

UNITED STATES)
Appellee,)
))
v.) **PETITION FOR NEW TRIAL**
))
Major (O-4))
CLARENCE ANDERSON III,)
United States Air Force,)
))
Petitioner.) 20 February 2018

**TO THE HONORABLE, THE JUDGE ADVOCATE GENERAL OF
THE UNITED STATES AIR FORCE:**

COMES NOW Petitioner, Major (Maj) Clarence Anderson III, who, hereby personally files this petition with the Judge Advocate General of the United States Air Force for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873 (2016); Rule for Courts-Martial (R.C.M.) 1210; and Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, Chapter 10, Section 10E (8 December 2017).

Pursuant to R.C.M. 1210(c)(1)-(9), Petitioner provides the following information:

1. Name, service number, and current address of the accused: Clarence Anderson III, [REDACTED]
[REDACTED]
2. Date and location of the trial: 20 April 2015 through 22 April 2015; Holloman AFB, NM;
A post-trial Article 39(a) session was held on 14 December 2015 at Holloman AFB, NM.
3. Type of court-martial and the title or position of the convening authority: General court-martial convened by Headquarters, Twelfth Air Force (Air Combat Command).
4. Request for the new trial: Petitioner hereby requests a new trial as to the findings of guilty for one charge and one specification of sexual assault and one specification of abusive sexual

contact; one charge and two specifications of assault consummated by a battery; one charge and one specification of communicating a threat and one specification of kidnapping.

5. The sentence as approved: A Military Judge sitting alone sentenced Petitioner to confinement for forty-two months, and a dismissal. On 10 March 2016, the convening authority approved the adjudged sentence.

6. A brief description of any finding or sentence believed to be unjust: Petitioner submits the finding of guilty for the charges and specifications listed in Paragraph 4 above and the entire sentence must be set aside.

7. A full statement of the newly discovered evidence which is relied upon for the remedy sought: The victim in each of these charges and specifications was K.A., the Petitioner's ex-wife. K.A. was the Prosecution's main witness as no physical evidence was presented to support the convictions. The only purported eye-witness was K.A.'s son, C.B. However, C.B.'s testimony was impeached as it was revealed C.B. had told his father, M.B., prior to trial that he had not witnessed any assaults (R. at 332, 338). An issue at trial was when K.A. started a romantic relationship with J.M. and whether that relationship provided her with a motive to fabricate her allegations against the Petitioner. After a closed M.R.E. 412 hearing at trial, the defense was ultimately precluded from presenting evidence of their relationship as the judge concluded that the evidence showed K.A. and J.M. started their relationship approximately 6-8 months after K.A. made her allegations in September 2013 and was therefore not relevant or material to the case. However, after trial concluded, new evidence was discovered from a recorded phone conversation between J.M. and the Petitioner's mother, Ms. Beatrice Anderson. First, the defense learned K.A.'s mother had paid J.M. at least \$10,000 prior to his testimony at trial regarding his relationship with K.A. Second, J.M.

admitted to Petitioner's mother that J.M.'s relationship with K.A. started in August 2013, a month prior to K.A.'s sexual assault allegations and while K.A. was still married and living with Petitioner. (A.E. XXIX at 37).

On 24 September 2015, Congresswoman Martha Roby submitted a Congressional Inquiry to Lieutenant General Mark Nowland regarding evidence showing potential witness tampering in the Petitioner's trial. *See Attachment 1*. On 23 October 2015, the Government responded affirming a post-trial hearing would be held to evaluate the evidence of witness tampering. *See Attachment 2*.

