UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

CLARENCE ANDERSON III [redacted] Petitioner, v. DR. HEATHER WILSON, Secretary United States Air Force 1670 Air Force Pentagon Washington, D.C. 20330 JEFFREY A. ROCKWELL, Lt Gen The Judge Advocate General United States Air Force 1420 Air Force Pentagon Washington, D.C. 20330 MARK NOWLAND, Lt Gen Commander, 12th Air Force United States Air Force 2915 S. 12th AF Drive, Suite 228 Davis-Monthan Air Force Base, AZ 85707 Respondents.	)	Civ. No. 1:18cv1590 **PETITION AND BRIEF IN SUPPORT OF A WRIT OF MANDAMUS**

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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 concerning the timing of the genesis of that witness's romantic relationship with the victim in the case after being given $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 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 allowing 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 seeks relief in the nature of a writ of mandamus directing the Secretary of the Air Force, The Judge Advocate General of the Air Force, and the Convening Authority in Petitioner's Case to order a new trial in his case or in the alternative order a post-trial hearing pursuant to Article 39(a), Uniform Code of

Military Justice, where he is allowed to present the exculpatory evidence discovered and raise all necessary motions for appropriate relief.

I. PREFATORY STATEMENT

1. On April 22, 2015, Petitioner was convicted at a General Court-Martial on allegations related to sexual assault of his ex-wife, K.A., based on the testimony of K.A., and without any physical or forensic evidence. 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.

2. This is a request for the issuance of a writ of mandamus to compel Respondents and those acting under their authority and control to take all appropriate action to give Petitioner the promised opportunity to fully and effectively present evidence of witness tampering at his general court-martial.

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, after 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. To Petitioner—and to any reasonable person—this payment of $100,000 appeared suspicious and perhaps was evidence of a fraud perpetrated upon the court. Petitioner's mother contacted her

(and Petitioner's) U.S. Congresswoman, the Hon. Martha Roby (R-Ala.), who in turn contacted Respondents.

4. Respondents promised Rep. Roby that Petitioner would get a chance to present this evidence of witness tampering at a post-trial hearing. But 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 for a petition for a new trial. Petitioner hereby moves this Court to order the Judge Advocate General of the Air Force to order a new trial or, in the alternative, order Respondents to afford Petitioner the *meaningful* post-trial hearing Respondents previously promised Congress it would give him.

II. JURISDICTION

5. This is a civil action brought pursuant to 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff"). Jurisdiction is further conferred by 8 U.S.C. § 1329 (jurisdiction of the district courts) and 28 U.S.C. § 1331 (federal subject-matter jurisdiction).

6. The U.S. Court of Appeals for the Fourth Circuit has held that district courts have jurisdiction under 28 U.S.C. § 1361 to issue writs of mandamus against military commanders—even when the action to be compelled may appear to be "discretionary." *Burnett v. Tolson*, 474 F.2d 877, 882 (4th Cir. 1973) (rejecting Government's claims that district court did not have jurisdiction to entertain writ to compel military commander to allow leafletting in public areas of a military installation); *see also*, *e.g.*, *Feliciano v. Laird*, 426 F.2d 424 (2d Cir. 1970) (failure of Army to follow its own regulations supported writ of mandamus); *Nixon v. Sec'y of Navy*, 422

F.2d 934, 939 (2d Cir. 1970) ("official military conduct may go so far beyond the limits of what may be considered a rational exercise of discretion as to call for mandamus").

III. VENUE

7. 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 a substantial part of the events or omissions giving rise to Petitioner's claim occurred. Respondent Dr. Heather Wilson is sued in her official capacity as the Secretary of the Air Force, a United States federal agency and resident in this district. Respondent Lieutenant General Jeffrey Rockwell 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), 28 U.S.C. § 873, to grant petitions for new trial for individuals convicted in military courts-martial. The Office of The Judge Advocate General of the Air Force is a resident in this district. Respondent Lt Gen Nowland is sued in his official capacity as the convening authority ultimately responsible for approving Petitioner's military conviction and, by extension, the individual ultimately responsible for granting the type of new trial or post-trial hearing requested by Petitioner here.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

8. 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 terminated the proceedings. Petitioner was not allowed to

fully address the circumstances surrounding the perjury 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.

