Public Comment
Mr. Clarence Anderson III

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From: Clarence Anderson III [redacted]
Sent: Monday, November 28, 2022 10:14 AM
To: [redacted]
WHS Pentagon EM Mailbox DACIPAD
Cc: [redacted]
Subject: [Non-DoD Source] DAC-IPAD/Major Clarence Anderson III
Attachments: Petition for Reconsideration to CAAF-Nov 2017.pdf; Petition for a New Trial to CAAF.pdf

Greetings DAC-IPAD,

Again I am Major Clarence Anderson III and we met at the DAC-IPAD a little over two months ago, where Federal Judge Reggie Walton asked me questions about the authentication process and why did that affect the Air Force from hearing exculpatory evidence in my case.

Here is a video from my testimony to reorient you to Judge Walton's questions:
https://youtu.be/PBuxK-6zrNg

After relistening, I don't think I thoroughly explained to Judge Walton that because the convening authority ordered my post-trial hearing and not the judge (due to the record already being authenticated when the new evidence was discovered), the Air Force determined that the judge was without authority to hear the evidence or order a new trial.

Unfortunately this decision conflicted with court martial rules, case law (see AFCCA/2013 *US v. Roy* where a judge ordered a new trial ordered by the convening authority) but more importantly conflicted with what the Air Force affirmed to US Congresswoman Martha Roby.

To help you better understand, attached is my personally written *Petition for a New Trial*, I submitted to the Judge Advocate General of the Air Force once I discovered after my post-trial hearing, that the Air Force did affirm with Congresswoman Roby the judge had the authority to hear the evidence and order a new trial, but withheld that correspondence from my Attorneys prior to trial.
- Please note that because at the time CAAF was reviewing my case to decide if they were going to take it or not, by law, the Judge Advocate General had to submit the Petition to CAAF

Secondly, Judge Walton also asked did I appeal the decision to CAAF and I told him that CAAF did not accept it. Please see the second attachment my *Petition for Reconsideration* that I, again, personally wrote to CAAF
- Please note that my *Petition for a New Trial* was not submitted pursuant to CAAF rules by my Appellate Attorney, Mr. Brian Mizer, which gave CAAF the grounds to reject it; when I fired him, the Air Force replaced him with an Attorney who was directed to only file my briefs but not draft them for me, thus why my *Petition for Reconsideration* is again, written by me and submitted by my new Attorney

- Please also note in my Petition for Reconsideration that I request an investigation into my Appellate Attorney, Mr. Brian Mizer, for not following CAAF rules when he did not file my Petition for a New Trial pursuant to CAAF rules; unfortunately CAAF did not investigate Mr. Mizer's actions (from what I was told Mr. Mizer had a colleague who was a Clerk at CAAF, Joseph Perlak I believe, that got him to kill it)

I believe this will thoroughly explain to Judge Walton why the Air Force unlawfully refused to accept exculpatory evidence in my case, all explained in my own words under the penalty of perjury, and more than likely why the Air Force did not have a rep to attend the DAC-IPAD when I testified.

I offer myself for any additional questions, and beg you in the interest of justice to have an independent party review my case, and provide me my merited relief.

Respectfully,

Clarence Anderson III

I, CLARENCE ANDERSON III, do hereby make the following declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

TO THE HONORABLE, THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

Issue Presented

I.

DID NEWLY DISCOVERED EVIDENCE OF A CONGRESSIONAL RESPONSE FROM THE CONVENING AUTHORITY PRESCRIBING THE MILITARY JUDGE'S AUTHORITY DURING A POST-TRIAL ARTICLE 39(A) SESSION, THAT WOULD AFFIRM AND SUBSTANTIATE THE DEFENSE'S ARGUMENT THAT THE MILITARY JUDGE'S POWERS WERE NOT LIMITED PURSUANT TO M.R.E. 412 DURING THE POST TRIAL ARTICLE 39(A) SESSION, WHEREAS THE APPOINTED MILITARY JUDGE AND CONVENING AUTHORITY REFUSED TO EXERCISE THAT AUTHORITY PRESCRIBED IN THE GOVERNMENT'S CONGRESSIONAL RESPONSE, UNFAIRLY PREJUDICED THE ACCUSED, AND WARRENT A NEW TRIAL UNDER UCMJ ARTICLE 73, 10 U.S.C. § 873?

Statement of the Case

Between 20 and 22 April 2015, contrary to my pleas, I was convicted of one specification of sexually assaulting my wife, one specification of abusive sexual contact, one specification of aggravated assault, one specification of assault, one specification of wrongfully communicating a threat, and one specification of kidnapping by confining my wife in our bathroom for a number of minutes in violation of Articles 120, 128, and 134, UCMJ and 10 U.S.C. §§ 920, 928, 934 (2012). The military judge sentenced me to 42 months confinement and a dismissal.

Subsequently, an Assignments of Error (AOE) and a *Grostefon* brief were submitted to the Air Force Court of Appeals (see 29 September 2016 Defense Appellate Brief and 4 October 2016 Motion to Attach Documents to *A.F. Ct. Crim App*). My appeals and petition for a new trial were denied by the Air Force Court of Criminal Appeals and my conviction and sentence were affirmed (see 31 May 2017 decision from the *A.F. Ct. Crim App*).

Statement of Facts

In the congressional inquiry that followed the revelation that Mr. John Madden, a witness who

testified in the preliminary hearing, was paid $10,000 by the victim's mother before he testified, Major General Thomas W. Bergeson, Secretary of the Air Force Legislative Liaison (SAF/LL), informed Congresswoman Martha Roby that the convening authority had ordered a post trial hearing in this case. (see attached September 2015 congressional from Congresswoman Roby) (see attached October 2015 response from SAF/LL). General Bergeson prescribed under Air Force vested authority from the convening authority, "This 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.*) The government's response to the Congressional was not provided to my Defense Counsel at the time of the post-trial Article 39(a) session, and was only obtained by a witness tangentially related to the case upon receipt from Congresswoman Roby's office approximately four months after the post-trial proceedings. (see attached affidavit from Beatrice Anderson). Testimony adduced from the post-trial hearing confirmed the amount at issue was not $10,000 but $100,000 in a potential bribe that impacted the veracity of testimony made during the trial. (R. at 663).

With Mr. Madden still on the stand, my Defense sought to elicit testimony covered in the M.R.E. 412 hearing in February 2015, to prove the allegations that warranted the post-trial Article 39(a) session and also to prove the allegations submitted in the congressional from Congresswoman Roby. (R. at 754; 757). The military judge prohibited my Defense from discussing material topics we wanted to cover on the record in the requested M.R.E. 412 hearing, and instead discussed the matter off the record in two R.C.M. 802 hearings. (R. at 760-61). When my Defense repeatedly insisted that we be allowed to develop the record with a proffer, even in a closed session, the military judge refused to allow us to do so. (R. at 765; 786-787; 790-791; 795). The military judge stated, "I don't think I've been authorized to do that. I think you could ask the convening authority for another post trial 39(a) session, if that was appropriate. But right now, I don't think I have any evidence that would cause me to even

allow you to make a proffer on [M.R.E. 412] because there's been nothing tied to the issue that's been given to me, which is to explore funding." (R. at 787). The military judge ruled that he would not "entertain follow-on motions or subsequent motions as part of this post-trial 39(a) session." (R. at 806). "I believe that that is outside the scope of this post-trial 39(a) session." (R. at 807). The military judge then directed my Defense 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 due to perjury and obstruction of justice stemming from the M.R.E. 412 hearing. (*Id*).

Nevertheless, in his written post-trial 39(a) findings of fact and conclusions of law summary, the military judge concluded that the evidence he would not allow my Defense to introduce on the record would "not probably produce a substantially more favorable result for the accused." (A.E. XXXVI at 4). However, the military judge failed to include in his post-trial 39(a) findings of fact and conclusions of law summary, the material fact that he did not allow my Defense to elicit key testimony to confirm the allegations that warranted the post-trial Article 39(a) session, and the judge also failed to include in his summary that he directed my Defense counsel to file a second motion for a new Article 39(a) session with the convening authority, even when advised by the government's trial counsel to do so. The government's trial counsel stated, "I think that if there's something here that informs the defense counsel that there is something 'fishy' with another matter, that that is something that at this stage, post-authentication of the record of trial by the military judge, you need to take your findings of fact that you will provide at the conclusion of this session, or at whatever time, take that and marry it with the other issue and provide that to the convening authority for action." (R. at 771). Unfortunately, the record will show the military judge did not follow the government trial counsel's advice on including these central trial issues in his post-trial 39(a) findings of fact and conclusions of law summary, and therefore failed to provide the convening authority with a complete and accurate summary of the issues.