On 14 December 2015, the military judge held a post-trial Article 39(a) session ordered by the Convening Authority to investigate the circumstances surrounding a \$10,000 payment made to J.M. by K.A.'s mother prior to J.M.'s testimony at the Petitioner's court-martial. During the post-trial session, it was discovered that K.A.'s mother actually paid J.M. \$100,000 prior to his testimony, not \$10,000. This was also considered a gift, not a loan (R. at 747). In addition, at the post-trial hearing, J.M. testified that his romantic relationship with K.A. started as early as November 2013--different than what he had told Petitioner's mother, but still much closer in time to when K.A. made the allegations in September 2013. At the conclusion of the post-trial session, Petitioner's trial defense team requested an additional M.R.E. 412 closed session to explore K.A.'s relationship with J.M. In addition, the defense team requested a new trial based on (1) the newly discovered evidence of a \$100,000 payment from K.A.'s mother to J.M.; (2) new evidence that K.A. had a relationship with J.M. at the time she made the allegations against the Petitioner; and (3) K.A. and J.M. having committed perjury in the previous court-martial when they said their relationship began in April or May of 2014.

The military judge refused to hold a closed M.R.E. 412 hearing (R. at 765; 786-87) and ruled that he would “not entertain follow-on motions or subsequent motions as part of this post-trial Article 39(a) session because that was “outside the scope of [that] post-trial Article 39(a) session.” (R. at 806-807). Instead, the judge directed the defense to file a second request for a new post-trial Article 39(a) with the convening authority to address their motion for a new trial and the issues relating to M.R.E 412 and perjury. (*Id.*) On 23 February 2016, the Convening Authority denied the Petitioner’s request for a second post-trial Article 39(a) session.

The Petitioner asserts that J.M.’s statement to his mother proves that his relationship with K.A. started before K.A. made allegations against the Petitioner. In addition, the Petitioner also argues the military judge’s conclusion that he was precluded from considering the defense motions at the post-trial session was erroneous. While R.C.M. 1102(b)(2) limits the authority of a military judge to *order* a post-trial Article 39(a) session before authentication of the record of trial, R.C.M. 1102(e) permits and requires a military judge to take appropriate action in an Article 39(a) session once it is ordered. Prior case law also supports the position that Article 39(a) authorizes military judges to order new trials. *U.S. v. Webb*, 66 M.J. 89, 91 (C.A.A.F. 2008); *U.S. v. Scaff*, 29 M.J. 60 (C.M.A. 1989). Although these cases dealt with a military judge’s decision to grant a new trial prior to authentication, Article 39(a) makes no distinction on the authority of a military judge to order a new trial during a post-trial 39(a) hearing that takes place before or after authentication of the record. In short, there is nothing limiting a judge’s ability to take remedial action once such a hearing is ordered.

Petitioner personally argues that new evidence obtained by the Petitioner after his trial from Major General Thomas W. Bergeson, Secretary of the Air Force Legislative Liaison Office,

also supports this position. In a response to a Congressional inquiry from Congresswoman Martha Roby regarding the Petitioner's court-martial, the Petitioner personally argues the Air Force stated (via Maj Gen Bergeson) that the military judge would be able to "rule on any motions the defense counsel submits." This response was dated 23 October 2015, two months prior to the Petitioner's post-trial Article 39(a) session and three months after the record of trial was authenticated. *See Attachment 2*. However, this document was never provided to the Petitioner's defense team by the Air Force but rather was sent by Congresswoman Roby's office to Petitioner's mother four months after the post-trial hearing. *See Attachment 3*.

The Petitioner personally asserts that failure to provide this evidence to his defense team constituted a violation of the Government's discovery obligations. "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." *Brady v. Maryland*, 373 U.S. at 83, 87 (1963). C.A.A.F. 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). As a result, Petitioner personally argues he was prejudiced because the discovery violation prevented his defense team from thoroughly confronting the military judge and the Prosecution's position that the military judge lacked the authority to consider the defense team's motions.

Evidence of (1) K.A. and J.M. starting their relationship before K.A. made the allegations; (2) K.A.'s mother paying J.M. \$100,000 prior to his testimony at Petitioner's trial; and (3) the Air Force (via Maj Gen Bergeson in a memo not presented to the Petitioner's defense team by

the Government) asserting the military judge could have ruled on any motions submitted by the Petitioner's defense team in the post-trial Article 39(a) session were all discovered by the Petitioner after trial and could not have been discovered by the Petitioner or his defense team prior to trial.