9. 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.

10. Petitioner then timely appealed to the Air Force Court of Criminal Appeals. 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).

11. 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).

12. In addition to his direct appellate review, Petitioner sought recourse via a petition for a new trial. The petition initially was denied by Respondent Rockwell. Petitioner appealed this denial, first to the Air Force Court of Criminal Appeals, and then 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., 11 October 2017). Petitioner asked the C.A.A.F. to reconsider its denial, which it declined to do.

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

V. PARTIES

14. Petitioner, Clarence Anderson III, resides at [redacted]

15. Respondents—Dr. Heather Wilson, Lt Gen Jeffrey Rockwell, and Lt Gen Mark Nowland—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, 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 a decision by an individual who "resides" in this District, venue is proper. Further, both Respondents Wilson and Respondent Rockwell have the authority to remedy the harm perpetuated upon Petitioner, and both officials "reside" in this District.

VI. FACTS AND PROCEDURAL HISTORY

16. 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 digital penetration of K.A.

a. The sexual offenses allegedly occurred on September 1, 2013.

b. These allegations were reported to police in mid-September 2013, four days *after* police responded to the Anderson home following a report by Petitioner that he had been struck by K.A.

c. This physical altercation arose when Petitioner and K.A. began arguing about whether K.A. was having an affair with J.M.

17. With no forensic evidence or direct eyewitnesses to the alleged sexual assault, the Government's case depended entirely on K.A.'s credibility.

a. Prior to the trial on the merits beginning, Petitioner filed a motion in limine to explore on the record whether K.A. indeed had had an affair with J.M. and, if so, when that affair began.

b. 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 possible adulterous behavior with J.M.

18. 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 roughly 6-8 months *after* Petitioner allegedly committed the offenses against K.A.

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.

b. The military judge also sealed the testimony presented during the M.R.E. 412 hearing, as well as the transcript of same.

19. A month after the trial, Petitioner's mother recorded two phone calls with J.M.

a. 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 the Petitioner giving rise to the charges against him.

b. J.M. then dropped another significant revelation that, shortly before trial, K.A.'s mother had given him $10,000.

c. 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.

20. 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).

a. On September 15, 2015, the Petitioner moved for a post-trial hearing to investigate the circumstances of the payment to J.M.

b. 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 2, *Post-Trial Hearing Transcript* at 2.

21. It was at this post-trial hearing that K.A. testified that the amount given to J.M. was actually *$100,000*. *Id.* at 32.

a. K.A. insisted, however, that her mother had transferred the money directly to J.M. to pay for renovation to his home. *Id.* at 30.

b. 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.*

c. K.A. testified she may have personally contributed just $20 to the renovation. *Id.* at 32.

22. K.A. was asked why her mother had wired money to J.M.'s account rather than directly paying the renovation contractor. *Id*.

a. 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.

b. 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.

c. K.A. also still could not remember exactly when her romantic relationship with J.M. began. *Id.* at 25, 50-54.

23. Unlike K.A., J.M.'s memory had improved since the trial, however.

a. 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.

b. 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.

c. 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.

24. 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.*

25. Once the renovations were complete, K.A. spent a total of just one night in the house.

a. After an argument, K.A. moved out the next day. *Id.* at 121.

b. According to J.M., he and K.A. did not speak again until February 2015. *Id*. at 122-23.

c. 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 the spring of 2014, which was 6-8 months after the alleged incident between the Petitioner and K.A.

26. 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.

27. 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.

a. 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.

b. 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.[1] *Id*. at 128-29.

[1] 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."

c. 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.

d. The military judge ruled that he would not "entertain follow-on motions or subsequent motions as part of this post-trial 39(a) 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 convening authority 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.

