EB | SRV

December 27, 2023

MEMORANDUM FOR UNITED STATES COURT OF APPEALS FOR THE 4TH CIRCUIT

FROM: CLARENCE ANDERSON III (PETITIONER)

SUBJECT: Informal Brief

FILE NUMBER: 23-2266

Declaration of Inmate Filing:

1. There is no declaration as the Petitioner is not an inmate.

Jurisdiction:

2. This review is sought from the United States Fourth District Court for the Eastern District of Virginia. The date for the order for which review is sought is October 3, 2023.

Issues for Review:

3. The issues the Petitioner requests for review are the following:

Issue 1. Did the District Court's October 3, 2023, order, err, and contradict its February 27, 2020, order, whereas the February 2020 order concluded that the Petitioner never submitted evidence of a recorded phone call at *any* time during his military appeals? On page two of the October 2023 order, the District Court "has again reviewed this case in detail in order to determine whether the Court did, in fact, err, and if so, what would be the appropriate remedy." The District Court ultimately affirmed its February 2020 ruling. Now over three years later, with the Petitioner's case having made its way through the halls of the White House, the District Court is now attempting to gaslight it's February 2020 ruling. On page four of the October 2023 order, the District Court stated, [it] "did not find that the evidence of the phone call had not been presented, as Petitioner contends in the Motion. Rather the Court found that the Petitioner had not raised or argued the specific claim to the *Air Force Court of Criminal Appeals* that Petitioner has advanced in this civil action."

The Petitioner argues as allegations have recently surfaced that the US Attorney's office in the Eastern District of Virginia, willfully misrepresented as fact to the District Court that the Petitioner never submitted evidence of the recorded call at *any* time during his military appeals; the District Court may be attempting to provide cover for unethical and maybe even unlawful conduct from the US Attorney's office in the Eastern District of Virginia.

Supporting Facts and Argument. In the District Court's February 27, 2020, order, it stated as the sole purpose to not reverse the Petitioner's court martial conviction is due to the Petitioner

never submitted evidence of the recorded phone call to *any* military tribunal, and not because the Petitioner failed to submit the evidence only to the Air Force Court of Criminal Appeals, as it is now stating in its October 3, 2023, order at 4.

In fact, in that February 2020 order, the District Court specifically said, "*Not until Petitioner's Mandamus Action ... and subsequently, this action–did he specifically allege as the basis for his relief that he had not been given the opportunity to present evidence that the relationship began before the reported sexual assault, evidence which was never considered by any military tribunal because Petitioner never presented it.*" *Anderson v. Donovan, et. al, E.D. Va. Adm. 16 (2020).* Additionally, the District Court stated in its February 2020 order that the Petitioner "*never presented within the military proceedings his specific claim advanced here as the basis for relief–that K.A.'s relationship with J.M. pre-dated K.A.'s accusations against him. Petitioner was not prevented from presenting that claim for consideration and cannot now claim that he was denied 'full and fair consideration' with respect to K.A.'s relationship with J.M. based on evidence and contentions he never presented to the military courts.*" [Italics for emphasis]. (*Id*).

The District Court received this erroneous and false claim from the US Attorney's office who argued at Court and in several briefings, that the Petitioner never presented the phone call during his military appeals. For example, in the Respondent's memorandum in opposition to Petitioner's third motion for reconsideration, filed on August 13, 2021, counsel for the US Attorney argued at page 11 of that brief, "And of course, the inverse is also true, if a ground for relief was not raised in the military courts, then the district court must deem the ground forfeited. *Lips v. Commandant*, US Disciplinary Barracks, 997 F.2d 808, 812 (10th Cir. 1993). Here, the Petitioner cannot meet his burden to show that his asserted error was not given 'full and fair' consideration. As this Court correctly held, Petitioner failed to raise the allegation that his ex-wife's ('K.A.') relationship with another man ('J.M.') began *prior* to K.A.'s report to the sexual assault in mid-September 2013 – and thus, his position that she perjured herself – as an issue in either of his requests for post-trial Article 39(a) hearings, on direct appeal to the AFCCA, or the CAAF."

To be clear, the Petitioner DID submit this exculpatory evidence to military tribunals for relief, as proved in his Motion(s) for Reconsideration dated April 7, 2020, and July 6, 2020, respectively, to include in his response to the Respondent's Opposition to His Motion for Reconsideration dated August 25, 2021, that he did submit this evidence for relief to military tribunals a total of six times, to include seven months after discovery.