On 15 January 2016, I followed the military judge's direction and submitted a second motion for

a new Article 39(a) session with the convening authority. The motion specifically argued, "... in order to provide additional context as to why the new evidence of payments from Dr. Horace to Mr. Madden was significant and warranted a new trial for Maj Anderson." (see 15 January 2016 Motion for a second Article 39(a) session). On 23 February 2016, the convening authority subsequently denied my request for a second 39(a) session to explore a good-faith legal basis to grant me a new trial (even though the military judge directed my Defense counsel to file the motion). (see 23 February 2016 decision from convening authority).

The convening authority subsequently affirmed my conviction and submitted my record to the Air Force Court of Criminal Appeals. My appeals and petition for a new trial were denied by the Air Force Court of Criminal Appeals and my conviction and sentence were affirmed (see 31 May 2017 decisions from the *A.F. Ct. Crim App*). I have been in confinement since 22 April 2015.

Law and Analysis

I.

DID NEWLY DISCOVERED EVIDENCE OF A CONGRESSIONAL RESPONSE FROM THE CONVENING AUTHORITY PRESCRIBING THE MILITARY JUDGE'S AUTHORITY DURING A POST-TRIAL ARTICLE 39(A) SESSION, THAT WOULD AFFIRM AND SUBSTANTIATE THE DEFENSE'S ARGUMENT THAT THE MILITARY JUDGE'S POWERS WERE NOT LIMITED PURSUANT TO M.R.E. 412 DURING THE POST TRIAL ARTICLE 39(A) SESSION, WHEREAS THE APPOINTED MILITARY JUDGE AND CONVENING AUTHORITY REFUSED TO EXERCISE THAT AUTHORITY PRESCRIBED IN THE GOVERNMENT'S CONGRESSIONAL RESPONSE, UNFAIRLY PREJUDICED THE ACCUSED, AND WARRENT A NEW TRIAL UNDER UCMJ ARTICLE 73, 10 U.S.C. § 873?

When it became evident during the post-trial Article 39(a) session that the victim and a key witness both committed perjury during their testimony at a hearing sealed pursuant to M.R.E. 412, and that my Defense intended to move for a new trial and to re-litigate the exclusion of evidence, the government successfully argued that the military judge's powers were limited because the record had been authenticated pursuant to R.C.M. 1102. (R. at 771-72). However, approximately two months prior to the post-trial hearing, the government assured Congresswoman Roby, that the convening authority

ordered a post trial hearing to evaluate new material evidence of a $10,000 payment. The government also assured Congresswoman Roby that the judge may rule on *any* motions my Defense counsel submits (to include a motion for a new trial), thus the government concluded in the congressional response, the judge's powers were *not* limited pursuant to R.C.M. 1102. (*Id*). Unfortunately, the government deviated from vested guidance prescribed by law and also in its response to the congressional, and allowed the government to determine the military judge was not given authority to rule on any motion presented by my Defense (to include a motion for a new trial). "I don't think I've been authorized to do that. I think you could ask the convening authority for another post trial 39(a) session, if that was appropriate." (R. at 787).

To be clear, when the government responded to Congresswoman Roby's inquiry in October 2015, the record was already authenticated in July 2015. In other words, in responding to the congressional, the government knew the record was authenticated and acknowledged only the convening authority had the authority to order a post-trial hearing post authentication of the record, pursuant to the language found in R.C.M. 1102. "Based on this post-trial information, Lieutenant General Nowland decided to delay signing the final action against Major Anderson and order a post-trial hearing as requested by Major Anderson's Defense counsel." (*Id*).

Also in responding to the congressional, the government acknowledged the convening authority granted the military judge full authority prescribed by law to rule on any motions (to include a motion for a new trial), and the government also acknowledged the military judge's powers were *not* limited pursuant to R.C.M. 1102, contrary to what was later argued at trial by the government. "The military judge also may rule on *any* motions the defense counsel submits." (*Id*).

The government's response to the congressional, substantiates my Defense's argument at trial that the authentication language found in R.C.M. 1102(b)(2) only governed that the military judge may order a post-trial hearing prior to the authentication of the record. The government's response to the

congressional, also substantiates my Defense's argument at trial that R.C.M. 1102(d) prescribes only the convening authority may order a post-trial hearing post-authentication. And finally, the government's response to the congressional, substantiates my Defense's argument at trial that R.C.M. 1102(e)(2) prescribes once the convening authority orders a post-trial hearing post-authentication, the military judge shall take such action as appropriate. (R. at 772-73).

Unfortunately for my Defense, the government never provided my counsel its response to the congressional inquiry from Congresswoman Roby in time for trial, nor did the government adhere to the provisions prescribed in its close-held response to Congresswoman Roby, when the convening authority considered matters for a second post-trial Article 39 (a) session and later, matters for clemency. This materially prejudiced my Defense when it challenged the government's novel argument that the military judge's powers were limited, because the record had been previously authenticated pursuant to R.C.M. 1102.

As a result, the military judge, the convening authority, and the Air Force Court of Criminal Appeals, were allowed to fatally and unfairly rule against the government's official prescription cited in its response to Congresswoman Roby, therefore prohibiting my Defense from eliciting testimony to prove the allegations in the congressional, thus unfairly and ultimately concluding that a $100,000 payment of benefits to a key witness prior to his testimony, would "not probably produce a substantially more favorable result for the accused." (*Id*).

Argument for a New Trial

Article 73, 10 U.S.C. § 873, which governs petitions for a new trial states, "At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the

appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition."

Article 67(a)(2), 10 U.S.C. § 867(a)(2), which governs review by the Court of Appeals for the Armed Forces states, "The Court of Appeals for the Armed Forces shall review the record in all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

Governing rules and case law (R.C.M. 1210 and United States v. Scaff, 29 M.J. 60) (C.M.A. 1989), provide that three elements must be met in order to grant a new trial based on the discovery of new evidence. First, the evidence was discovered after trial. Second, the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence. Finally, the newly-discovered evidence, if considered by a court-martial in the light of all the pertinent evidence, would probably produce a substantially more favorable result for the accused.

The **first element** of *Scaff* [the evidence was discovered after trial] must first prove there is tangible-credible evidence and secondly, that evidence was discovered after trial. In this case both parts of the first element exist. The proof of the government's response to the congressional from Congresswoman Roby is both factual and indisputable. (*Id*). This evidence, obtained by a witness tangentially related to the case upon receipt from Congresswoman Roby's office after the post-trial proceedings, is also both factual and indisputable. (*Id*). Therefore the evidence of the government's response to the congressional, that neither my counsel nor I was made aware existed until after my post-trial proceedings, is also factual and indisputable, thus the first element of *Scaff* is met.

The **second element** of *Scaff* [the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence] is substantiated as the government's response to the congressional was not made known to my counsel from the convening authority nor was it submitted as discovery evidence from the government. The government's response to Congresswoman Roby was submitted by and through the convening authority, presumably vetted

through the Judge Advocate General, and ultimately through the Secretary of the Air Force Legislative Liaison (SAF/LL), thus the government was the sole gate keeper to this evidence. There was no other reasonable way my counsel could have anticipated this evidence and therefore discovered it, short of my counsel being told by the government, thus this evidence was not available to discover at the time of trial even with the exercise of due diligence.

The **third element** of *Scaff* [newly-discovered evidence, if considered by a court-martial in the light of all the pertinent evidence, would probably produce a substantially more favorable result for the accused] is substantiated by the impact of all the material factors not afforded to my Defense by the Constitution, to prove my innocence of all charges and to fairly and equitably challenge the government's novel argument that the military judge's powers were limited, because the record had been authenticated pursuant to R.C.M. 1102. The government's response to the congressional proved the judge's powers were *not* limited, even after the record was authenticated pursuant to R.C.M. 1102.

To begin, this is a 'he said-she said' case where my innocence hinged on if the judge (and later the Air Force Court of Criminal Appeals) believed my testimony or the victim's. The government even admitted during my trial that the government's case was problematic because it was a 'he said-she said' case. The government's trial counsel stated, "And the sexual offenses--you know, we don't have in that, what we have in the others, which is the accused admitting to putting his hands on her because when it comes to sexual assault, he's a squadron commander, apparently he knows. I mean he didn't even touch her. 'I just got into the bed naked with her' and either went to sleep or tapped her and started talking about divorce. And it is one person's word against another … ." (R. at 584).

When it became evident during the post-trial Article 39(a) session that the victim and key witness both committed perjury during their testimony at a hearing sealed pursuant to M.R.E. 412, and that my Defense intended to move for a new trial and to re-litigate the exclusion of evidence, the merits of the government's case fell apart because now my Defense had a 'smoking gun'. The only solution the

government had to maintain my conviction was to argue that the law, post authentication, limited the military judge's powers pursuant to M.R.E. 412. This novel argument coupled with the fact the military judge conducted two R.C.M. 802 conferences to prevent central trial issues from appearing on the record; the military judge failed to include central trial issues in his post-trial 39(a) findings of fact and conclusions of law summary to the convening authority for action (as advised by the Trial Counsel not to do); and the Judge Advocate General of the Air Force being cited in a ruling three months prior to my trial that "'victims' are to be believed and their cases referred to trial," (United States v. Wright, 75 M.J. 501) (A.F.C.C.A 2015), all violated my Constitutional rights to prove my innocence.