Moreover, had these pieces of evidence been considered by the Petitioner's court-martial, the Petitioner argues it probably would have produced a substantially more favorable result for the Petitioner. In this case, K.A. made her allegations in September of 2013 after the Petitioner accused K.A. of having an extramarital affair (A.E. XXII at 3). As a result, given that new evidence shows the victim was not truthful about her relationship with J.M., a newly convened court-martial might reasonably infer K.A.'s relationship started even earlier than she eventually copped to (especially in light of J.M.'s statements to the Petitioner's mother) and that she fabricated the sexual assault allegation against the Petitioner to further that relationship and to ensure Petitioner did not gain full custody of their daughter. *Anderson*, 2017 CCA LEXIS 382, at *11. This is further supported by K.A.'s demonstrated support for a potential resignation-in-lieu-of court-martial that she offered to support if the Petitioner gave up his quest for full custody of their daughter, as cited in Petitioner's clemency submission to the Convening Authority. (Defense Clemency Submission dtd 24 Sep. 2015 at 116).

In addition to being critical to Petitioner's ability to properly cross-examine K.A. during the findings portion of his trial, evidence of her earlier relationship with J.M. warrants a new trial because it likely would have produced a more favorable result even at sentencing. The standard for a new trial requires a showing that newly discovered evidence would likely produce a substantially favorable result at a new trial. However, this is not limited to just findings, but applies to sentencing as well. In her testimony during sentencing, K.A 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). The military judge considered this information when determining the appropriate sentence. (R. at 600). Based upon the evidence discovered after trial that showed K.A. apparently had little difficulty starting a relationship with J.M., Petitioner’s defense team should have had the opportunity to demonstrate there was less victim impact than K.A. conveyed to the military judge.

Lastly, the evidence of the \$100,000 payment to J.M. would have highlighted J.M.’s bias and would have shown the lengths at which K.A. and her family went to manipulate the evidence and testimony in K.A.s favor. As a result of all of the newly discovered evidence, the fact that the new discovered evidence probably would have led to a different and more favorable result for the Petitioner had it been available at trial, and the negative public perceptions this case has garnered on overall fairness of the military justice system, a new trial is warranted.

8. Affidavits pertinent to the matters in RCM 1210(c)(6): Relevant testimony and evidence presented during the various phases of the Petitioner’s court-martial are identified above with citations to the record of trial. Additionally, attached to this petition for a new trial is another affidavit from Ms. Beatrice Anderson, authenticating the date she received the response sent from Maj Gen Bergeson to Congresswoman Roby. *See Attachment 3.*

9. Affidavits of each person expected to be a witness in the event of a new trial: Relevant affidavits are included as described above.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 15 February 2018.



CLARENCE ANDERSON III

3 Attachments:

1. Congressional Inquiry from Congresswoman Martha Roby, dated 24 September 2015
2. Air Force Response to Congressional Inquiry, dated 23 October 2015
3. Affidavit from Ms. Beatrice Anderson, dated 1 August 2017

CERTIFICATE OF FILING AND SERVICE

I certify that I caused the original and two copies of the foregoing to be served on AFLOA/JAJM pursuant to AFI 51-201, paragraph 10.12.1, on 20 February 2018. I respectfully request that a copy of any orders submitted to the Petitioner also be submitted to me at the address listed below.

Respectfully submitted,



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

MARTHA ROBY
2ND DISTRICT, ALABAMA

CANNON HOUSE OFFICE BUILDING
ROOM 442
WASHINGTON, DC
PHONE: (202) 226-2801

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.

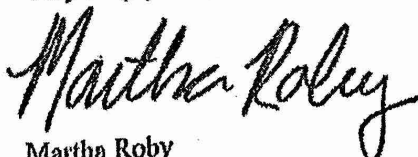
According to Mrs. Anderson, new evidence has come to light in the intervening period of time that could cast serious doubt on the veracity of testimony made during the trial. Further, according to Mrs. Anderson, she has physical evidence of witness tampering and has submitted that evidence to the defendant's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

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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,

A handwritten signature in black ink, appearing to read "Thomas W. Bergeson", is written over a large, stylized signature graphic.

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:

