the military court's judgment on non-custodial review. *Sanford* at 31.

41. In *Burns v. Wilson*, 346 U.S. 137 (1953) the Supreme Court first articulated the "full and fair consideration" standard, stating in the context of military *habeas* proceedings that "when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civilian court to grant the writ simply to re-evaluate the evidence." *Id.* at 142. In *Kauffman v. Sec'y of Air Force*, 135 U.S. App. D.C. 1, 415 F.2d 991 (1969) the Circuit Court interpreted that standard, observing that "[t]he Supreme Court has never clarified the standard of full and fair consideration, and it has meant many things to many courts." *Id.* at 997. The court reasoned that the standard should not differ "from that currently imposed in habeas corpus review of state convictions," and held that "the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." *Id.*

42. The second line of precedent follows *Schlesinger v. Councilman*, 420 U.S. 738 (1975), which held that federal courts have jurisdiction to review the validity of court-martial proceedings brought by *non-custodial* plaintiffs who cannot bring habeas suits, *id.* at 752- 53. However, for a court to grant any relief to such plaintiffs, the military court judgment must be "void," *id.* at 748; *see id.* at 753, meaning the error must be fundamental. The Supreme Court stated

that "whether a court-martial judgment properly may be deemed void . . . may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress." *Id.* at 753. That court adopted the *Councilman* standard as law for the circuit for non-custodial collateral attacks on court-martial judgments in *Priest v. Secretary of the Navy*, 570 F.2d 1013, 1016, 187 U.S. App. D.C. 104 (D.C. Cir. 1977).

The Military Courts Did Not Give Petitioner Full and Fair Consideration

43. There are two clear violations of petitioner's right to a full and fair consideration. First, the military judge erred at the post-trial hearing when he prohibited Petitioner from meaningfully exploring whether key government witnesses lied during the M.R.E. 412 hearing. The judge then compounded this initial error by reaching a dispositive conclusion of law (that Petitioner had not raised sufficient evidence of perjury, motive to fabricate, or bias) despite denying Petitioner the ability to present the evidence that underpinned said conclusion. Secondly, Respondents have wrongfully denied Petitioner the ability to present evidence of perjury and fraud upon the court despite Respondents' binding promise to Rep. Roby that Petitioner would be allowed to raise *any* motion in a post-trial hearing related to the payment of a key witness. When the Petitioner (himself) raised the matter of the newly discovered evidence promised to the Congresswoman on timely appeal to the CAAF, his appellate counsel failed to follow the rules of the C.A.A.F. to appropriately present this newly discovered evidence before that court, and the C.A.A.F. failed to investigate the circumstances as to why Petitioner's appellate counsel failed to follow its rules when introducing the newly discovered exculpatory evidence.

The Err of the Military Judge During the Post-Trial Hearing

44. At the post-trial hearing, Petitioner sought to develop the record regarding evidence of the timing of the sexual relationship between K.A. and J.M., demonstrate that K.A. had previously offered false testimony in this regard, and generally demonstrate the bias of these key witnesses in a manner that was unavailable at the time of trial because the timing and nature of the relationship between K.A. and J.M. was now known to be substantially different than had been previously represented. However, the military judge, the military appellate courts, and the Judge Advocate General of the Air Force ignored exculpatory evidence presented at trial from testimony by the Petitioner himself, civilian law enforcement testimony at trial, and J.M.'s own words to the mother of the Petitioner on the recorded phone call after trial, that inferred evidence of a sexual relationship between K.A. and J.M. prior to K.A.s reporting to military officials. The U.S. Supreme Court has recognized that impeachment evidence "may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 76 (1985).
45. The military court argued that, "unlike *U.S. v. Williams* (37 M.J. 352) (Court of Military Appeals 1993), a newly convened court-martial in this case could not find or infer that by reporting Petitioner's crimes K.A. was attempting to preserve a sexual relationship with J.M. because, at the time she reported Petitioner's offenses, no such relationship existed." *U.S. v. Anderson*, 2017 CCA LEXIS 382 at 11 (A.F.C.C.A. 2017).
46. This Court should grant Petitioner's prayer for relief because the military court system clearly deprived Petitioner of the right to full and fair consideration in light of *Burns*. The military courts first refused to allow Petitioner the right to have developed the details of the inappropriate relationship between key prosecution witnesses in the motion hearing. Next, it

made findings about what that evidence would have shown despite Petitioner having been expressly disallowed from contradicting such a conclusion through the presentation of evidence, and on a matter that should have been in the province of the finder of fact.