My Defense should have been allowed to bolster its argument by producing the government's response to Congresswoman Roby's congressional, and proved the convening authority's intent that the military judge's powers were *not* limited pursuant to M.R.E. 412. This would have caught the government in a lie, and presumably allowed my Defense to develop additional evidence by cross examining testimony provided at the post-trial hearing with that of the M.R.E. 412 hearing. My Defense then would have proved perjury and filed a motion for obstruction of justice and petitioned the government to solicit a federal investigative agency i.e. the FBI, to thoroughly investigate the circumstances surrounding the $100,000 payment by investigating e-mail, phone records, tax returns, etc., from the civilian witnesses who testified at the post-trial hearing (and potentially other culprits that did not testify), and not just rely solely on witness testimony at trial. This would have undoubtedly proved my innocence by establishing reasonable doubt, destroyed the credibility of the victim, and shifted the landscape of the trial on its merits.

Perjury that Would Produce a Substantially More Favorable Result for the Accused

First, it is now clear that the dating relationship between Mr. Madden and the victim began well before the time that was suggested in the M.R.E. 412 hearing. (R. at 95). More importantly, testimony from the post-trial hearing proved the sexual nature between the victim and Mr. Madden began well

before the time suggested in the M.R.E 412 hearing. In ruling against my previous petition for a new trial under Article 73, the Court argued, "Unlike *Williams*, a newly convened court-martial in this case could not find or infer that by reporting Petitioner's crimes [the victim] was attempting to preserve a sexual relationship with [Mr. Madden] because, at the time she reported Petitioner's offenses, no such relationship existed." (*A.F. Ct. Crim App* decision from Petition for New Trial Pursuant to Article 73; page 6). (Decided 31 May 2017). At the requested M.R.E. 412 hearing (that the military judge denied at the post-trial Article 39(a) session), my Defense would have proved and/or 'inferred', the sexual nature between the victim and Mr. Madden began before the victim made her sexual assault accusations against me to AFOSI. Similarly to my trial, at the requested M.R.E. 412 hearing, I would have testified to confirm the police report from September 2013, where I tell the responding officer that I believe the victim is having an affair with Mr. Madden. (AE XXII police report). The responding officer also verified my belief of their affair during her testimony at trial. (R. at 304).

My belief from the aforementioned police report, of the victim's and Mr. Madden's affair, were affirmed before the victim made her report to AFOSI and while we were still married and living together, thus would contest the Court's decision that, "at the time she reported Petitioner's offenses, no such relationship existed." (*Id*). I would have also testified at the requested M.R.E. 412 hearing to the Letter of Counseling statement I received in October 2013. (see PE 11). I received a Letter of Counseling for e-mailing Mr. Madden at his job (where he shared a classroom with the victim) (R. at 699), when my neighbor across the street from the home I recently shared with the victim, revealed to me that Mr. Madden started spending the night with the victim, only days after I moved out on or around 16 September 2013. Though both the victim and Mr. Madden danced around actually affirming when they began their sexual relationship, the victim testified in her own words, her intent to have me out of the house so she could begin her "dating" relationship with Mr. Madden, thus corroborating my neighbor's story. "I did not start dating John Madden until after that relationship was over; until after

Clarence was moved out of the house." (R. at 684). My testimony at a new M.R.E. 412 hearing, coupled with the victim and Mr. Madden's testimony, as they are now willing to provide, completely undercuts both of their insistence that they had a sexual relationship at the conclusion of my divorce from the victim in April or May of 2014 (R at 95).

A review of Mr. Madden's testimony from the M.R.E. 412 hearing in February 2015, shows how evasive, unresponsive, and uncooperative Mr. Madden was with the Defense during that hearing and also during his brief pre-trial interview. (R. at 61-67). Also troubling, while Mr. Madden testified at the M.R.E. 412 hearing, the victim chose to remain in the court-room to observe his testimony (R. at 61). My Defense would have argued a key Defense theory: the victim's behavior suggested the victim remained in the court-room during Mr. Madden's testimony to ensure he fulfilled his obligations for the $100,000 payment, and the victim wanted to make certain he remained, evasive, unresponsive, and uncooperative while he testified. This theory is further reinforced by the victim's behavior at the post-trial hearing. After it was discovered there was a $100,000 payment to Mr. Madden, and her involvement in this matter needed to be explained, the victim elected to leave and not remain in the courtroom to observe Mr. Madden's testimony. (R. at 685). The Defense would have also correlated this suspicious behavior to the only other occurrence when the victim chose to remain in the court-room while another key witness testified, her child (see paragraph #6 from February 2016 Clemency Memorandum). (R. at 288). Most telling, her child's testimony was ultimately impeached, because it was discovered after the child testified that he witnessed me assault the victim (his mother), the child's father later testified the child admitted to his father prior to trial, the child *never* witnessed me assault the victim (R at 332). Forcing her child to testify untruthfully creates an additional problem for the victim, 'Subornation of Perjury', and punishable under 18 U.S.C § 1622.

Mr. Madden summarized in a statement some of the evidence that would have been elicited if allowed to at the post-trial 39(a) session (see 15 January 2016 Motion for a second Article 39(a)

session). That statement, in conjunction with testimony that was actually given by both Mr. Madden and the victim at the post-trial hearing, coupled with the testimony I would have provided, proves that a M.R.E. 412 hearing at a new trial, would be dramatically different than the one that took place in February 2015.

Mr. Madden's testimony at a M.R.E. hearing in a new trial, corroborated by the common sense that their engagement in June 2014, would have followed nearly nine months of dating, would catch the victim in a lie, and would presumably have been deemed admissible before the fact-finder. Lying about a sexual relationship with another man before she made the sexual assault accusations against me, in the midst of divorce and custody proceedings, would have amounted to important cross-examination material against the victim at trial. Not only would this material evidence cast doubt about the truth of her sexual assault allegations (along with the other allegations), it also reinforces another key Defense theory my Defense would have presented at the new M.R.E. 412 hearing: her motive to fabricate allegations to deflect what would certainly have been viewed in family court as unfavorable, adulterous behavior during her attempt to win custody of our minor child. (R. at 704-05).

This evidence could have been used to show that the victim only used contraception with Mr. Madden while our divorce was pending. Once the divorce was finalized, the victim had to no longer worry about the stigma in family court of becoming pregnant by another man, and began having unprotected sex with Mr. Madden. Not coincidentally, within about one month of doing so, she became pregnant. (again see 15 January 2016 Motion for a second Article 39(a) session). Such evidence reflects the victim's manipulative nature, which my Defense should have been allowed to explore at trial. The ability to do so would have affected my forum choice, because I would have testified at the conclusion of the new M.R.E. 412 hearing that I would have elected a jury panel instead of a judge alone panel, based on if the information revealed at the new M.R.E. 412 hearing, was made available at the time of trial. Especially in the absence of evidence (other than the victim's and her son's perjured testimony) to

corroborate the victim's allegations, these are crucial decisions, and the impact of this new evidence (as well as Mr. Madden's uninhibited testimony) on those decisions reiterate why a new trial is appropriate, if the findings are not altogether disapproved.

Finally, it must be noted that the third element of *Scaff's* standard for a new trial only references the probability of producing a substantially more favorable result at a new trial. A more favorable result is not limited to findings; it can include sentencing. This is where, if nothing else, the new evidence would have clearly produced a more favorable result, as the victim perjured details to her benefit. In her 'unsworn' statement to the court, the military judge acknowledged he would consider it in arriving at a sentence. (R. at 600). The victim stated, "Because of the things Clarence has done to me, I have difficulty trusting and struggle to allow people to get close to me." (R. at 598). My Defense should have been allowed to appropriately qualify this lie, either through cross-examination at findings, or through rebuttal at sentencing. By introducing evidence that the victim was in a committed relationship that lasted nearly a year, and which was sexual before she brought allegations against me, my Defense could have further proven this statement was false. The intimate nature of the victim's relationship with Mr. Madden, culminating in having a child together, further demonstrates this point. At the post-trial hearing, the victim admitted that she and Mr. Madden were engaged to be married. (R. at 657). Most damaging to the victim's credibility, the victim admitted at the post-trial hearing, her relationship with Mr. Madden ended not as a result of the accusations alleged against me as mentioned in her unsworn statement and also her testimony at trial, the victim admitted her relationship with Mr. Madden ended because of lack of "communication" with Mr. Madden. (R. at 659).