28. Petitioner followed the military judge's direction and requested a second post-trial hearing.

a. 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.

b. 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.

29. Petitioner raised Respondent Nowland's denial, on direct appeal at both the Air Force Court of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces.

a. Petitioner also appealed the military judge's refusal to allow Petitioner's attorneys to confront K.A. and J.M. on their sealed testimony in the original M.R.E. 412 hearing.

b. Petitioner's appeals were denied.

Congressional Inquiry

30. 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 in seeking some form of relief from his conviction. Rep. Roby then reached out to Air Force officials.

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

32. 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.

33. Maj Gen Bergeson's response to Rep. Roby was not provided to Petitioner before the post-trial hearing was held. In fact, Petitioner did not discover the response—or the promise it contained—until four months *after* the post-trial hearing concluded.

34. Based on the discovery of the response to Rep. Roby, Petitioner—through counsel—filed a petition for a new trial.

a. The request was denied by The Judge Advocate General of the Air Force.

b. Petitioner unsuccessfully appealed this denial to the Air Force Court of Criminal Appeals and the C.A.A.F., exhausting his administrative remedies.

VII. CAUSE OF ACTION

35. A writ of mandamus may be issues if three criteria are met. First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires …." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004). Second, "the petitioner must satisfy the burden of showing that [his] right to the issuance of the writ is clear and indisputable." *Id.* And third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* As set forth below, all the prerequisites for issuance of the writ are present here.

A writ of mandamus is the only means Petitioner has to prevent irreparable harm.

36. Through the military courts, Petitioner has sought review of the errors that occurred at his post-trial hearing, to no avail. Despite raising the issues set forth below, the military appellate courts have failed to even address Respondents' assurance to Congress that Petitioner would be able to raise any motion related to the transfer of money to J.M. *See* Appendix 1. After the military's highest appellate court denied Petitioner's petition for review, he sought reconsideration by highlighting Respondents' intent that he be afforded a meaningful post-trial hearing—an intent either unknown or blatantly ignored by the military judge. Yet the Court of Appeals for the Armed Forces still refused to grant review.

37. With his military appeals complete, Petitioner has no adequate means for relief. The C.A.A.F. recently ruled that military appellate courts do not have jurisdiction to consider writs or petitions for extraordinary relief once an accused's direct appeals are final under the Uniform

Code of Military Justice. *United States v. Gray*, 77 M.J. 5 (C.A.A.F. 2017) (*per curiam*). As Petitioner's direct appeals are final under Articles 71 and 76, UCMJ, Petitioner cannot seek relief for the errors that occurred at his post-trial hearing through the military courts, nor can Petitioner seek a new trial based on newly discovered evidence. His only avenue for relief is through a writ of mandamus to this Court.

Petitioner's right to mandamus is clear and indisputable, as the military judge and Respondents clearly abused their discretion.

38. Petitioner is entitled to a new trial or, at the very least, a post-trial hearing where he is afforded the promise made by Respondents to Rep. Roby; specifically, that he will be able to raise *any* motions related to the discovery of a $100,000 payment to a key prosecution witness. Petitioner's right to mandamus here is clear and indisputable, for Respondents' denial of a second post-trial hearing constitutes a clear abuse of discretion.

39. The U.S. Supreme Court has held that issuing a writ of mandamus is appropriate where there has been a "clear abuse of discretion" or "usurpation of the judicial power[.]" *Mallard v. U.S. Dist. Ct. for Southern Dist.*, 490 U.S. 296, 309 (1989) (quotations and grammatical alterations omitted). The Fourth Circuit has explained, however, that it—along with other federal circuits—has "come to appreciate the usefulness and flexibility of mandamus in other, less extreme, situations." *In re Virginia Electric & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976) (citations omitted). The Fourth Circuit also has noted that "official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted." *Burnett v. Tolson*, 474 F.2d 877, n.8 (4th Cir. 1973) (quoting *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374 (2d Cir. 1968)). The *Burnett* Court also noted that there are few sights as unseemly "for a democratic country … than the specter of its courts standing powerless to prevent a clear transgression by

the government of a constitutional right of a person with standing to assert it." *Id.* (quoting *Bivens v. Six Unknown Named Agents of the Fed. Bur. Of Narc.*, 409 F.2d 718, 723 (2d Cir. 1969), rev'd on other grounds, 403 U.S. 388 (1971)).