47. The question regarding the timing of the relationship between K.A. and J.M. should have been a matter for the finder of fact to decide, not the appellate court, and certainly not without substantial development of the record on that matter. To put it simply, the military court's decided that because K.A. declared that the relationship with J.M. didn't start until after she reported the alleged criminal conduct, K.A.'s testimony could not be questioned or further developed. This analysis amounts to pandering to the whims of an alleged sexual assault victim who substantially deprived Petitioner of his Constitutional right to confrontation by lying about critical facts.

48. The military court blatantly disregarded what the Petitioner told the police on his knowledge that K.A. was having an affair with J.M., and the recorded conversation between J.M. and Petitioner's mother in which J.M. admits that he was in a relationship with K.A. in August of 2013, both of which occurred unambiguously before K.A. reported the alleged criminal conduct, and then before the 4th Federal District Court, Respondents willfully misled that court and argued the Petitioner never submitted the evidence during his military appeals. This matter involves the Constitutional right to confrontation. The military courts did not give adequate consideration because they either ignored or disallowed the presentation of evidence by Petitioner and reached conclusions that could have been different had they received Petitioner's evidence, and they selectively considered evidence which yields unreasonably to the credibility of one witness and not the actual evidence presented on the record.

49. The military courts then ruled that K.A.'s credibility wasn't the only reason the Petitioner was convicted. To bolster the Petitioner's conviction, they cite K.A.'s son C.B.'s testimony, omitting the fact his testimony contradicted police officers' testimony at trial as well as his own father's testimony. C.B.'s father testified that C.B. revealed to him, that he never witnessed the Petitioner strike K.A. although C.B. testified at trial that he observed the Petitioner strike his mother.

50. The military courts then cite the police officers' testimony at trial as an additional reason to find the Petitioner guilty, again deliberately omitting the facts that law enforcement officials testified there was never any evidence that the Petitioner committed any offenses against K.A. Finally, the military courts relied on text messages from the Petitioner saying "I don't like that facts that I put my hands on you" to support his conviction. However, the military courts disregarded testimony from the Petitioner himself at trial also corroborated by testimony from civilian law enforcement officials also at trial, that revealed those texts were referencing the Petitioner having to put his hands on K.A. in self-defense to restrain K.A. from striking him, and that they never suspected him of assaulting her. The military courts also failed to disclose those same civilian law enforcement officials, granted the Petitioner a protective order from K.A. after he put his hands on her to restrain her from striking him.

51. Petitioner easily satisfies the requirement that his judgment was not given "full and fair consideration," as the military judge specifically refused to consider the full quantum of impeachment evidence that existed against the key witnesses in Petitioner's court-martial, despite a specific order from the convening authority to do so. By extension, then, the military appellate courts were likewise unable to give "full and fair" consideration to the

judgment because they did not have the benefit of all crucial impeachment evidence in the record.

52. Thus, having satisfied the *Burns* standard, this Court must next determine whether the *Schlesinger* standard is met.

The Military Court Judgement is Void

52. Petitioner's Court-Martial Judgment is void. As the Supreme Court held in *Schlesinger*, "whether a court-martial judgment properly may be deemed void . . . may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed the military justice system established by Congress." 420 U.S. at 753.

Respondents Wrongfully Denied Petitioner the Ability to Present Evidence of Fraud and Perjury

53. The military judge wrongfully failed to allow Petitioner to present key impeachment evidence when he concluded that he did not have the authority to consider any additional motions or issues outside the convening authority's direction that he "address the circumstances" of the payment to J.M. Not only did Respondent Kendall—through his legislative liaison—express that he intended for the military judge to entertain *any* motions, but as explained below the military judge had a regulatory obligation to grant appropriate relief. Instead of fulfilling both Respondents Kendall and Nowland's intent, the military judge narrowly interpreted his authority to be virtually nil as the record of trial had been authenticated and therefore closed. The military judge narrowly interpreted the scope of the post-trial hearing by failing to consider the actual stated intent of the convening authority.