And ultimately, the fact that Dr. Horace, at the victim's behest, "invested" $100,000 in the victim's fiance's home, squarely places her "victim impact" statement not only into the realm of fraudulent, but also self-serving and disingenuous. Because the military judge took that impact into consideration, I was irreparably prejudiced at trial and my adjudged sentence was improper.

Testimony of Dr. Horace that Would Produce a Substantially More Favorable Result for the Accused

Another deeply troubling issue relating back to the victim's credibility also extends to her mother, Dr. Katheryne Horace, who over the course of the summer of 2014 invested up to an estimated $100,000 into the home of Mr, Madden. This is an enormous amount of money, so serious and suspicious, it warranted both a congressional and a post-trial hearing to investigate the circumstances surrounding the payment. Since my Defense was prevented from developing additional testimony to prove why this exchange of money warranted a new trial, I will connect the dots to prove this evidence (in the light of all the pertinent evidence), would also bolster a substantially more favorable result for the accused.

To begin, the purported agreement simply does not make sense. Dr. Horace is not a wealthy woman. (R. at 716). Despite her salary, she regularly provides financial support to her daughter, and she testified that this entire endeavor exhausted her assets. (R. at 691,715). So investing the amount she did was no small matter. But when Mr. Madden and the victim effectively ended their engagement on a whim, Dr. Horace simply accepted her lost investment and moved on? This is a preposterous assertion, especially after she testified that her willingness to provide the money was predicated exclusively on helping her daughter. (R. at 716). It is significant that testimony reveals she began paying for the renovations to Mr. Madden's house around the same time that AFOSI requested a witness statement from her. (R. at 678,721,728). After renovations were complete in October 2014 and the victim and Mr. Madden moved into the house, the victim only lived there for one day before ending her engagement with Mr. Madden and moving out. (R. at 749). The victim moved out days before she testified at the Article 32 hearing in my case. My Defense would have argued the victim only lived with Mr. Madden for one day in their newly renovated home, and moved out to live alone because she had to appear victimized by my acts, as testified during her unsworn statement that she "struggle[s] to allow people to get close to [her]", and being engaged and also living with Mr. Madden, would have been used to

damage her credibility at the Article 32 hearing.

It is also significant that Dr. Horace's testimony from the post-trial Article 39(a) session was that everyone knew from the beginning of the project, that this was merely a loan to her daughter and her daughter's fiance, and that she fully expected payment. (R. at 714). Despite this understanding, no effort was made to memorialize such a large agreement in writing. (R. at 667, 714). Dr. Horace testified she paid for the renovations because neither the victim nor Mr. Madden had the finances to qualify for a home. (R. at 710). However, the victim contradicted her mother's testimony and stated her mother paid for the home, *not* because of the victim's bad credit or because the victim couldn't qualify, but because it was easier to pay her mother back. (R. at 662). And perhaps most telling is the fact that Dr. Horace did not begin pursuing legal options against Mr. Madden to repay the money, until more than a year after the relationship with the victim ended. (R. at 719). To be sure, Dr. Horace did not begin seeking remedies against Mr. Madden until after the evidence was discovered, the post-trial Article 39(a) session had been ordered, and she had been subpoenaed to testify. In other words, Dr. Horace only began treating the payments as a loan once it became clear that she and the victim needed to craft an explanation for them, such that it would suit their interests to act as if the payments were something other than what they were.

Mr. Madden acknowledged in testimony that this is a benefit he stills enjoys to this day. (R. at 753). Though the non-contractual nature of these payments left him with no legal indebtedness to the victim and Dr. Horace, there was absolutely a moral indebtedness. And that indebtedness appears to have affected his testimony at the M.R.E 412 hearing. Again, a review of Mr. Madden's testimony from the M.R.E. 412 hearing (as was also observed by the victim), shows how evasive, unresponsive, and uncooperative Mr. Madden was with the Defense during that hearing and also during his brief pre-trial interview. (R. at 61-67). After the evidence showing the breadth of his connections to Dr. Horace and the victim became public, however, he was required to embrace and explain those payments, just as

they did.

Regardless of the collective disavowal of any wrongdoing, the simple truth remains that a witness received substantial benefits from an interested party before testifying. Another 'red flag' that would have supported my Defense's petition to solicit a federal investigative agency such as the FBI to thoroughly investigate this $100,000 payment; when Dr. Horace was questioned under oath why she didn't pay the victim directly instead of Mr. Madden, Dr. Horace said because the victim was stressed because of the emotional issues of her baby and asked not to have one more thing to worry about. (R. at 711). This testimony was proven false, which substantiates some underhanded purpose to the payment, because Dr. Horace later testified she did not discover the victim was pregnant with Mr. Madden's child, until after the renovations were completed and only when the victim visited Dr. Horace at Alabama in November 2014. (R. at 730-32). When the victim was questioned why her mother paid Mr. Madden directly instead of her, she could not provide a definitive answer but never mentioned it was due to her pregnancy. (R. at 665). Again this new evidence, in the light of all the pertinent evidence (as well as the aforementioned evidence of perjury), would bolster a substantially more favorable result for the accused and reiterate why a new trial is appropriate, if the findings are not altogether disapproved.

Factual Sufficiencies Used to Bolster My Conviction

Having proved why the newly discovered-evidence of a congressional response from the convening authority would, in the light of all the pertinent evidence (to include the aforementioned evidence of perjury from victim), probably produce a substantially more favorable result for the accused. I will briefly challenge the Court's response why my conviction should still be affirmed and a new trial should not be awarded based on newly discovered evidence.

Again, this is a 'he said-she said' case where my innocence hinged on if the judge (and later the Air Force Court of Criminal Appeals) believed my testimony or the victim's. The Court acknowledged I testified at trial but that the merits of my conviction did not rest solely on the victim's credibility. (*A.F.*

Ct. Crim App decision from Petition for New Trial Pursuant to Article 73; page 7). (Decided 31 May 2017). The Court bolstered it's affirmation of my guilt from the police officers' testimony who responded in 2009 and 2012, the victim's 13 year old son who testified about what he witnessed in the 2012 assault, the government's introduced photograph's taken after the 2012 assault, the text messages from me to the victim following the 2012 assault, and the fact I admitted to taking off my clothes before getting into our bed. (*Id*). I will briefly and factually address these issues to further prove my innocence.

To begin, I was acquitted from two very violent allegations of punching the victim in the face multiple times and striking the victim in the buttocks with a door knob, even though the victim testified under oath I committed these offenses. (see charge sheet). The victim testified I punched her repeatedly as hard as I could leaving no visible signs of injury whatsoever. A medical doctor for the Defense, Major Hampton, testified there is no scientific explanation how the victim could have been punched not only once, but multiple times in the face and not sustain a black eye, bruise, facial fractures or broken teeth. (R. at 540-41). Dr. Hampton also testified that I would have also sustained some type of injury to my hand to include possible fractures. (R. at 541-42). No such injuries were ever reported.

I was also acquitted from striking the victim in the buttocks with the door knob even with photos used as evidence produced by her and taken by her child who later testified against me. (R. at 217-218). Again, the medical doctor for the Defense, Major Hampton, testified there is no scientific explanation for a doorknob at the height of 3 feet, could sustain the injuries on the buttocks of a 5 foot 4 inch person. (R. at 536). Dr. Hampton also testified the only way the victim could have sustained an injury on her buttocks they way she testified, was if she were wearing "several 3 or 4 inch heels stacked on top of one another." (R. at 537).

The significance of these specifications, and especially the allegation of being punched in the face, is that they did not result from a finding of 'not guilty' simply from a lack of supporting evidence.

Rather, they failed because the victim was clearly fabricating details that simply were not possible. This must lead the Court to question, if the victim was willing to lie under oath about several serious allegations against me, why would she not lie about the others? I've already proved the victim committed perjury during the M.R.E. 412 hearing, where she again lied under oath about the sexual relationship with Mr. Madden. So it should be expected she would also lie about being punched in the face multiple times and assaulted by a door knob on her buttocks.

Both police officers who testified from the police reports in 2009 and 2012 both testified after their investigations, they concluded I committed no crime, therefore I was not subject to an arrest. (R. at 262,269,276).

In the 2009 incident, the government argued during cross examination of this incident, I conveniently changed the story during my testimony adding details about a radio being the cause of the argument which I did not disclose to AFOSI during my interview. (R. at 474). However the police report of the incident states, "the disagreement was over him turning the lights and radio on while getting ready for work...", which was a true statement and consistent with my testimony. (I.O. Ex. 11 at 2; A.E. XXI). The police officer from the 2009 incident testified on the stand, no matter what a witness reports, it is protocol to check for injuries anyway and he did not notice any injuries after interviewing both the victim and I. (R. at 275-76). The officer stated he couldn't remember the incident even with the help of reviewing his report. (R. at 274).

