IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

MICHAEL G. NEW, formerly SPC Michael G. New, Petitioner, v. UNITED STATES, Respondent.	BRIEF IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF ERROR *CORAM NOBIS* Docket No. _____

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS:

BRIEF IN SUPPORT OF
PETITION FOR EXTRAORDINARY RELIEF IN THE
NATURE OF A WRIT OF ERROR *CORAM NOBIS*

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BRIEF IN SUPPORT OF THE PETITION

Pursuant to Rule 20(e) of the Joint Rules of Practice and Procedure of the Courts of Criminal Appeals [hereinafter "C.C.A.R."], Petitioner Michael G. New [hereinafter "Mr. New"] submits this Brief in Support of his Petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis*.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This Petition involves the Due Process Clause of the Fifth Amendment to the U.S. Constitution. It also involves Article 46, Uniform Code of Military Justice (10 U.S.C. section 846) and 22 U.S.C. sections 287d and 287d-1, sections 6 and 7, respectively, of the United Nations Participation Act. Additionally, it involves Rule for Court-Martial 701. All are attached hereto in the Appendix to the brief.

ARGUMENT

I. SUBJECT MATTER JURISDICTION OF THE WRIT LIES IN THIS COURT.

On June 8, 2009, the United States Supreme Court ruled that a military court of criminal appeals has jurisdiction to entertain a petition for a writ of error *coram nobis* to challenge an earlier decision affirming a court-martial conviction. *United States v. Denedo*, 556 U.S. 904, 914 (2009). In this case, Mr. New petitions this Court: (a) to reverse its decision, dated April 28, 1999, in which this Court affirmed Mr. New's court-

martial conviction of disobedience of a lawful order; and (b) to vacate Mr. New's conviction and sentence to a bad conduct discharge. *See* Petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis* [hereinafter "New Pet"], paras. 1-4. Pursuant to Article 66 of the Uniform Code of Military Justice [hereinafter "UCMJ"], 10 U.S.C. section 866(a), this Court has subject matter jurisdiction of this petition to challenge the validity of petitioner's conviction on the grounds that "there were fundamental flaws in the [court martial] proceedings" (*Denedo*, 556 U.S. at 916) impugning the "neutrality" and "integrity" of the court martial judgment. *Id.*, 556 U.S. at 917.

II. THE WRIT IS AVAILABLE TO PETITIONER IN THIS CASE.

The writ of *coram nobis* is an "extraordinary remedy [available] only under circumstances compelling ... action to achieve justice." *See United States v. Morgan*, 346 U.S. 502, 511 (1954). *See also Denedo v. United States*, 66 M.J. 114, 125-26 (CAAF 2008). This petition is timely, as petition for a writ of *coram nobis* "may be filed at any time without limitation." *Denedo*, 66 M.J. at 126. However, a petitioner must meet six "stringent threshold requirements." *Id.* As demonstrated in his Petition (*see* New Pet., pp. 29-35), and as demonstrated further herein, Mr. New meets each requirement.

A. The Alleged Error is of the Most Fundamental Character.

Petitioner alleges that he was denied: (i)liberty without due process of law under *Brady v. Maryland*, 373 U.S. 83 (1963), and (ii) discovery rights under Article 46, UCMJ, and Rule 701 for Courts-Martial [hereinafter "R.C.M."] according to the standard laid down in *United States v. Williams*, 50 M.J. 436, 441-42 (CAAF 1999). *See* New Pet., pp. 22-23, 28-29.

The Government breached its constitutional and statutory duty to disclose exculpatory and material information contained in a classified document specifically requested by civilian defense counsel as Presidential Decision Directive 25 [hereinafter "PDD 25"]. *See* New Pet., paras. 21-38. In response to an order to produce the classified version of PDD 25, trial counsel: (a) explicitly represented to the military judge and civilian defense counsel that the classified version of PDD 25 was "eight to 10" ten pages in length; and (b) secured from the military judge verbal assent that production of the "eight to 10" page document was all that was required by the military judge's order to produce the classified version of PDD 25. *See* New Pet., paras. 34-36.