54. The military judge was required to permit additional questioning of K.A. and J.M. regarding their respective motives to fabricate—and the military judge clearly abused his discretion when he determined he did not have authority to allow such questions. *See United States v.*

Meghdadi, 60 M.J. 438, 442 (C.A.A.F. 2005) (explaining that "on an issue related entirely to witness credibility, the military judge declined the opportunity personally to hear the testimony of witnesses and, in the process, denied counsel the opportunity to develop that testimony in an adversarial forum"); *United States v. Webb*, 66 M.J. 89, 91 (C.A.A.F. 2008) (military judges are authorized to order new trials); see also *United States v. Roy*, 2013 CCA LEXIS 620 n. 2 (A.F. Ct. Crim. App. 2013) (military judge properly granted a defendant a new trial at a post-trial hearing ordered by the convening authority, even though the military judge's actions occurred after authentication).

55. Because of this overly narrow view of his authority, the military judge improperly halted Petitioner's attorneys at the post-trial hearing when they attempted to question both K.A. and J.M. about their prior testimony. He based this erroneous conclusion on R.C.M. 1102(d), which provides that the "military judge may direct a post-trial session any time before the record is authenticated." As the record in this case already had been authenticated, the military judge thought he was powerless to do anything outside receive evidence that J.M. had been given money by K.A.'s mother which was an obviously erroneous interpretation of the convening authority's intent given the response provided to Rep. Roby. Furthermore, the convening authority had directed the military judge to conduct a post-trial session to "address the circumstances" regarding the $10,000 payment which later was discovered to be $100,000 upon receipt of testimony; in other words, it was not the military judge who was directing the session but rather a competent military authority. Essentially, by relying on R.C.M. 1102(d), the military judge implicitly determined that he had no authority to preside over the post-trial hearing because (1) he was a military judge and (2) the record already had

been authenticated. This conclusion, however, ignored binding military jurisprudence. *United States v. Lofton*, 69 M.J. 386, 391 (2011).

56. Not only did the military judge, and the appellate courts through their affirmation of the verdict, violate Petitioner's right to confrontation, the courts then found that the very evidence Petitioner was not allowed to explore probably "would not produce a substantially more favorable result" for the Petitioner. See R.C.M. 1210(f)(2012) (specifying that a new trial will be granted based on newly discovered evidence if the evidence probably would produce a "substantially more favorable result for the accused" in the light of all other pertinent evidence). In other words, the military judge simultaneously (1) prevented Petitioner from introducing evidence that would have potentially given rise to a new trial and (2) determined that there was no evidence justifying a new trial. Had the military judge properly applied R.C.M. 1102(e), Petitioner would have been able to develop the type of evidence that would produce a more favorable result; namely, that the Government's star witness had lied under oath about when her adulterous affair began.

57. In the post-trial session ordered by the convening authority, the intent of the convening authority – as demonstrated in the written Congressional response – was that the Petitioner would have a full opportunity to "address the circumstances" regarding the payment to J.M. The trial court and the subsequent military appellate courts' decision on this question is void because it was all premised on factual determinations that were made in light of an unlawful limitation on Petitioner's right to present evidence post-trial which dealt with the right to confrontation.

58. The trial court determined that the additional evidence Petitioner sought to introduce would not have been Constitutionally required. However, the trial court erred in making that

decision without hearing the powerful impeachment testimony, which reasonably may have influenced a determination by any finder of fact. The appellate court based their decision to not grant Petitioner relief heavily on the trial court's fundamentally erroneous determination that the additional credibility evidence would not have been persuasive, without actually reviewing such evidence directly.