40. Here, Petitioner has a constitutional right to due process; specifically, to be tried in a court free from bribery, witness tampering, and fraud upon the court. He has standing to assert this right, as he was the person wrongfully convicted. Thankfully, this Court is not powerless to prevent the clear transgression by Respondents and their subordinates.

41. There are three key reasons why this Court should order relief.

a. First, the military judge clearly abused his discretion in two ways. The military judge initially erred 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. In other words, the judge prohibited Petitioner from presenting evidence, then ruled against Petitioner for having not presented that evidence.

b. Second, 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 <u>*any*</u> motion in a post-trial hearing related to the payment of a key witness.

c. Finally, the prosecution failed to disclose favorable and material evidence.

d. Each of these errors will be discussed in turn.

The military judge abused his discretion when he denied Petitioner the right to present evidence.

42. A judge abuses his discretion if he relies on clearly erroneous factual findings, relies on erroneous conclusions of law, or misapplies the law to the facts. *E.g.*, *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 112 (4th Cir. 2013) (citation omitted). Here, the military judge who presided over the post-trial hearing relied on an erroneous conclusion of the law and then misapplied that erroneous view of the law to the facts.

43. First and foremost, the military judge wrongfully 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 Wilson—through her legislative liaison—express that 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 Wilson 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.

44. 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 in a closed session of Petitioner's court-martial. Specifically, Petitioner's attorneys wished to expose inconsistencies or outright perjury in both K.A. and J.M.'s prior testimony regarding when their romantic affair began. The military judge, however, determined he did not have the authority to allow any such questions. He based this erroneous conclusion on R.C.M. 1102(d), which states 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. But the convening authority in this case already 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 actually $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 whatsoever 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.

45. It is true that R.C.M. 1102(b)(2) limits the authority of military judges to order post-trial sessions before authentication of the record of trial, which accords with the theory that courts-martial proceed through "a 'tunnel of power' where, depending on the locus of the case, a particular authority has power over the substance of the case." *United States v. Diaz*, 40 M.J. 335, 343 (C.M.A. 1994) (citation omitted). But in this case, the convening authority returned "the train" to the military judge's "station—stoked and ready to move[.]" *Id.* Once back in the trial court, R.C.M. 1102(e) required the military judge to take appropriate action in this case. In fact, a literal reading of the convening authority's order to "address the circumstances" of this suspicious payment clearly demonstrates that the convening authority intended for the military judge to take any appropriate action to address this potential tampering with a witness as well as the inability of the Petitioner to impeach these two important witnesses with material evidence of bias, prior inconsistent statements, and a demonstrable motive to fabricate. Further, military courts have recognized that "if the military judge lacked the power to take action to correct prejudicial error that occurred at trial, relief for the accused might be delayed until review of the case by the Court of Military Review or might never be given." *United States v. Griffith*, 27 M.J.

42, 47 (C.M.A. 1988). This is precisely what has happened to Petitioner here, where, after spending years in confinement, he is still waiting for a meaningful opportunity to confront key Government witnesses on newly discovered evidence. Binding case law required the military judge 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 a convening authority, even though the military judge's actions occurred *after* authentication).

46. It is bad enough that the military judge bucked binding case law and prohibited Petitioner from confronting K.A. and J.M. on their prior testimony. But it is even worse that the judge 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) (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.