The District Court in its October 3, 2023, order, is now attempting to move the legal goalpost on matters of fact. In February 2020, it ruled the Petitioner never presented evidence of the recorded call at *any* time during his military appeals which simply is not true, as the Petitioner proved he presented the evidence at his Article 39(a) hearing, and on direct appeal to the CAAF and the Judge Advocate General of the Air Force, with the latter two being part of the military appeals process. Now as the upcoming Presidential election is looming, where it has become public record that the Petitioner has ties to the former President as he was offered a pardon that he declined instead requesting a new trial, it appears the District Court is attempting to rewrite history to avoid almost certain scrutiny from the Executive Branch, if the former President wins the election in 2024.

The Petitioner's theory is certainly not frivolous especially when you consider the response time from the District Court to the Petitioner's second pro se letter, as referenced in the District Court's October 3, 2023, order at 1. The District Court on average took two to three months to respond to the Petitioner, in some instances only a matter of weeks even in the middle of a pandemic. However, in this instance, in July of 2022, this Court denied the Petitioner's second appeal because he ultimately failed to timely file his first appeal. The following month in August of 2022, the Petitioner wrote the aforementioned second letter to the District Court requesting it to fix the mistake "on its own" pursuant to the language in Rule 60(a). The District Court had no legal obligation to respond to the Petitioner's request, but well over a year, after allegations surfaced that the US Attorney's office for the Eastern District of Virginia may have acted unethically and unlawfully in defending the United States Air Force in this case, and that the Petitioner has ties to the former President, the District Court all of a sudden decides to respond with a half-baked analysis at best, contradicting its initial ruling--should give this Court pause.

At the time of the Petitioner's trial in April 2015, 10 USC § 873 (Article 73 UCMJ), as implemented by RCM 1210[1], allowed plaintiffs to submit newly discovered evidence after trial, to their respective Judge Advocate General. The law specifically said:

"*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.*"

In the Petitioner's case, his convening authority approved his court martial sentence on March 10, 2016, which meant he had until March 10, 2018, to submit the newly discovered evidence of the recorded phone call to the Judge Advocate General, where J.M. admitted to his mother of a pre-exiting relationship with his wife (K.A.) in May 2015, one month after the Petitioner's trial. CAAF denied review of his case in November of 2017, thus there was no pending court for the Judge Advocate General to defer the matter. In the Petitioner's first motion for reconsideration to the District Court at 7, he proved he petitioned the Judge Advocate General, pursuant to Article 73 UCMJ, with this newly discovered evidence of the recorded phone call, where J.M. admitted to his mother of a pre-existing relationship with his wife (K.A.) on February 20, 2018, approximately one month before the law expired. On that recorded call with the Petitioner's mother, J.M. admitted to a pre-existing relationship a month before K.A. made accusations against the Petitioner. The District Court in its October 2023 order on page 3 references this motion to the Judge Advocate General.

The law at 10 USC § 873 (Article 73 UCMJ), did not require the Petitioner to submit newly discovered evidence of the recorded phone call to the Air Force Court of Criminal Appeals, as the District Court suggests on page 4 of their October 2023 order. The law specifically stated "At any time…" which is what the Petitioner did. The Petitioner first introduced evidence of the

[1] This rule reference can be found in the 2012 Court Martial Manual which was in effect during the Petitioner's trial in April 2015.

transcript of that recorded phone call (a 50-page document), as Appellate Exhibit XXIX at the actual post-trial Article 39(a), but the military judge forbade the Petitioner from developing the contents of that evidence. This was a legal matter the Petitioner raised in his lawsuit to the District Court, and the District Court refused to opine on the matter.

On appeals the Petitioner first legally raised the issue of the newly discovered evidence of the recorded phone call to the Court of Appeals of the Armed Forces (CAAF), which he presented in his first motion for reconsideration to the District Court at 6. CAAF decided not to hear the issue, which meant the matter was unresolved. After CAAF refused to hear the matter, the Petitioner finally submitted it the Judge Advocate General pursuant to the law in February 2018.

In its October 2023 order on page 4, the District Court cites a ruling from the Air Force Court of Criminal Appeals, that only considered testimony allowed at the Article 39(a) post-trial hearing, but that testimony did not include what J.M. told the Petitioner's mother at Appellate Exhibit XXIX, because the military judge unlawfully prohibited that evidence from being developed at trial. The evidence the District Court cites in its October 2023 order, is when J.M. testified that his relationship with K.A. began around November of 2013, and not what J.M. admitted to on the recorded call with the Petitioner's mother, which was his relationship with K.A. began in August of 2013, one month before K.A. made accusations against the Petitioner.