59. The post-trial hearing amounted to a comedy of errors that devolved into a travesty of justice. In summary, the newly discovered evidence, brought forth post-trial, was sufficient for the convening authority to demand answers regarding the matter, and which resulted in confirmation of the matter at the post-trial hearing, but the military judge then failed to seek clarification from a competent authority regarding the scope of the proceeding and instead prejudiced Petitioner by not permitting further inquiry.

60. The Court in *Schlesinger* refers to the deference that must be afforded the "carefully designed military justice system established by Congress." 420 U.S. at 753. This is precisely the issue that arose in this case: the military justice system – which afforded its trial judges the ability to hear additional evidence at a post-trial hearing, even after the original trial has concluded – failed here due to the trial judge's refusal to comply with court martial rule R.C.M. 1102(e), which mandated he consider impeachment evidence in the post-trial hearing. Thus, the presumption of regularity that may otherwise attach to actions in the military justice system cannot be relied upon in this case. As such, it is within the province of this Court to step in and remedy the failure of the military justice system to appropriately address the complaints of the Petitioner that resulted in grave harm to him.

61. The trial court's error was fundamental, and ultimately voids the judgment in this case. The credibility of the alleged victim is single-handedly the only substantive evidence that the

alleged crimes occurred–there was no confession, forensic evidence, or other damning information that could have otherwise secured Petitioner's conviction, hence why the Petitioner was granted a post-trial hearing in the first place. Thus, any additional evidence regarding her motive to fabricate, or which highlighted other potential credibility issues with her testimony or that of J.M. would have been absolutely critical for a fact finder to consider in determining the viability of the allegations, particularly in light of the convening authority's correspondence with Congress to have such information considered.

Petitioner's Appellate Attorney Ineffectively Presented Respondent's Promise to Congress

62. Petitioner's surprise only intensified when he discovered after the conclusion of his illusory post-trial hearing, that Respondents actually had assured Congress that Petitioner would have a meaningful opportunity to present evidence and raise *any* motion at the post-trial proceeding. The Air Force Legislative Liaison, Maj Gen Bergeson, speaks on behalf of, and represents the Secretary of the Air Force in the halls of Congress. Thus, when Maj Gen Bergeson promised Rep. Roby that Petitioner would have a meaningful post-trial hearing during which he would be able to raise any motions related to the possible bribery of a key government witness, Maj Gen Bergeson was reflecting the views of Respondent Kendall and his subordinates.[3]

63. When the Petitioner discovered the very issues he was prevented from introducing during his post-trial hearing, was previously promised to Congress affirming that he could present them but that correspondence was withheld from his counsel prior to the post-trial hearing, he personally drafted a petition for a new trial based on this newly discovered evidence. Again, *see*, Appendix 7. Unfortunately, Petitioner's counsel (Mr. Brian Mizer) during his military

[3] See Jonathan Turley, THE MILITARY POCKET REPUBLIC, 97 Nw. U.L. Rev. 1, 83 (explaining that military branches use their legislative liaison offices "as a direct conduit to Congress").

appeals, failed to follow the rules of the C.A.A.F. to appropriately present this newly discovered evidence before that court, and the C.A.A.F. failed to investigate the circumstances as to why Petitioner's appellate counsel failed to follow its rules. Most notably, the C.A.A.F. also failed to investigate how Petitioner's counsel knew to the day his petition would be rejected by C.A.A.F., immediately after the Petitioner questioned his appellate counsel's ineffectiveness. *See* Appendix 8, *Petition for Reconsideration to C.A.A.F.*

Respondents violated their Brady obligations

64. Further compounding the various errors here is Respondents' failure to comply with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). As this Court is aware, *Brady* mandates that the Government turn over to a criminal accused certain information—and that failure to do so "violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." *Id.* at 87. On appeal, there are three essential components to a claim of *Brady* violation: (1) the evidence was favorable to the accused; (2) it was suppressed by the prosecutor; and (3) it was material. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Hein v. Sullivan*, 601 F.3d 897, 906 (9th Cir. 2010). Evidence is "favorable" if it is advantageous to the defendant or could tend to call the Government's case into doubt. *Strickler*, 527 U.S. at 281-82; *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different."