47. As the affair gave K.A. a motive to fabricate—and as her credibility was the central issue of the sexual-assault allegations against Petitioner—her testimony on this point was of the utmost importance. The military judge had ruled at trial that the proximity of the beginning of that relationship was too remote to meet the standards for admissibility, but when newly discovered evidence demonstrated that the proximity of the relationship was within a relevantly proximate time period, the military judge closed his eyes and refused to consider even a proffer of how the newly discovered evidence would have impacted his prior ruling. 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, 67 (1985). It is for this very reason that the prosecution must disclose impeachment evidence, especially "if the reliability of a given witness may well be determinative of guilt or innocence." *United States v. Romano*, 43 M.J. 523, 526-27 (A.F. Ct. Crim. App. 1995), rev'd on other grounds, 46 M.J. 269 (C.A.A.F. 1997) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972).

48. Here, the impeachment is twofold: first, on the ground that K.A. made substantially inconsistent statements about the timing of the relationship in a context that bolstered her credibility; and second, that the new admission of the actual proximity of the relationship to the charged offenses demonstrates impeachment by both bias and motive to fabricate, matters that fall directly within Military Rule of Evidence 608(c). Regardless of whether the affair began before or fully blossomed after the alleged sexual assault, the evidence is clear: both J.M. and K.A. lied under oath at the trial about when her relationship with J.M. turned sexual. And to be blunt: K.A. *lied*. She was not simply mistaken. She was not confused. When she testified that

her relationship with J.M. turned sexual in the spring of 2014, she was not simply inaccurately recalling dates. Her timeline was off by at least half a year, which is remarkable considering the close proximity between the alleged events (fall of 2013 and spring of 2014) and the Petitioner's court-martial (fall of 2014 and spring of 2015). Her prior testimony also must be viewed in light of the uncontroverted evidence that her mother gave J.M., a humble school teacher, $100,000 just as charges were being brought against Petitioner. K.A.'s mother claimed the money was for renovations for J.M.'s home, so that K.A. and her children would be accommodated. Yet K.A. lived with J.M. for a grand total of one night, breaking off the engagement for a reason she claims she cannot remember and moving out of J.M.'s newly renovated house for reasons she cannot recall. At the post-trial hearing, the prosecutors did not even argue that Petitioner had not met the threshold for a new trial; instead, they successfully persuaded the judge into believing he did not have the authority to grant a new trial based on a narrow and incorrect reading of the convening authority's direction. Those same prosecutors, however, believed Petitioner could—and should—ask the convening authority to order a second post-trial hearing. Much to Petitioner's surprise, the military judge improperly assessed whether evidence that was *not* allowed to be presented at the post-trial hearing warranted a new trial. And much to Petitioner's shock, the convening authority denied a second post-trial hearing despite the prosecutors's implicit support.

Respondents have reneged on their promise to Congress.

49. Petitioner's surprise only intensified when he discovered, several months 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 Respondent Wilson 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 Wilson and her subordinates. 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").

50. While Maj Gen Bergeson's promise likely does not rise to the level of a government *contract*, his response to Rep. Roby's inquiry provides critical evidence of Respondents' intent: that Petitioner would be able to pursue issues (related to the transfer of money to J.M.) in an adversarial forum. It also represents the Respondents' interpretation that R.C.M. 1102(e) did allow the military judge to entertain all motions and not just those he believed were specifically permitted by the order of the convening authority. Notably, the order of the convening authority did not explicitly limit the military judge in any way from considering any motions. Thus, at the very least, all Petitioner asks of this Honorable Court is to enforce Respondents' intent and promise.

51. Here, there simply is no reason for Respondents to continue to refuse Petitioner a new trial or, at the very least, a meaningful and robust post-trial hearing. Respondents' denial of Petitioner's request for a new trial or a second post-trial hearing is all the more baffling considering their intent to provide a forum in which Petitioner could explore the issue of the $100,000 transfer to J.M. and raise any motions thereto. All that need be done at this point is make clear to the military judge what was made clear to Rep. Roby.

Respondents violated their* Brady *obligations.

52. 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." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.*

53. 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 2 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 refused ty the Air Force's official response prior to that very hearing.