Relying upon trial counsel's representations, civilian defense counsel verbally agreed that production of the "eight to 10" page document would satisfy the military judges' order that the Government produce for inspection and review the classified

version of PDD 25. *See* New Pet., para. 37. In fact, unknown either to the military judge or to civilian defense counsel, the classified version of PDD 25 was not, in fact, a document of "eight to 10" pages, but a document of 29 pages, three times the length stated by trial counsel. *See Id.*, App. C., C-4 - C-32 (PDD 25). Whatever document was tendered by trial counsel, it certainly was not the actual classified document that trial counsel was ordered to produce. This discrepancy between the actual classified document ordered to have been produced and the "classified" document, as represented and attested to by trial counsel, constitutes a "fundamental flaw[] in the proceedings" threatening the "integrity" of the "final judgment" in Mr. New's court-martial entitling Mr. New extraordinary relief in this case. *See Denedo*, 556 U.S. at 916.

Additionally, the Government failed to make a "due-diligence" search to determine whether a document identified by civilian defense counsel as either Presidential Decision Directive 13 ("PDD 13") or Presidential Review Directive 13 [hereinafter "PRD 13"] existed. *See Williams*, 50 M.J. at 441. Initially, trial counsel objected to this request solely on the grounds that PDD 13 or PRD 13 was irrelevant. *See* New Pet., para. 40. By so objecting, trial counsel implied that he possessed such a document, reviewed it, and determined that it was, in his good faith opinion, not relevant to any issue before

the court-martial proceeding. Later trial counsel took the position that he did not know whether such a document even existed. *See* New Pet., para. 46. Relying solely upon the trial counsel's representation that he "didn't have any idea what" PDD 13 or PRD 13 was, the military judge summarily dismissed civilian defense counsel's discovery request. Without reason or analysis, the military judge rejected civilian defense counsel's discovery request, stating that Mr. New had "as good a chance" at locating a government document as the government, itself. *See* New Pet., para. 44.

In fact, known to the government, and impliedly known by trial counsel, but not to the military judge, or to Mr. New or his civilian defense counsel, a classified document entitled PRD 13 did exist. And, because it was classified, Mr. New certainly did not have an equal opportunity to discover and access PRD 13 as did trial counsel or other government officials. *See* New Pet., para. 47. Such cavalier treatment by the military judge of Mr. New's request for the classified document PRD 13 — a document that even trial counsel surmised might be linked to the classified PDD 25 document (New Pet., para. 31) — aggravates the adverse impact that the misrepresentations about the classified version of PDD 25 had upon the "neutrality and integrity"[1] of the court-martial record upon which Mr. New's conviction and sentence

[1] *See Denedo*, 356 U.S. at 917.

rest.

The Government's breach of its duty to produce the two classified documents was also "material" to Mr. New's defense. Indeed, the Government's failure to produce the two documents directly and significantly impaired Mr. New's effort to overcome the strong presumption that the order to wear the U.N. uniform for the deployment to Macedonia was unlawful. *See* New Pet., paras. 54 and 63. *See also* Section III. D., pp. ----, *infra.*

There is, then, no question that Petitioner's due process claim is of the most fundamental character. As this Court recently observed: "The Due Process Clause of the Fifth Amendment guarantees that 'criminal defendants be afforded a meaningful opportunity to present a *complete defense.*'" *United States v. Trigueros*, 69 M.J. 604, 609 (A.C.C.A. 2010) (emphasis added). To that end, the Supreme Court has identified a "group of constitutional privileges [to] deliver[] exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Such discovery privileges have been granted because "[u]nder the Due Process Clause..., criminal prosecutions must comport with prevailing notions of *fundamental fairness*." *Id.* (emphasis added).

