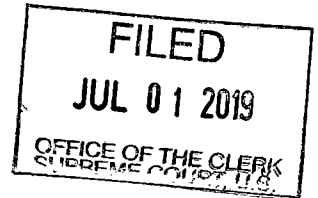


19-5256  
No.

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

Cadet 1/c Anthony Livingstone — PETITIONER  
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals of the Armed Forces  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony Joseph Livingstone  
(Your Name)

P.O. Box 452136  
(Address)

San Diego, CA 92145-2136  
(City, State, Zip Code)

n/a  
(Phone Number)

### **QUESTIONS(S) PRESENTED**

1. Was the 6<sup>th</sup> Amendment right to confront witnesses violated due to a misapplication of MRE 412 by the military judge?
2. Did the prosecutor prejudice the appellant and violate the rules for discovery when she undertook a discovery obligation she would not normally have and failed to exercise due diligence in executing that obligation?
3. Does the Military SVC (Special Victims' Counsel) program violate the defendant's right to due process?

## LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

**TABLE OF CONTENTS**

OPINIONS BELOW..... 1

JURISDICTION.....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....

STATEMENT OF THE CASE .....

REASONS FOR GRANTING THE WRIT .....

CONCLUSION.....

**INDEX TO APPENDICES**

APPENDIX A *Decision of United States Court of Appeals of the Armed Forces*

APPENDIX B *Decision of United States Coast Guard Court of Criminal Appeals*

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

## TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

### STATUTES AND RULES

1. *Military Rule of Evidence 412* 3
2. *The 5<sup>th</sup> Amendment of the U.S. Constitution* 4
3. *The 6<sup>th</sup> Amendment of the U.S. Constitution* 4

OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at 78 M.J. 619 (C.G. Ct. Crim. App. 18); or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 16 APR 2019.

- No petition for rehearing was timely filed in my case.
- A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.
- An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

- A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.
- An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Military Rule of Evidence (MRE) 412

- (a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):
- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior
  - (2) Evidence offered to prove any alleged victim's sexual predisposition
- (b) *Exceptions.*
- (1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
    - (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
    - (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent of by the prosecution; and
    - (C) evidence the exclusion of which would violate the constitutional rights of the accused.
- (c) *Procedure to determine admissibility*
- (1) A party intending to offer evidence under subsections (b) must—
    - (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and
    - (B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
  - (2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.
  - (3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.
- (d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law, or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.
- (e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is in affirmative defense or in which the lack of consent in an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempt to commit such offense.



### The 5<sup>th</sup> Amendment of the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### The 6<sup>th</sup> Amendment of the U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## **STATEMENT OF THE CASE**