54. By its very terms, this information was favorable to Petitioner: it detailed exactly what Respondents (and, particularly, Respondent Wilson) 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.

55. 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 2 at 126. The defense added, "In order to add context and make it actually worth what we need to develop here, there has to be additional testimony to show why what happened in point A is now different when we're talking about point B." *Id.* at 126-27. Had the prosecution disclosed Respondents' memorandum to Rep. Roby, with the clear statement that Petitioner would get to raise any motion at the post-trial hearing, it is sufficiently probable that the military judge would have allowed the defense to explore the very issue it was foreclosed from pursuing. From the transcript of the post-trial hearing, it is clear the military judge struggled to understand

the left and right limits of his authority to take evidence during the proceeding. Was he supposed to narrowly construe the convening authority's order, as argued by the prosecution? Or was he to allow the defense to get to the heart of the alleged perjury even though the perjury occurred during a pretrial hearing sealed pursuant to M.R.E. 412? Ultimately, the military judge determined it was the former. But had the prosecution disclosed Respondents' memorandum to Rep. Roby, it would have been clear to the military judge that Respondents wished to afford Petitioner the ability to fully explore alleged perjury—even if that exploration was dependent on a subsequent (albeit related) motion filed pursuant to M.R.E. 412.

56. 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. As such, this Court should sanction the prosecution by granting this writ and dismissing the charges with prejudice or, in the alternative, order Respondents to afford Petitioner his promised meaningful post-trial hearing through a new trial or an Article 39(a) in which any motions can be raised.

The issuance of the writ is appropriate here.

57. As discussed above, Petitioner satisfies the first two requirements for issuance of a writ; namely, that he has no other adequate means to attain the relief he seeks and that he has satisfied the burden of showing his right to issuance of the writ is clear and indisputable. He satisfies the third and final requirement as well, as the issuance of the writ is appropriate.

58. When a writ of mandamus is sought to confine an officer to the lawful exercise of his prescribed authority, the district court should issue the writ almost as a matter of course. That is precisely the situation here, where Respondent Nowland inexplicably refused to grant a second post-trial hearing after the military judge erroneously determined he did not have the authority to conduct the hearing. At this point, issuing the writ would not be directing Respondent Nowland

to exercise his discretion but rather enforcing the ministerial duty he set in motion when he ordered a meaningful post-trial hearing in Petitioner's case. *See Burnett*, 474 F.2d at n.8 (quoting *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925)) (noting that "[m]andamus issues to compel an officer to perform a purely ministerial duty"). 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.

VIII. CONCLUSION AND RELIEF SOUGHT

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

a. Award the writ directing the military convening authority to either order a new trial or in the alternative order a post-trial hearing during which Petitioner will be afforded his promised opportunity to confront key witnesses about their testimony during a closed session of his court-martial and file all appropriate motions in pursuit of meaningful relief;

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 23 December 2018

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO LOCAL CIVIL RULE 7 FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT

Pursuant to Local Civil Rule 7 for the United States District Court Eastern District of Virginia, I certify as follows:

1. This Petition for Writ of Mandamus complies with the type-volume limitation of Local Civil Rule 7 *Briefs Required* because this writ does not exceed the thirty (30) 8-1/2 inch x 11 inch page, double spaced limitation; and

2. This writ complies with the typeface requirements of Local Civil Rule 7 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 12-point font in Times New Roman font.

Dated: December 23, 2018

/s/ Benjamin Aaron Beliles
Benjamin Aaron Beliles

CERTIFICATE OF SERVICE

I do hereby certify that on December 23, 2018, I electronically transmitted Petitioner Clarence Anderson III's Petition for Writ of Mandamus under 28 U.S.C Rule 21, to the Clerk's Office using the CM/ECF System for filing, forwarding to a judge pursuant to the Court's assignment and will transmit of a Notice of Electronic Filing accompanied with Petitioner's Writ of Mandamus by certified mail to the named Respondents in the above-referenced matter.

/s/ Benjamin Aaron Beliles
Benjamin Aaron Beliles