So fundamental is this principle that "[t]he military

criminal justice system contains much broader rights of discovery than is available under the Constitution or in most civil jurisdictions." *United States v. Adens*, 56 M.J. 724, 731 (A.C.C.A. 2002). Quoting from the Manual for Courts-Martial, United States (2000 ed.), this Court explained in *Adens*:

> [E]xperience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is *essential* to the administration of military justice. [*Id.*, 56 M.J. at 731 (emphasis added).]

A core essential of the discovery process in a court-martial is the guarantee of "equal opportunity" for both sides to obtain relevant evidence and information (*Trigueros*, 69 M.J. at 610), and to "eliminate 'gamemanship' from the discovery process." (*Adens*, 56 M.J. 731), such as that practiced by trial counsel in this court-martial. *See* New Pet., paras. 33-38, 39-40, 45-46.

Thus, Petitioner's allegations that the Government breached its duty of disclosure under (i) the *Brady* due process principle, and (ii) Article 46, UCMJ and R.C.M. 701, both rules being essential to the administration of military justice, meet the *coram nobis* requirement that the alleged error is of the most fundamental character.

B. No Other Remedy is Available to Rectify the Consequences of the Error.

Petitioner is not in custody, so he cannot obtain relief through a writ of habeas corpus. *See Denedo*, 66 M.J. at 126. Nor is there subject matter jurisdiction in any Article III

federal court to correct a legal error in the court-martial proceeding. *See Morgan*, 346 U.S. at 505 n.4. *See also Denedo*, 556 U.S. at 913-14.

Moreover, there is no administrative board wherein Mr. New may obtain the relief that he seeks. The Army Board for Correction of Military Records [hereinafter "ABCMR"] "may only consider clemency on [an applicant's] court-martial sentence." *See* ABCMR Applicant's Guide to Applying to the Army Board of Correction of Military Records (ABCMR), Section 5(c). The ABCMR "may not disturb the finality of a court-martial." *Id.* Likewise, the Army Clemency and Parole Board is authorized only to "consider individuals for clemency and parole," and even then its authority is limited to persons who have been convicted at court-martial and sentenced to confinement. *See* Army Reg. 15-130, ch. 1, para. 1-1 and ch. 3, para. 3-1(a)-(d). Finally, the Army Discharge Review Board "is not authorized to revoke any discharge," but may "upgrade" a bad conduct discharge, such as the one in this case "only on the basis of clemency." *See* Army Discharge Review Board, "Overview."[2] As the Court of Appeals for the Armed Forces has observed, such administrative boards would be obligated to give "res judicata effect to the court-martial conviction." *See Denedo*, 66 M.J. at 127.

C. Valid Reasons Exist for Not Seeking Relief Earlier.

[2] http://arba.army.pentagon.mil/adrb-overview.cfm.

Prior to issuing the order to wear the U.N. uniform in preparation for deployment of Petitioner's unit to Macedonia, Mr. New's commanding officer ordered the unit to attend a special meeting to be briefed on the legality of the Macedonian deployment. *See* New Pet., para. 27. At that meeting, the briefing officer (who later served as trial counsel) stated that PDD 25 was one of the major policy and legal foundations "for participation of U.S. soldiers in UN peacekeeping operations." *Id.*

1. Classified PDD 25.

Prior to trial, civilian defense counsel specifically requested discovery of the classified PDD 25 document. *Id.*, para. 21. At the time of this initial request, civilian defense counsel did not know the full contents of the requested document. *See id.*, para. 22. There was no question that a classified version of PDD 25 existed. *Id.*, para. 23. The only issue was whether the classified version of PDD 25 would be made available to civilian defense counsel. *See id.*, para. 30. The military judge ordered the government to produce the classified version. *Id.*, para. 32.

In response to this order, and arguing in opposition to civilian defense counsel's request that the classified version of PDD 25 be produced at some future date at Fort Knox, Kentucky, trial counsel represented to the military judge that he was ready

to produce the document "now." *Id.*, para. 33. In response to civilian defense counsel's question concerning the length of the classified document, trial counsel stated that it was a document of "eight to 10 pages." *Id.*, para. 34. Contrary to trial counsel's representation of the document to be produced for civilian defense counsel's review, the classified version of PDD 25 was 29 pages in length. *Id.*, para. 38. *See* also *id.*, App C at C-3 - C-32 (PDD 25, pp. 1-29). The actual classified PDD 25 did not come to light until 2009 when Mr. New obtained a copy of the actual classified PDD 25 through means of a Mandatory Review proceeding to declassify the document. *Id.*, para. 38.