1. The military judge's misapplication of MRE 412 prevented the defense from fully exploring the relevant facts regarding the accusations of sexual assault. Complaining witness RD and the appellant shared numerous explicit messages in the days leading up to the alleged assault. On the night prior to the alleged assault, explicit messages were exchanged and arrangements were made for intercourse the following day. The inclusion of these messages between the two would have provided the jury with a more complete and accurate depiction of the appellant's and RD's mindsets going into the alleged assault and were crucial to the appellant's mistake of fact defense. Complaining witness MF was granted immunity for her testimony, but at the court martial made statements in direct contradiction of testimony provided by LTJG BJ. At his own risk, LTJG BJ admitted to intercourse between himself and MF at a 39a motions hearing, but under immunity on the stand at General Court Martial MF denied these events. The defense intended to ask questions probing this contradiction, and agreed to water them down so as not to allude to anything sexual, but just to expose this denial of previously obtained testimony. While the intercourse between MF and BJ does not specifically weigh on whether or not the appellant sexually assaulted MF, credibility and transparency regarding anything in the time line of events is critical to the jury's execution of their duty as factfinders and determining the credibility of the witness. The exclusion of this content resulted in an imbalance of the evidence before the jury barring the defense from building a full and fair defense for the appellant's innocence.
2. The prosecutor undertook discovery obligations, normally reserved for CGIS, in the early part of the investigation. She inquired of RD if she had any communications with MF and RD denied this. After a year, the sought after messages were discovered during the court martial when MF referenced them. The prosecutor should not have taken on this discovery obligation, and did so to an insufficient extent even after compelled by the military judge. While the appellant's electronic communications across all platforms were scoured, no comparable search of the complaining witnesses devices was performed initially or after the military judge ordered the prosecution to seek out, "stored electronic communication between RD and MF". The prosecutor could have relegated this duty to CGIS, but executed it herself and did so insufficiently. The bungling and inequality of this discovery process severely prejudiced the appellant. Until the exposition of these messages at trial, the defense's assertions of collusion were unbacked by evidence. With these messages now in hand, collusion between the complaining witnesses became a supported position. Had the defense's legal team had these messages in hand at the outset of the investigation and a year to structure the arguments accordingly, the potential for a different outcome is immeasurable.
3. The aforementioned messages between RD and MF were in the possession of the SVC, LT DF. Lead trial counsel claimed to have contacted MF's SVC regarding the evidence we were seeking. LT DF could not recall such a request being made of him. In addition, LT DF overstepped his role as solely an advocate for MF's privacy rights and engaged in the litigation of a motion to dismiss, by opining on the value and importance of the text messages he was in possession of which became known during trial. The involvement of the SVC creates another layer wherein mistakes and miscommunication can happen, as did in this case. Evidence absolutely critical to the mounting of a full and fair defense, a right under the UCMJ, went undisclosed until mid-trial. Had the prosecution been able to contact MF directly (even though she should have left this obligation to CGIS), the

objective would have been completed in two steps—request and response. Working through the added layer of the SVC, the process now became a five-stop one—request by trial counsel, response to trial counsel from SVC, request by SVC for evidence from MF, response from MF, and response back to the trial counsel from SVC. The evidence of collusion we had sought for months remained unknown to us because of the mistakes of the SVC. The SVC again weighed-in on the issue regarding MF and BJ, and the combined argument of trial counsel and SVC over that of defense counsel resulted in the erroneous MRE 412 ruling. The SVC program adds a second layer of protection to the complaining witness. During trial, one member of each legal team, defense and prosecution, speaks at a time on behalf of the team regarding individual topics, motions, objections, etc. With the SVC involved, the complaining witness now has a second advocate to outweigh, distract from, and water down the merit of the defense's argument. The defense's assertions are sandwiched between those of the opposing party. The judge asks the SVC if have anything to add, and they proceed with, "Really quick judge, the SVC finds that...". The addition of a second, vocal litigator to the prosecutorial team who is keen to overstep the bounds of the role is an unfair advantage which treads on the defense's 5<sup>th</sup> Amendment right to due process.

## REASONS FOR GRANTING THE PETITION

1. The Supreme Court should address these questions because of the persistent miscarriage of justice by the Military judicial system. Article 412 of the Military Rules of Evidence is especially important because it key to a defendant's right to cross-examine the accuser and to mount a full and fair defense. In addition, in the age of the #metoo movement, examining accusations to the fullest and fairest extent, while still preserving a complaining witness's integrity is a balancing act on which the the military justice system sorely needs instruction. This court can and should provide that guidance.
2. The SVC program, specifically discussed and examined by the JPP, amplifies the conditions—deference to the accuser, political/social climate, training military members receive about sexual assault having no basis in law—which are already skewed in favor of the prosecution. These issues have grown to such an extent that in 2017 the Secretary of Defense established the Judicial Proceedings Panel (JPP) Subcommittee to conduct a wholesale investigation of the military's handling of sexual assault cases from beginning to end. The JPP compiled the Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases. They found a number of inherent problems preventing the proper adjudication which harm both complaining witnesses and the accused.
3. The aforementioned issues are but a few examples of the problems the accused suffer from. In 2016, the appellant was prejudiced by the imbalanced scales of military justice and these issues persist today, continuing to harm others whose lives and futures depend on the military justice system.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Anthony J. Fingleton

Date: 28 JUN 2019