In the 2012 incident, where I was convicted for covering the victim's mouth and nose, communicating a threat, and kidnapping by confining her in our bathroom, these allegations were not only investigated by civilian law enforcement and concluded I committed no crime therefore I was not subject to an arrest, but the government also investigated the incident and determined no crime occurred, therefore I was not punished nor charged. (see attachment #5 from February 2016 Clemency Memorandum). (A.E. XXII at 18). The state's attorney office was also notified and sought no action

(*Id*; R. at 262). Also note pertaining to the 2012 incident, a medical doctor for the Defense, Major Hampton, testified that according to the victim's testimony, she should have sustained injuries across her chest by the force she described I used to restrain her while allegedly covering her mouth and nose and that she never reported any such injuries across her chest. (R. at 533). The medical doctor also testified it would not "be unreasonable to associate [the bruise on K.A.'s arm] with finger pressure." (R at 529).

Again from the 2012 incident I was convicted for allegedly communicating a threat saying "I know how to kill you and blame it on PTSD". Again evidence and testimony will show this incident was also reported to and investigated by on the scene civilian law enforcement officials, along with the government and again due to there being no evidence I committed a crime, I was never arrested nor charged. (R. at 262,269). My testimony along with my medical records will reflect I have never been treated for or diagnosed with PTSD (see AFOSI Form 40 where my mental health records were obtained and state "there is no suspicion SUBJECT had mental health counseling").

The 2012 incident where I allegedly confined her in the bathroom for 45 minutes should have also been dismissed at trial. A text message I sent at 1700 later that day while in Saint Petersburg, Florida, which is an hour drive from the home we shared, also proved she was not confined in the bathroom at all. (R. at 411-13,419). We arrive to my house at 1600, incident occurs lasting no more than a few minutes, I leave immediately with my daughter and make the text message at 1700 when I arrive at Saint Petersburg, Florida. (R. at 421).

Again, her son testified he witnessed me assault the victim during the 2012 incident, but the child's father later testified the child admitted to his father prior to trial, the child *never* witnessed me assault the victim, and the child's testimony was impeached (R at 332).

From the 2012 incident, I was granted a protective order against the victim, for her assaulting me. (R. at 424). This proves my testimony was consistent and believable even in the language I used

from the text message months after the incident. My testimony is consistent that I only 'restrained' the victim from assaulting me.

Finally with the sexual assault charges. I testified I did not commit these offenses. (R. at 443). I have proved my testimony is consistent. Evidence will show in my testimony and police report weeks after the alleged sexual assault, the victim and I shared a bed as we were still married and living together. (R. at 446). Also testimony on a text message I sent her regarding sex almost a year prior to this alleged incident, I acknowledge that I complained of us only having sex "when she wanted to", proving I had no such history of forcing her to have sex. (*Id*). Also weeks later after the alleged sexual assault, we both testified to sharing a bed and I initiated sex (again I was naked in our shared bed as I always sleep naked). This testimony was also verified by the responding police officer. (AE XXII police report). (R. at 304-07). After I initiated sex that morning, she refused consent. There is no testimony from her or I that at this time, I forced her to have sex even after she said no to my advances. After she declined my offer, I got out of the bed, never forcing myself on her (*Id*).

Conclusion

I have proven the Government's response to the congressional inquiry from Congresswoman Roby was discovered after trial substantiating all three elements of *Scaff*. I have proven the victim perjured herself during the M.R.E. 412 hearing and that by reporting my crimes, the victim was attempting to preserve a sexual relationship with Mr. Madden because, at the time she reported my offenses, the relationship existed. Finally, I have proven the merits the Air Force Court of Criminal Appeals used to affirm my convictions (in light of all the pertinent evidence), should not be considered when deciding to grant me a new trial.

WHEREFORE, I respectfully request this Court accept and affirm this petition based on the evidence discovered after trial, and order a rehearing.

Signed on this 8th day of August 2017.

CLARENCE ANDERSON III, Major, USAF

MARTHA ROBY
2ND DISTRICT, ALABAMA

CANNON HOUSE OFFICE BUILDING
ROOM 442
WASHINGTON, DC
PHONE: (202) 225-2901

COMMITTEE:
APPROPRIATIONS

Congress of the United States

House of Representatives

Washington, DC 20515–0102

September 24, 2015

Lieutenant General Mark Nowland
Commander, 12th Air Force
United States Air Force
2915 S. 12th AF Drive, Suite 228
Davis-Monthan Air Force Base, Arizona 85707

Dear General Nowland:

I write regarding the matter of USAF Major Clarence Anderson who was convicted under the Uniform Code of Military Justice on 22 April 2015 and is now incarcerated at Naval Consolidated Brig Miramar.

Beatrice Anderson is Major Anderson's mother, a resident of Ozark, Alabama, and my constituent.

Mrs. Anderson strongly maintains her son's innocence, and appeared in person at my office in Washington to discuss her son's conviction and subsequent incarceration. My understanding, based on conversations with Mrs. Anderson and documents that she has provided, is that at a court martial convened on April 22, 2015 and Major Anderson was found guilty of sexual assault and a number of other related charges. My further understanding is that, under established procedure at the time of the alleged criminal acts, Major Anderson is afforded the opportunity to have his case reviewed by you, as the Convening Authority, and could later appeal his conviction to both the Air Force's Court of Criminal Appeals and the Court of Appeals for the Armed Forces.

According to Mrs. Anderson, new evidence has come to light in in the intervening period of time that could cast serious doubt on the veracity of testimony made during the trial. Further, according to Mrs. Anderson, she has physical evidence of witness tampering and has submitted that evidence to the defendant's counsel.

As you know, my responsibility is to represent my constituents, and one form of that representation is to serve as a conduit of information between citizens and their government. I have no personal knowledge of the merits of this matter, nor is it my intent to influence your decision making in any way. However, in the course of representing my constituent, I ask that you please:

1. Make note of my Congressional office's interest in this matter, and as appropriate provide this letter to all interested parties,

2. Consider the totality of all evidence now available, as presented by legal counsel, and use your best judgment when weighing the relative merits of that evidence in the full pursuit of justice,

3. Use appropriate channels to keep my office informed about the progress of this case, as consistent with all applicable laws and regulations and as deemed appropriate by you.

Thank you for your distinguished service to our country, and thank you in advance for your time and consideration of this matter.

Very truly yours,

Martha Roby

Martha Roby
Member of Congress

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330-1000

OFFICE OF THE SECRETARY

October 23, 2015

SAF/LL
1160 Air Force Pentagon
Washington, DC 20330

The Honorable Martha Roby
United States Representative
422 Cannon House Office Building
Washington, D.C. 20515

Dear Representative Roby:

Thank you for your letter to Lieutenant General Mark Nowland, Commander, 12th Air Force, regarding Major Clarence Anderson. Lt Gen Nowland's staff directed your letter to the Secretary of the Air Force Office of Legislative Liaison for consideration and appropriate response.

At the present time, Major Anderson's conviction and sentence are not yet final. Lieutenant General Nowland, the convening authority for Major Anderson's case, was made aware of a $10,000 payment to a witness who testified at a pre-trial hearing. Based on this post-trial information, Lieutenant General Nowland decided to delay signing the final action against Major Anderson and order a post-trial hearing as requested by Major Anderson's defense counsel. This 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.

Once the post-trial hearing is concluded, the record of trial from the hearing will be provided to Major Anderson. After receiving this information, Major Anderson will be given an opportunity to submit additional matters in clemency for Lieutenant General Nowland to consider before taking action on the findings and sentence.

We encourage Major Anderson to continue engaging with his defense counsel to seek redress for any perceived legal deficiencies in his case.

We trust this information is helpful.

Sincerely,

THOMAS W. BERGESON
Major General, USAF
Director, Legislative Liaison

STATE OF ALABAMA)

COUNTY OF DALE)

To all interested parties: Congresswoman Martha Roby provided me the Congressional Response from Major General Thomas W. Bergeson. I then mailed a copy of the Congressional Response from Major General Thomas W. Bergeson to my son, Major Clarence Anderson III, on or around April 2016, four months after the post-trial hearing.

Beatrice Anderson

BEATRICE Anderson

State of Alabama)
County of Dale)

Subscribed, Sworn To and Acknowledged before me this the 1st day of August, 2017.