At the time of the court-martial, however, Mr. New's civilian defense counsel had no reason to suspect that the document represented by trial counsel to be the classified PDD 25 was not the document that trial counsel represented it to be. *Id.*, para. 37. Having no reason to doubt trial counsel's veracity, there was no basis for defense counsel to claim on direct appeal that the Government had failed to perform its duty to meet the due process and military standards governing discovery. That opportunity did not arise until November 18, 2009, well after all direct appeals and collateral challenges had been concluded.

2. Classified PRD 13.

Prior to trial, civilian defense counsel requested the production of a document identified either as PDD 13 or PRD 13. *Id.*, para. 38. Based on press reports, civilian defense counsel had reason to believe that a PDD 13 or PRD 13 existed, but was unsure of its actual existence, its contents, or its nature, although he suspected that a "portion" of it was "classified" and related to PDD 25. *Id.*, para. 41-43.

Despite his earlier objection on the ground of relevance (*id.*, para. 40), trial counsel later represented to the military judge that he had no idea whether PDD 13 or PRD 13 existed. *Id.*, paras. 45-46. Based on this representation of trial counsel, and civilian defense counsel's statement that he had learned of the possible existence of the document in the press, the military judge summarily denied Mr. New's request for production of the document. *Id.*, para. 44.

Based on the court-martial record, civilian defense counsel had insufficient grounds upon which to claim error on direct appeal. At the court-martial, civilian defense counsel acknowledged that he was uncertain whether: (a) a document entitled PDD 13 or PRD 13 existed; and (b) the document was public or classified. To be sure, civilian defense counsel was suspicious that it contained information relevant to Mr. New's claim that the order to wear the UN uniform for the Macedonian

deployment violated the UNPA or other law, but he was uncertain of the document's contents. On this record, it would have been impossible for defense counsel to demonstrate on direct appeal that PRD 13 was "material" and "favorable" to the defense, as required by the *Brady* rule (373 U.S. at 87) or, as required by Article 46, UCMJ and R.C.M. 701, "material to the preparation of the defense." *See Trigueros*, 69 M.J. at 610. It was not until well after the court-martial that Mr. New finally discovered that a PRD 13 actually existed and that it was directly related to PDD 25. *See* New Pet., para. 47.

In sum, there are valid reasons why Mr. New did not seek the relief sought by this Petition until after he succeeded in his effort to declassify PDD 25 and PRD 13, and obtained possession of them. As for the military judge's ruling on PDD 25, based upon what civilian defense counsel knew then, there was no reason to doubt that the "eight to 10" page document that trial counsel had represented to be the classified version of PDD 25 was not the actual classified PDD 25. As for PRD 13, civilian defense counsel simply did not have enough information of its existence or contents to make a credible argument that it was necessary for his defense. Not until the two classified documents were declassified did Mr. New have sufficient information demonstrating their relevance and materiality to his claim that the order he disobeyed violated the law.

D. Classified PDD 25 and PRD 13 Could Not Otherwise Have Been Obtained by the Exercise of Reasonable Diligence.

As noted in I.C. *supra*, civilian defense counsel exercised reasonable diligence in an effort to obtain access to the classified versions of PDD 25 and PRD 13 through the court-martial discovery process, but did not succeed. The Mandatory Review process by which Mr. New eventually gained access to both classified documents came in 2009. That process was neither feasible nor available before or at the time of the court-martial. As noted in Mr. New's Petition, the information contained in the classified versions of PDD 25 and PRD 13 were presumed to be in the national security. New Pet., p. 33. Furthermore, as pointed out in the Petition, it took over two years to obtain a decision to declassify the two documents. *See id.*, paras. 38 and 47. Such a lengthy process could not have been accommodated by the timetable set for Mr. New's court-martial. Indeed, trial counsel objected to the military judge's first order requiring the Government to produce the classified version of PDD 25 at Fort Knox on the ground that it "is going to delay this proceeding past the time table" that had already been set. *Id.*, para. 33. There is no doubt that trial counsel would have made the same objection to any effort by civilian defense counsel to obtain access to the classified PDD 25 by some means other than by discovery.