To be clear, in February 2020, the District Court ruled the Petitioner *never* at any time, submitted evidence of the recorded phone call between J.M. and the Petitioner's mother to any military tribunal, where J.M admitted to a pre-existing relationship that began in August 2013, approximately one month before the Petitioner's wife (K.A.) made accusations against the Petitioner. This sole decision is why the District Court did not reverse the Petitioner's military conviction. Now in its October 2023 order, the District Court has shifted its position, defining *never* to not mean tribunal authorities such as the Court of Appeals of the Armed Forces or the Judge Advocate General (which the Petitioner lawfully submitted the evidence to), but the District Court's new definition of *never* now means *only* the Air Force Court of Criminal Appeals, never citing any military law that mandated the Petitioner had to submit the newly discovered evidence to the Air Force Court of Criminal Appeals.

The Petitioner is simply requesting this Court to either correct the lower Court's ruling in February 2020, showing that the Petitioner did submit this exculpatory evidence during his military appeals, or order the District Court to correct it.

Issue 2. Does the aforementioned conduct from the District Court and or the US Attorney's Office in the Eastern District of Virginia highlighted at Issue #1, justify potential new case law that allows a Federal Court to use Federal Rule 60(a), to reverse the Petitioner's conviction, or order a new trial, as an appropriate remedy per the District Court's language in its October 2023 order at page 2?

Supporting Facts and Argument. The District Court cited at page two of its October 2023 order, *Sartin v. McNair Law Firm PA*, 756F.3d 259, 265 (4th COA 2014) to justify that Rule 60(a) "[does] not allow a court to reconsider underlying substantive issues." This Court did further say in that ruling, "Rule 60(a) is not confined just to fixing typographical and other

clerical errors. The Rule's text also authorizes a court to correct 'a mistake arising from oversight or omission.' Such a mistake occurs when there is an inconsistency between text of an order or judgement and the district court's intent when it entered the order or judgment. A 'mistake arising from oversight or omission' also includes an unintended ambiguity that obfuscates the court's original intent."

In February 2020, the District Court ruled the Petitioner *never* at any time, submitted evidence of the recorded phone call between J.M. and the Petitioner's mother to *any* military tribunal, where J.M admitted to a pre-existing relationship that began in August 2013, approximately one month before the Petitioner's wife (K.A.) made accusations against the Petitioner. This sole factual error from the District Court, is the only reason it did not reverse the Petitioner's military conviction. Now in its October 2023 order, the District Court has shifted its position, defining *never* to not mean tribunal authorities such as the Court of Appeals of the Armed Forces or the Judge Advocate General (which the Petitioner lawfully submitted the evidence to), but the District Court's new definition of *never* now means *only* the Air Force Court of Criminal Appeals, never citing any military law that mandated the Petitioner had to submit the newly discovered evidence to the Air Force Court of Criminal Appeals.

This Court must analyze the District Court's intent in its February 2020 order. The District Court was evaluating the Full and Fair consideration analysis, that allows the Federal Court to determine if it can intervene and correct a fundamental error within the military's criminal justice system. The District Court's intent was that if the Petitioner did not present evidence to any military tribunal of the recorded phone call where J.M. told his mother that he was in a pre-existing relationship with K.A. in August 2013, one month prior to K.A.'s accusations against the Petitioner, then the military criminal justice system provided Full and Fair consideration to the Petitioner thus his claims should be dismissed. Now the District Court in its October 2023 order, has obfuscated its intent, and this Court must make it right in the interest of justice.

This Court must also evaluate the role of the US Attorney's office in the matter to determine if it's conduct should warrant new case law for Federal Rule 60(a) to correct a factual error, if the law doesn't already allow it. Rule 4.1 *Truthfulness in Statement to Others-Comment* from the Americanbar.org states:

"A lawyer is required to be truthful when dealing with others on a client's behalf. A misrepresentation can occur if the lawyer incorporates or 'affirms' a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

The Department of Justice who employs the US Attorney's office for the 4th Federal District of Virginia states under its Standards of Conduct:

"*Compliance with Government ethics rules and rules of professional conduct supports the credibility of and faith in government decisions and promotes the common good.*"

Which is exactly the issue here, the credibility of decisions from the District Court, that were unethically influenced by misrepresentations from the US Attorney's office with a duty to be truthful.

From the Cornell School online search *stare decisis* is the common law principle that requires courts to follow precedents set forth by other courts. Under *stare decisis*, courts are obliged to follow some precedents, but not others. *Id.* In fact, in all the case law provided by the 4th District to bar it from exercising Rule 60(a) per the Petitioner's request, none of those cases were decided due to misrepresentations or fraud from the US Attorney's office in those decisions, thus this Court has the authority and should consider the Petitioner's case as new law, in order to grant him his merited relief.

As the Supreme Court stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008), "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw a reasonable inference that the defendant is liable for the conduct alleged."

Relief Requested:

1. To modify the District Court's previous order, to show that the Petitioner did submit the exculpatory evidence of the recorded phone call, where J.A. admitted to the Petitioner's mother that he was in a pre-existing relationship with K.A. one month prior to K.A.'s accusations against the Petitioner.