Sara Elizabeth C. Matthews

Notary Public

My commission expires:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellee,* *v.* Major (O-4) **CLARENCE ANDERSON III,** United States Air Force, *Appellant.*	**PETITION FOR RECONSIDERATION** USCA Dkt. No. 17-0429/AF Crim. App. No. 39023 Filed on November 13, 2017

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Appellant personally requests this Court to reconsider its order dated 11 October 2017 (Attachment 1), denying his petition for a new trial, for the following reasons:

1. First, the appellant's previous Petition for a New Trial pursuant to Article 73 UCMJ, dated 8 August 2017 (Attachment 2), was filed erroneously by his former counsel, Mr. Brian Mizer. A Petition for a New Trial pursuant to Article 73 UCMJ can only be filed to TJAG pursuant to CAAF Rule 19 (f) and/or CAAF Rule 29. However, in this case, it was filed pursuant to Grostefon (Attachments 3 and 4) under CAAF Rule 21A and/or Rule 19 (a)(5)(C), rather than under CAAF Rule 29. In addition, the Petition for a New Trial exceeded the limit of 15 pages, was not filed within 30 days of the filing of the supplement, and was not filed in the correct form pursuant to CAAF Rule 21A (a-c). Moreover, counsel did not file a brief in support of appellant's Petition for a New Trial as required by CAAF Rule 29(c). Therefore, the appellant was prejudiced because his petition for a New Trial pursuant to Article 73 UCMJ, was filed erroneously, failed to comply with the Rules of this Court and may not have been considered by this Court on its merits.

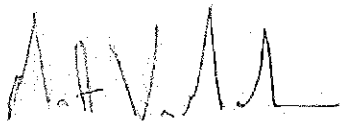
2. Additionally, because appellant was prejudiced by his former counsel for erroneously filing his Petition for a New Trial not pursuant to Article 73 UCMJ, CAAF Rule 19 (f), and CAAF Rule 29, he requests this Court conduct an inquiry into his former counsel, Mr. Brian Mizer, pursuant to CAAF Rule 15, for failing to comply with the Rules of this Court.

3. Lastly, appellant asks this court to reconsider its denial of his prior Petition for New Trial because his previous appellate counsel works for the Air Force and is a judge advocate in the U.S. Navy Reserves and as a result any Air Force or Navy counsel detailed to assist him likely has a conflict of interest. As a result, appellant requests a civilian appellate counsel be provided to him at no expense or an attorney be detailed from the Army's Appellate Defense Division.

Respectfully submitted,

CERTIFICATE OF FILING AND SERVICE

I hereby certify I filed a copy of the foregoing electronically with the Clerk of Court on November 13, 2017 and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.



Matthew D. Van Maasdam, Maj, USAF
Chief, Policy & Training
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20 November 2017

IN THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	) OPPOSITION TO APPELLANT'S) PETITION FOR) RECONSIDERATION
v.	)
	) Crim. App. No. 39023
Major (O-4) CLARENCE ANDERSON III, USAF, *Appellant.*	)) USCA Dkt. No. 17-0429/AF)

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Pursuant to Rule 31(b) of this Court's Rules of Practice and Procedure, the United States responds and opposes Appellant's Petition for Reconsideration. Appellant has failed to show why reconsideration is necessary in this Court's denial of his second petition for new trial.

First, Appellant claims he was prejudiced "because his petition for a New Trial pursuant to Article 73 UCMJ, was filed erroneously, failed to comply with the Rules of this Court and may not have been considered by this Court on its merits." (App. Pet. at 1.) Yet Appellant wholly fails to explain how the rule under which his Petition was filed in any way prejudiced this Court's review of his petition. Moreover, Appellant's ambiguous and speculative claim that this Court "may not" have considered his petition on the merits falters as well as he wholly

fails to show that this Court did not properly and judiciously review his petition before denying it.

Next, Appellant turns his sights on his former appellate counsel and requests that this Court "conduct an inquiry" into his former counsel's actions since Appellant was allegedly "prejudiced by his former counsel for erroneously filing his Petition for a New Trial . . . ." (Id.) Again, Appellant has failed to show how he has been prejudiced by any action of his former appellate defense counsel, let alone the way in which his counsel filed his latest petition for new trial. Notably, Appellant's former appellate counsel assisted Appellant in drafting and filing numerous motions, briefs, writs, and Appellant's first petition for new trial before the Air Force Court of Criminal Appeals (AFCCA). Moreover, Appellant's former counsel represented him before AFCCA during the oral argument in this case that focused on Appellant's first petition for new trial.

Before this Court, the extensive representation of Appellant's former appellate counsel continued before in the form of drafting and filing multiple motions, as well as a petition for review and its accompanying supplement. Appellant has unquestionably benefitted from his former appellate counsel's representation; while each of the issues and petitions raised by Appellant have ultimately failed, such is due to the lack of evidentiary support for those issues and petitions, not the advocacy by which Appellant's former counsel presented them.

Appellant has simply not been prejudiced in any fashion by the representation of his former appellate counsel, particularly with regard to the instant petition for new trial.

Finally, Appellant asks this Court to provided him with "a civilian appellate counsel . . . at no expense or an attorney detailed from the Army's Appellate Defense Division." (Id.) Again, Appellant fails to explain how his current representation by his newly-assigned Air Force military appellate defense counsel is insufficient. Moreover, he wholly fails to explain how such representation is "likely . . . a conflict of interest" due to his former appellate defense counsel's affiliation with the Air Force as a civilian attorney and the Navy as a reserve judge advocate. Such claims and requests should be easily dismissed.

Notably, Appellant does not even attempt to ask this Court to reconsider his petition based on the actual merits of said petition. Likely, this is because this second petition for new trial, an essential carbon copy of his first petition for new trial filed at AFCCA, was as equally unpersuasive to this Court as it was to AFCCA when AFCCA rightfully denied his first petition. Every claim and complaint Appellant raised in his second petition has been thoroughly examined and shown to warrant no relief. As such, reconsideration is unnecessary in this instance.

WHEREFORE, the United States respectfully requests this Honorable Court deny Appellant's Petition for Reconsideration.

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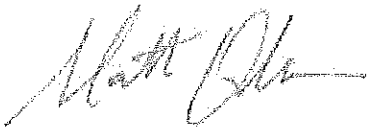
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and to the Appellate Defense Division on 20 November 2017.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellee,* *v.* Major (O-4) **CLARENCE ANDERSON III,** United States Air Force, *Appellant.*	**REPLY TO GOVERNMENT ANSWER TO PETITION FOR RECONSIDERATION** USCA Dkt. No. 17-0429/AF Crim. App. No. 39023 Filed on November 27, 2017

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Appellant personally requests this Court consider his reply to the Government's answer to his Petition for Reconsideration.

Pursuant to Rule 31(c) and 34 of this Court, the Appellant responds to the Government and wholeheartedly rejects its assertion that the merits of his petition for reconsideration are "ambiguous and speculative," that "[e]very claim and complaint Appellant raised in his second petition has been thoroughly examined and shown to warrant no relief," and "this second petition for new trial, [is] an essential carbon copy of his first petition for new trial filed to AFCCA." (Gov't. Response at 1 and 3).

The petition is neither frivolous nor speculative. The Government alleged that the appellant did not address any of the merits contained in his petition for a new trial. To address those merits, the appellant asks that this Court consider the following. First, it is a fact that Appellant's second petition for a new trial disclosed the Government withheld favorable discovery evidence of a congressional response pursuant to Article 46 UCMJ, 10 U.S.C. § 846, (as implemented by RCM 701-703, MRE 401 and MRE 402) and constituted a violation of its discovery obligations. *(Brady v.*

Maryland, 373 U.S. at 83, 87 (1963) (See also *Appellant's Second Petition for a New Trial at 5*). This issue was not brought up in Appellant's initial petition for a new trial. In fact, the Government will not find any previously filed assignment of errors brief, oral argument, or petition for a new trial to the Air Force Court of Criminal Appeals (AFCCA), nor will the Government find any previously filed extraordinary writ, or petition for review to this Court – alleging the Government withheld discovery. "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, 'irrespective' of the good faith or bad faith of the prosecution." (Id). This Court has gone even further and held that Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional rights to due process. *(United States v. Roberts,* 59, M.J. 327). (C.A.A.F. 2004). (citing *United States v. Hart,* 29, M.J. 407, 409-10). (C.M.A. 1990).

The Appellant's second petition for a new trial showed the Government stated in the congressional response, which was not provided as discovery evidence to the Appellant, the proper interpretation of RCM 1102, which grants the military judge authority to order a new trial during a post-trial Article 39(a) session, even after post- authentication of the record. (*see Appellant's Second Petition for a New Trial at 5*). The Government stated in the congressional response three months after the record was authenticated that "the military judge may rule on *any* motions the defense counsel submits" (to include a motion for a new trial). (*Id*). The Appellant should have been allowed to support his argument at trial by producing the Government's congressional response, and prove the law pursuant to RCM 1102(e), authorizes "that the military judge shall take such action as may be appropriate" and even order a new trial after authentication of the

record. This would have allowed the Appellant's trial defense team to counter the Government's argument at trial by showing that its assertion at trial was contradicted by the overall position of the Air Force as a whole. It is especially noteworthy that neither the Government nor the AFCCA, mention RCM 1102(e) in their justification to deny Appellant merited relief. The newly discovered evidence of the Government's congressional response conflicts with both the Government's novel argument made during the post-trial Article 39(a) session, and the AFCCA's ruling on this element of law, and could have been used to impeach the Government's case at trial. *Anderson v. United States*, 2017 CCA LEXIS 382 (A.F. Ct. Crim App. 2017). Therefore, the Government violated the Appellant's due process rights because it withheld evidence that is "exculpatory, substantive evidence, or evidence capable of impeaching the [G]overnment's case," and "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *(United States v. Behenna,* 71, M.J. 228, 238). (C.A.A.F. 2012).