E. The Writ Does Not Seek to Reevaluate Previously Considered Legal Issues.

At issue in this petition is whether the Government breached its constitutional and statutory duties to provide exculpatory evidence and information that directly related to Mr. New's motion to dismiss on the ground that the deployment of his unit under U.N. control violated the UNPA. This issue was not considered on direct appeal. *See United States v. New*, 50 M.J. 729 (ACCA 1999), *aff'd., United States v. New*, 55 M.J. 95 (CAAF 2001), *cert. den.*, 534 U.S. 955 (2001). Nor was the issue included in Mr. New's efforts to obtain post-conviction relief in the United States District Court for the District of Columbia. *See United States ex rel New v. Rumsfield*, 350 F. Supp. 2d 80 (D.D.C. 2004), *aff'd. United States ex rel New v. Rumsfield*, 448 F.3d 403 (D.C. Cir. 2006), *cert. den. sub nom. United States ex rel. New v. Gates*, 550 U.S. 903 (2007). This is the first opportunity that Mr. New has had to litigate the question whether the Government breached its constitutional and statutory duties to provide exculpatory evidence and information supporting Mr. New's motion to dismiss on the ground that the order to wear the UN uniform was unlawful insofar as the order rested upon the lawfulness of the Macedonian deployment under the UNPA.

F. Serious Consequences Persist.

By special court-martial, Mr. New was convicted of disobedience of a lawful order and sentenced to a bad conduct

discharge. In his sentencing instructions the military judge stated, as follows:

> Members of the court, you're advised that the *ineradicable stigma* of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities, and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A punitive discharge will affect an accused's future with regard to his legal rights, economic opportunities and social acceptability.
>
> This court may adjudge a bad-conduct discharge. Such a discharge *deprives one of substantially all benefits* administered by the Department of Veterans' Affairs and the Army establishment. A bad conduct discharge is a severe punishment and may be adjudged for one who, in the discretion of the court, warrants *severe punishment* for bad conduct, even though such bad conduct may not include the commission of serious offenses of a military or civil nature. [New Pet., App. A at A-51 - A-52 (R. at 946, l. 23 - 947, l. 14)(italics added).]

In so instructing the military jury, the military judge gave the verbatim instruction set forth in the Military Judges' Benchbook, indicating that the military judge found no reason in this case to omit or modify any portion of the standard instruction. *See United States v. Rush*, 54 M.J. 313, 314-315 (2001). Thus, the full force of the bad conduct discharge was brought against SPC New, establishing thereby that "serious consequences" persist, beginning immediately with the discharge sentence, and continuing up to the present and into the future.

As previously noted in the Petition, SPC New has lost his education benefits under the Montgomery GI bill. New Pet., pp. 34-35. That loss, along with the loss of other VA and Army

benefits, demonstrates the persistence of serious consequences indicating that, on its face, the bad conduct discharge satisfies the sixth criterion necessary to warrant a review by this Court of the merits of this petition.

III. THE WRIT SHOULD BE GRANTED.

A. Before Preferring Charges of Violation of a Lawful Order, the Government Took the Position that, because the Deployment to Macedonia was Lawful, the Order to Wear the U.N. Uniform was Presumed Lawful.

On 2 October 1995, and then again, on 4 October 1995, Mr. New was charged with having disobeyed a lawful order "to wear the prescribed uniform for the deployment to Macedonia, *e.g.*, U.N. patches and cap." *See* New Pet., para. 19. Before preferring this charge, the United States Army took steps to persuade Mr. New to obey the order on the ground that the deployment for which the uniform was prescribed was lawful. *See id.*, paras. 26-29.