65. Here, during Petitioner's post-trial hearing, the Air Force prosecutor repeatedly asserted—on the record—that the purpose of the hearing was narrowly limited to exploring the payment made to J.M. *E.g.*, Appendix 6 at 136-140. But these assertions directly conflicted with

Respondents' congressional response. As the Air Force's official response to Rep. Roby made clear, Respondents intended to allow Petitioner to raise any motions at the post-trial hearing—a fact that the prosecutor either knew or should have known. This official response, however, was not disclosed to Petitioner until well after the post-trial already had concluded. The prosecutor asserted repeatedly to the tribunal that the intent of the convening authority was not to allow for any motions to be considered, which was refuted by the Air Force's official response prior to that very hearing.

66. By its very terms, this information was favorable to Petitioner: it detailed exactly what Respondents (and, particularly, Secretary Frank Kendall) expected to occur at the post-trial hearing. Given that the military judge repeatedly prevented Petitioner from raising any motions outside of the prosecution's narrow interpretation of the convening authority's direction, the congressional response would have been advantageous to Petitioner in this unique context. Respondents' response to Rep. Roby clearly recognized Petitioner's rights to raise any motions, and would have served as the vehicle for him to do so.

67. The congressional response also was material: had the response been disclosed to Petitioner *before* the post-trial hearing, there is a reasonable probability that the military judge would have allowed Petitioner to raise an additional motion and, therefore, have a true and meaningful opportunity to explore the perjury that occurred during the pretrial M.R.E. 412 hearing. As the defense strenuously argued during the post-trial hearing, "without being able to get into that relatively limited portion of testimony"—wherein J.M. and K.A. perjured themselves—"there's going to be less evidence from which to seek meaningful relief." *See* Appendix 6 at 126.

68. By failing to disclose the response to Rep. Roby, the prosecution violated its obligations

under *Brady* to turn over favorable and material evidence to the defense.

Relief is Appropriate Here.

69. As discussed above, Petitioner satisfies the requirements for relief under 28 U.S.C. § 1331, the federal question jurisdictional statute, as he has demonstrated that he was deprived a full and fair consideration of his case by the military appellate courts, and furthermore that his conviction is void due to the fundamental errors that transpired post-trial in direct contravention to the convening authority's intent. As the military judge's clear abuse of discretion usurped Respondents' intent that Petitioner be afforded the opportunity to explore the payment to J.M. and raise any subsequent motions, this Court now must step in to prevent a clear transgression by the Government of a petitioner's constitutional right to due process, and to correct the fundamental errors that occurred.

VIII. CONCLUSION AND RELIEF SOUGHT

70. WHEREFORE, Petitioner Clarence Anderson III, respectfully prays that this Court:

a. Issue an order dismissing all charges with prejudice or direct the Respondents to order the Petitioner a new trial so he can fully and effectively present evidence of witness tampering, prosecutorial misconduct, and evidence suppression at his general court-martial that Respondents previously promised Congress it would give him;

b. Award Petitioner court costs and attorney's fees pursuant to 5 U.S.C. § 504; and

c. Grant such other relief as may be appropriate as law and justice require.

Respectfully Submitted,

Dated: April 17, 2023

By: Clarence Anderson III
1125 S Hwy 123
Ozark, AL 36360
(334) 663-0280
Email: clarenceanderson132@gmail.com
Pro Se Petitioner

FORM OF AFFIDAVIT

I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief.

WHEREFORE, Clarence Anderson, III., the Petitioner, respectfully requests that the court accepts this Petition for Relief.

Clarence Anderson III
1125 S Hwy 123
Ozark, AL 36360
Pro Se Petitioner

LOCAL RULE CERTIFICATION

I certify that this brief meets all requirements of Local Rule 5.6.

GHOSTWRITING CERTIFICATION

I certify that A11 documents submitted to this court were not submitted with the aid of an attorney.

CERTIFICATE OF SERVICE

I hereby certify that this document was served via First Class postage via U.S. Mail upon all Respondents on April 17, 2023.

Clarence Anderson III
Pro Se Petitioner
334-663-0280 (Cell)