Additionally, it is neither frivolous nor speculative t that Appellant's second petition for a new trial also disclosed the AFCCA erred in its decision that *U.S. v. Williams* (37 M.J. 352 (C.M.A. 1993) does not apply to the Appellant when it argued that "Unlike *Williams,* a newly convened court-martial in this case could not find or infer that by reporting Petitioner's crimes [the victim] was attempting to preserve a sexual relationship with [Mr. Madden] because, at the time she reported Petitioner's offenses, no such relationship existed." *Anderson v. United States*, 2017 CCA LEXIS 382 at 11 (A.F. Ct. Crim App. 2017). Because the Government was allowed to successfully argue the military judge's powers were limited at the post-trial Article 39(a) session because the record was previously authenticated, and subsequently also successfully argue for the military judge to deny the Appellant's request to prove perjury and obstruction pursuant to M.R.E. 412,

the Appellant was unlawfully prohibited from proving and/or 'inferring', the sexual nature between the alleged victim and Mr. Madden began before the victim made her sexual assault accusations against the Appellant. Evidence clearly shows the AFCCA ignored the police report from 14 September 2013, where the Appellant reports to the responding officer his belief that the alleged victim was having an affair with Mr. Madden. (AE XXII.) The responding officer also verified the Appellant's belief of the affair during her testimony at trial. (R. at 304). The Appellant's belief substantiated by the aforementioned police report of the affair, were affirmed before the alleged victim made her report to AFOSI and while she and the Appellant were still married and living together, thus fatally contests the AFCCA's decision that "at the time she reported Petitioner's offenses, no such relationship existed." *Anderson v. United States*, 2017 CCA LEXIS 382 at 11 (A.F. Ct. Crim App. 2017).

Further proof of the misapplication of *Williams* from the AFCCA is substantiated when it also blatantly ignored evidence that Mr. Madden admitted to the Appellant's mother on a recorded phone call after the Appellant's trial, that he was dating the alleged victim in August of 2013 (one month before the alleged victim made her report to AFOSI and while she was still married and living with the Appellant), which clearly proves Mr. Madden not only perjured himself during the MRE 412 hearing where both he and the alleged victim testified that they had a dating and sexual relationship around the time of her divorce from the Appellant in April or May of 2014, but again fatally contests the AFCCA's decision that "at the time she reported Petitioner's offenses, no such relationship existed." (*Id*). (R. at 95). (AE XXIX at 37).

Furthermore, it is not frivolous nor speculative but also fact Appellant is not arguing that his former appellate counsel did not effectively assist Appellant in "drafting and filing numerous

motions, briefs, writs," to the AFCCA or this Court. (Gov't Answer at 2). Appellant specifically argues his former appellate counsel did not provide effective assistance of counsel when filing Appellant's petition for a new trial pursuant to the rules of this Court. Effective assistance of counsel and due diligence is not one step in the process, but a continuum throughout. "A military accused is entitled to the effective assistance of counsel during pretrial stages, trial proceedings, and post-trial processing of the court- martial." (*United States v. Rivas*, 3 M.J. 282). (C.M.A. 1977).

It is indisputable as evidence clearly shows Appellant's former counsel did not adhere to the rules of this Court when he filed the Appellant's petition for a new trial pursuant to *Grostefon,* and that the Appellant was prejudiced as a result of this erroneous filing because his former counsel did not file a brief in support of the petition for a new trial or advise the Appellant of this Rule pursuant to 29(c). (*See Attachment 1*) (*see also Appellant's Second Petition for a New Trial at 1*). Appellant's former counsel even stated there are no rules for the accused to submit his own petition for a new trial. (*See Attachment 2*). However, RCM 1210(b) states "a petition for a new trial may be submitted by the accused personally," proving his counsel was ineffective and his actions prejudiced the Appellant.

The Appellant's former counsel and the Government wish the Appellant to speculate and accept the preposterous assumption that this Court would accept and review a petition for a new trial on its merits alleging a *Brady* violation but not submitted pursuant to its Rules, and that this Court (without a request from appellant) would waive the requirement to file a brief in support of the petition for a new trial, ruling in favor of the Appellant's petition on its merits, and never provide the Government an opportunity to contest the petition on its merits in an adversarial form. (*See Attachment 3*).

Appellant's former counsel even stated the Government does not have to respond to the petition for a new trial by stating "the government doesn't have to file a response" (*Id*). However, Rule 29(c) of this Court states "An appellee's answer 'shall be' filed no later than 30 days after the filing of an appellant's brief" further proving his former counsel was ineffective and did not fall within the range of competence.

Also noteworthy, the Appellant's former counsel even suspected this Court was going to deny Appellant's petition for a new trial for not following the rules of being timely filed "I suspect they were originally going to deny it for being untimely filed", but now expects Appellant to believe his petition for a new trial was thoroughly considered on its merits without following the rules which specifically state a brief in support of the petition for a new trial "will be filed" pursuant to Rule 29(c) of this Court. (*Id*).

The Sixth Amendment guarantees an accused the right to the effective assistance of counsel. (*United States v. Gooch*, 69, M.J. 353, 361). (C.A.A.F.2011) (citing *United States v. Gilley*, 56, M.J. 113, 124). (C.A.AF. 2001). To establish that his counsel was ineffective, appellant must satisfy the two-part test, "both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." (*United States v. Green*, 68, M.J 360, 361-362). (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687). (1984). It is evident that because the Appellant's petition was not filed pursuant to the rules of this Court, due process was impeded even preventing the Government from fairly responding to the accusations of withholding discovery (please note the government did not respond to Appellant's petition for a new trial but did respond to Appellant's petition for reconsideration as the latter was filed pursuant to this Court's rules), and ultimately prejudiced the Appellant from appropriately presenting these issues before this Court. This Court is a federal court of appeals, governed by federal judges appointed by the President of the United

States, and affirmed by members of the United States Senate, therefore the rules of this Court are not open for interpretation, they must be followed.

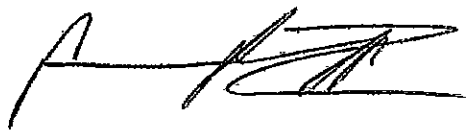
Furthermore, it appears the integrity of due process may be further compromised which warrants a deeper dive into these matters pursuant to Rule 15 of this Court. It is highly suspicious when the Appellant began to challenge the dubious nature of how his former counsel submitted his petition for a new trial on Tuesday, 10 Oct 2017 (after waiting almost two months on the status of the petition) (*See Attachments 4 and 5*), his former counsel responded later that day to the Appellant's challenge hinting that the petition would likely be "denied any day" (*See Attachment 1*). Suspiciously, the following day on Wednesday, 11 Oct 2017, Appellant's former counsel "suddenly" received word from this Court that Appellant's petition for a new trial was denied. (*See Attachments 3 and 6*) (*See also Court of Appeals for the Armed Forces decision on Petition for New Trial Pursuant to Article 73, Decided 11 Oct 2017*).

Finally, Appellant recognizes and understands this Court previously denied a petition for review in another case, but when additional evidence was presented, this Court reversed course and granted review of the case because of the merits of the new evidence. *(United States v. Keith E. Barry)*. (C.A.A.F. 2017). Likewise, the Appellant rejects the advice from his former counsel that he can only receive justice by way of "collateral attack/habeas corpus in U.S. District Court" (*See Attachment 3*), and prays in the interest of justice this Court also accept the merits of the new evidence in this case, and reject the Government's argument against merited relief. (Gov't. Response at 3).

Lastly, Appellant respectfully withdraws his request for civilian counsel or counsel from the Army's Appellate Defense Division, as the conflict of interest issues no longer exist as his newly assigned counsel works in a separate division not associated with the Appellate Defense

Division or the Government Appellate Division.

Respectfully submitted,



CLARENCE ANDERSON III

CERTIFICATE OF FILING AND SERVICE

I hereby certify I filed a copy of the foregoing electronically with the Clerk of Court on November 27, 2017 and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

Matthew D. Van Maasdam, Maj, USAF
Chief, Policy & Training
C.A.A.F. Bar No. 34619
AFLOA/JAJD
1500 W. Perimeter Road, Suite 1310
Joint Base Andrews, MD 20762
Office: (240) 612-4793

Attachment 1

From: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Sent: Tuesday, October 10, 2017 2:34 PM

To: Beatrice Anderson
Subject: RE: Update and CAAF Rule 29

Mrs. Anderson,

I apologize for the delayed response. Our office and the courts were closed yesterday. Today, I have been in court, and preparing for another full day of court tomorrow. I likely will not be able to speak with Clarence until tomorrow afternoon or Thursday. But the bottom line is there isn't much to discuss.