Sometime after 7 September 1995, after Mr. New made it known to his superior officer that he believed the order to be unlawful, Major David Charles Osborne — at the request of Mr. New's commanding officer, LTC Stephen R. Layfield — "interacted with the accused prior to the disobedience for which he is charged." *Id.* at para. 26. In response to LTC Layfield's specific instruction "to make sure that Mr. New had all the facts concerning U.S. policies," Major Osborne reviewed with Mr. New the major's "understanding of PDD 25":

> I had been given a portion of PDD-25 while on recon to Macedonia. I read portions of the text to SPC New and drew a diagram on a napkin. SPC New acknowledged what I was saying and said that he understood. I gave the text to SPC New and he kept it until the following day. When he returned it, I asked him if he had any questions and he said "No." [*Id.* at B-181 (App. Exh. LXXV at 2).]

Beginning on 31 August and continuing through early September 1995, Mr. New was advised by several of his military superiors that Mr. New's duty to wear the UN uniform was inextricably linked to his duty to serve in UN operation in Macedonia. *See id.*, App. B at B-56 – B-61 (App. Exhs. XXXI-XXXV). For example, one of Mr. New's superiors recounted:

> SPC New you are being counseled on refusal to wear the proper uniform while deployed to Macedonia. Be advised that this is a United Nations mission directed by the President of the United States. By refusing to deploy in the proper uniform you are not only disobeying [a] command order but an order directed by the President." [*Id.*, App. B at B-62 (App. Exh. XXXV at 1).]

Just before 2 October 1995, the day that the first order to wear the U.N. uniform was issued, trial counsel gave Mr. New's unit a policy and legal briefing on its upcoming deployment to the U.N. operation in Macedonia, in which trial counsel emphasized that PDD 25 was one of the "legal" bases of the Macedonian deployment. *Id.*, para. 27. *See also*, *id*. *See also*, *id.*, App. B at B-43 (App. Exh. XXVIII (Information Briefing). Immediately after the Task Force received this information briefing on the *policy and legal* bases for US participation in the UN peacekeeping operations, members of SPC New's unit were

advised that if anyone had any "questions ... they should see [Major Osborne] who would provide them with background information." *Id.*, App. B at B-181 (App. Exh. LXXV at 1) (emphasis added).

On 5 October 1965, the day after the order had been issued a second time, Mr. New came to "see [Major Osborne] for information." *Id.* Major Osborne provided Mr. New a number of documents, addressing the policy and legal bases for U.S. participation in U.N. peace operations, including what the major described as the "complete version" of PDD 25. *Id.*

There is, then, no question that, prior to the court-martial, Mr. New's military superiors — including trial counsel acting in his capacity as briefing officer — stated that the legality of the order to wear the U.N. uniform issued on 2 and 4 October depended upon the legality of the deployment to Macedonia, the purpose for which the order to wear the U.N. uniform was made. Further, there is no question that the military officers acted on the belief that the legality of the Macedonia deployment depended substantially upon factors discussed in PDD 25.

Consequently, it should have come as no surprise to trial counsel at the court-martial that civilian defense counsel's paramount discovery requests were for a copy of the officially classified PDD 25 and related documents, all of which concerned

the legality of the deployment of American service members to the U.N. Macedonia peace operation. *Id.*, App. B at B-11 - B-15 (App. Exh. XXII, Items 1, 3, 4, 10-12, 16-21).

B. At the Court Martial the Government Changed its Position, Contending That The Lawfulness of the Deployment to Macedonia was Irrelevant.