2. Use Petitioner's case as new case law, to justify using Federal Rule 60(a) to modify the lower court's decision and set aside the Petitioner's conviction with prejudice or order him a new trial, due to the fundamental errors in his case.

3. Restore the Petitioner to the rank of Major and award him all rights, benefits, and privileges, to include awarding of attorney fees IAW 5 USC § 504.

4. Grant such other relief this Court believes is appropriate.

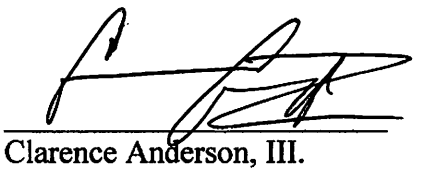
Prior Appeals:

The Appellant has filed two appeals to this Court. The first, Anderson v. Rockwell, et al., No. 20-1972, was dismissed for being untimely filed. The second, Anderson v. Rockwell, et al., No. 22-1126, was also dismissed because this Court ruled the Appellant cannot use a Motion for Reconsideration to reopen a case, when he could have appealed but failed to do so citing *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (en banc) (stating standard of review).

FORM OF AFFIDAVIT

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

WHEREFORE, I, Clarence Anderson, III, the Petitioner, respectfully request that this Court accept this Informal Brief.



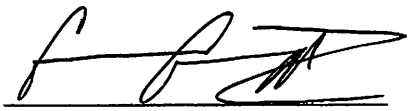
Clarence Anderson, III.
Pro Se Petitioner
1125 S Hwy 123
Ozark, AL 36360

Clarence Anderson III
Printed Name

CERTIFICATE OF SERVICE

I certify that on December 27,2023, I served a copy of this Informal Brief on all parties, addressed as shown below:

Matthew J. Mezger
OFFICE OF THE UNITED STATES ATTORNEY
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, VA 22314-5194



Signature

ORITY
IAIL
PRESS®

T RATE
ELOPE
■ ANY WEIGHT

ule free Package Pickup,
can the QR code.

S.COM/PICKUP

S10001000006

EP13F July 2022

UNITED STATES POSTAL SERVICE®

PRIORITY MAIL EXPRESS®

EI 931 865 103 US

CUSTOMER USE ONLY

FROM: (PLEASE PRINT) PHONE ( ) _____

Clarence Anderson III
1125 S Hwy 123
Ozark, AL 36360

DELIVERY OPTIONS (Customer Use Only)

☐ **SIGNATURE REQUIRED** *Note:* The mailer must check the "Signature Required" box if the mailer: 1) Requires the addressee's signature; OR 2) Purchases additional insurance; OR 3) Purchases COD service; OR 4) Purchases Return Receipt service. If the box is not checked, the Postal Service will leave the item in the addressee's mail receptacle or other secure location without attempting to obtain the addressee's signature on delivery.

Delivery Options

☐ No Saturday Delivery (delivered next business day)
☐ Sunday/Holiday Delivery Required (additional fee, where available*)
*Refer to USPS.com® or local Post Office™ for availability.

TO: (PLEASE PRINT) PHONE ( ) _____

Clerk
US Court of Appeals, Fourth Circuit
1100 East Main St, 5th Floor
Richmond, VA
ZIP + 4® (U.S. ADDRESSES ONLY)
23219-____

■ **For pickup or USPS Tracking™, visit USPS.com or call 800-222-1811.**
■ **$100.00 insurance included.**

PEEL FROM THIS CORNER

PAYMENT BY ACCOUNT (if applicable)
Federal Agency Acct. No. or Postal Service™ Acct. No.

ORIGIN (POSTAL SERVICE USE ONLY)

☑ 1-Day ☐ 2-Day ☐ Military ☐ DPO

PO ZIP Code	Scheduled Delivery Date (MM/DD/YY)	Postage
36360	12-28-23	$ 28.25

Date Accepted (MM/DD/YY)	Scheduled Delivery Time	Insurance Fee	COD Fee
12-27-23	3:00 PM	$	$

Time Accepted		Return Receipt Fee	Live Animal Transportation Fee
1:15 ☐ AM ☑ PM		$	$

Special Handling/Fragile	Sunday/Holiday Premium Fee	Total Postage & Fees
$	$	$ 28.25

Weight	☑ Flat Rate	Acceptance Employee Initials
lbs. ozs.		

DELIVERY (POSTAL SERVICE USE ONLY)

Delivery Attempt (MM/DD/YY)	Time	Employee Signature
	☐ AM ☐ PM	
Delivery Attempt (MM/DD/YY)	Time	Employee Signature
	☐ AM ☐ PM	

LABEL 11-B, NOVEMBER 2023 PSN 7690-02-000-9996

UNITED STATES POSTAL SERVICE®