As I have relayed to both you and Clarence, his petition for new trial was filed on time. I have confirmed the court received it. There isn't a brief in support because Clarence's brief was incorporated into the petition pursuant to Grostefon. I expect the petition for new trial to be denied any day, and Clarence can then appeal his case to federal district court, where I hope a judge will give it the review his case deserves.

Very Respectfully,

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

Attachment 2

From: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Sent: Tuesday, October 10, 2017 7:55 PM
To: Beatrice Anderson
Subject: RE: [Non-DoD Source] Re: Update and CAAF Rule 29

Mrs. Anderson,

The Grostefon rules refer to direct appeal, and there is no rule pertaining to a Grostefon petition for new trial. I submitted it, and the Court accepted it, pursuant to Rule 29. Petitions for new trial are rare, and the rules really do not contemplate the filing of a Grostefon petition for new trial. Clarence can rest easy that, while we disagree with the outcome, the CAAF reviewed the merits of his case and there are no procedural defects in his pleadings submitted either by his attorneys or himself. I hope that helps.

Very Respectfully,

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

Attachment 3

From: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Sent: Wednesday, October 11, 2017 6:29 PM
To: Beatrice Anderson
Cc: Boomer, Jane E Col USAF AFLOA (US)
Subject: RE: [Non-DoD Source] Re: Update and CAAF Rule 29

Mrs. Anderson,

I tried calling Clarence's counselors at the brig for two hours this afternoon, to include on my drive home this evening, but the phone was either busy or just rang. You appear to be able to contact him much more easily than I, so I will write a brief explanation tonight. I will hopefully be able to reach Clarence tomorrow, and I will be in the office all morning.

I do not mean to discourage your from contacting Colonel Cordova. You have the same rights as any citizen to contact your government. However, you should not include our private/potentially privileged/attorney-client communications. He can share anything you send him with the government, to include U.S. Attorneys should Clarence pursue collateral attack in the future.

Clarence's petition was filed with TJAG pursuant to Article 73 in August, as Clarence and I have discussed on multiple occasions. TJAG fulfilled his obligation under Article 73, UCMJ, and forwarded the petition to CAAF. CAAF Rule 29, to the extent it is substantively relevant, was triggered. I have repeatedly told Clarence that the Court's clerk's office may have been confused by the pleading because it was delivered before the Court denied his direct appeal, but they didn't process it or review it until after direct appeal was denied. I suspect they were originally going to deny it for being untimely filed, but I insisted in multiple phone calls to the clerk's office that the Court consider it on its merits because it was timely filed pursuant to Article 73, UCMJ.

The government doesn't have to file a response. In fact, they did not file anything but a pro forma response to the attorney petition for new trial, which I filed earlier this summer. That is actually true of most pleadings filed even on direct appeal at CAAF. The government rarely responds to our requests asking the Court to review a case. As you can see from the order I forwarded earlier this evening, CAAF considered Clarence's Grostefon arguments on their merits, and denied them on their merits. Clarence's procedural concerns are not valid. Substantively, I could not ethically file the pleading Clarence drafted and I submitted to TJAG because any attorney would consider it to be frivolous. Put another way, no attorney would argue the Air Force's representation to a member of Congress regarding the general powers of a military judge conducting a post-trial Article 39a hearing has any legal significance whatsoever at either that hearing or on appeal. Grostefon permits Clarence to submit frivolous pleadings, but there is no procedural rule that operates to make them any more likely to succeed.

None of that is meant to say that I do not believe there has been a great injustice in Clarence's case. I sincerely believed CAAF would cure that error, but that obviously did not happen. I can speculate they did this because they may have believed the Air Force Court was wrong, but that it did not abuse its discretion, which is a high standard of review. However, nobody but the judges will ever know why they denied review because they don't have to offer an explanation.

With Clarence's direct appeal at an end, I can send the entire paper copy of the record of trial to you or Clarence's future counsel or designee. I would encourage Clarence to pursue collateral attack/habeas corpus in U.S. District Court. I hope that blatant perjury is enough to interest the federal, civilian judiciary. Unfortunately, I have no statutory authorization to participate in that process absent some nexus to an eventual hearing under the UCMJ. I hope you can find some measure of comfort in the fact that Clarence will soon be home with you, and I wish you all the best. As always, I stand ready to answer any remaining questions about Clarence's now-complete appeal.

Very Respectfully,

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

Attachment 4

-----Original Message-----
From: Beatrice Anderson
[Caution-Caution-Caution-Caution-Caution-mailto:beatriceanderson57@hotmail.com < Caution-Caution-Caution-Caution-Caution-mailto:beatriceanderson57@hotmail.com >]
Sent: Tuesday, October 10, 2017 10:40 AM
To: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Subject: [Non-DoD Source] Update and CAAF Rule 29

Mr. Mizer, I am very disappointed and baffled to say the least. I have tried to contact you and my son has tried to contact you with no luck. Could you give me any updates on what's going on and explain to me CAAF Rule 29?

According to CAAF Rule 29(a), If the TJAG has filed the 7 copies to the Clerks office at CAAF? Rule 29(b), If the Clerk at CAAF has notified all Counsel of the petition for a new trial? Finally in Rule 29(c), If a brief in support of his petition for a new trial has been submitted to CAAF?

Thanks and look forward to hearing from you.

Beatrice Anderson

Crime Victims' Right Advocate and Crime Victim

Attachment 5

Brian L. Mizer
Senior Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4773

-----Original Message-----
From: Beatrice Anderson [Caution-Caution-Caution-mailto:beatriceanderson57@hotmail.com < Caution-Caution-Caution-mailto:beatriceanderson57@hotmail.com >]
Sent: Tuesday, October 10, 2017 9:31 PM
To: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Subject: [Non-DoD Source] Re: Update and CAAF Rule 29

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Brian thanks for the prompt reply, but Clarence is confuse with what you told him about Grostefon.

According to Rule 21A, Grostefon shall be presented in a separate Appendix to the supplement not exceed, 15 pages. Clarence's petition for a new trial was submitted to the TJAG per Article 73 and was 21 pages long. Rule 21A states Grostefon issues raised within 30 days of the filing of the supplement under Rule 19 (a) (5) (C) are subject to and included within the 15 page limit in Rule 21A (a).

Clarence busted his Grostefon suspense because you filed his petition for review to CAAF on 6 June 2017, therefore his Grostefon was due no later then 6 July 2017.

When Clarence filed his petition for a new trial, he filed it on 16 August 2017, past the suspense of 6 July 2017.

If this is the case, Clarence file his petition for a new trial under Rule 29 and not under Rule 21A. Thanks and I look forward to your reply.

Beatrice Anderson

Crime Victims Right Advocate

and Crime Victim

Attachment 6

Sent: Wednesday, October 11, 2017 11:41 PM
To: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Cc: Boomer, Jane E Col USAF AFLOA (US) <jane.e.boomer.mil@mail.mil>
Subject: Re: [Non-DoD Source] Re: Update and CAAF Rule 29

Brian, I just talked to Clarence and he wishes to talk to both you and Col.
Boomer tomorrow morning at 0930 EST. Clarence feels it is highly suspicious for CAAF to deny his petition for a new trial pursuant to Article 73 the day he question how you erroneously filed his petition for a new trail directly to CAAF and not the TJAG pursuant to Article 73 and Rule 29. Clarence feels that this warrants an IAC complaint and would like to speak to Col. Boomer or anyone else who can provide him counsel to file the IAC complaint. After the IAC complaint is filed Clarence wants to file a petition for a new trial with the new counsel Col. Boomer will provide to him. Good Luck to You and Thanks for all your help in highlighting all of the injustices Clarence has received.

Beatrice Anderson
Crime Victims' Right Advocate and Crime Victim

From: Mizer, Brian L CIV (US) <brian.l.mizer.civ@mail.mil>
Sent: Wednesday, October 11, 2017 6:29:59 PM
To: Beatrice Anderson
Cc: Boomer, Jane E Col USAF AFLOA (US)
Subject: RE: [Non-DoD Source] Re: Update and CAAF Rule 29

Mrs. Anderson,

I tried calling Clarence's counselors at the brig for two hours this afternoon, to include on my drive home this evening, but the phone was either busy or just rang. You appear to be able to contact him much more easily than I, so I will write a brief explanation tonight. I will hopefully be able to reach Clarence tomorrow, and I will be in the office all morning.

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