In an about-face, trial counsel took the position that the lawfulness of the Macedonian deployment was irrelevant, and refused to provide civilian defense counsel with the classified version of PDD 25, or any other related document addressing the legality of the Macedonian deployment. *See id.*, App. B at B-20 - B-22 (App. Exh. XXIII, Supplemental Discovery Response, Items 1a, 3, 4, 10, 11, 12, 16, 17, 18-21). Trial counsel, qua briefing officer, deemed these documents *relevant to the lawfulness of the order* that Mr. New wear the U.N. uniform for deployment to the U.N. peace operation in Macedonia, but later as trial counsel, he deemed those same documents *irrelevant* at the court-martial. *See id.*, paras. 23, 25, and 29. Indeed, trial counsel filed a motion in limine "to preclude the defense from offering any documentary or testimonial evidence ... concerning the legality of the deployment of United States forces in the Former Yugoslav Republic of Macedonia." *Id.*, App. B at B-1 (App. Exh. XX, Item I.A).

As civilian defense counsel pointed out at the court-martial, trial counsel justified the order on the ground that the

President had the inherent legal authority to deploy Mr. New into the service of the United Nations, but insisted that the lawfulness of the deployment had nothing to do with the lawfulness of the order to wear the UN uniform. *See id.*, App. A at A-15 – A-17 (R. at 147, l.5 - 149, l.21). Trial counsel abandoned his earlier position as briefing officer — that PDD 25 provided a *legal* basis for the order to wear the U.N. uniform — contending instead as trial counsel that PDD 25 provided only a *policy* basis for that order. In effect, trail counsel "want[ed] a presumption of lawfulness, but [he did not] want ... New to present evidence of unlawfulness." App. A at A-16 (R. at 148, ll. 21-23).

C. Trial Counsel Failed to Comply with the Court Order to Produce the Classified PDD 25, and Prompted the Military Court to Dismiss Summarily Civilian Defense Counsel's Request to Produce PRD 13.

After denying trial counsel's motion in limine, and permitting civilian defense counsel to challenge the legality of the order on the ground that the deployment of SPC New's unit to Macedonia was unlawful, the military judge turned to civilian defense counsel's discovery requests. *See id.*, App. A at A-24 - A-26 (R. at 163, l. 2 - 165, l. 25).

1. Classified PDD 25.

Foremost for consideration was defense counsel's request for the classified version of PDD 25. *Id.*, paras. 21-22. Trial

counsel objected to the production of the classified version of PDD 25 on the ground that it had nothing to do with the lawfulness of the Macedonian deployment, even though he had utilized a summary of it as part of his 2 October 1965 briefing on the legality of that deployment. *Id.*, paras. 23, 27. Rather, trial counsel insisted that the classified PDD 25 concerned only "policy considerations," not the legality of the Macedonian deployment under the UNPA. *Id.*, App. A at A-28 - A-29 (R. at 168, l. 23 - 169, l. 8).

The military judge questioned why civilian defense counsel, each of whom had an appropriate security clearance, should not examine the classified PDD 25 document, "and make a determination themselves that it is not relevant?" *Id.*, App. A at A-29 (R. at 169, ll. 14-22). Unpersuaded to rule otherwise, the military judge ordered trial counsel to produce the classified document and, in response to civilian defense counsel's request, that the document be produced at Fort Knox on a mutually agreeable future date. *See id.*, App. A at A-31 - A-32 (R. at 171, l. 14 – 172, l. 14). Expressing his concern that production at Fort Knox "is going to delay this proceeding past the time table ... already set," trial counsel countered, "then the government would argue that ... they can *look at it now*." *Id.*, App. A at A-32 (R. at 172, 11. 15-18) (emphasis added).

In response to trial counsel's representation that he was in

possession of the classified PDD 25 document, and ready to produce it "now," the following exchange occurred:

> MJ: Is that acceptable, that you may see it, certainly, today -- or before you leave Germany, in any case?
>
> CDC1: How long a document is it?
>
> TC: My recollection of it is somewhere in the eight to 10 pages --
>
> CDC1: That would be satisfactory ...
>
> MJ: Very well.
>
> TC: And let me say, sir, that's to all this stuff that you're going to tell me I have now to give them -- the government has to give them; certainly they can inspect it now.
>
> MJ: Very well. Thank you.
> [*Id.*, App. A at A-32 — A-33 (R. at 172, l. 21 - 173, l. 8).]

By thus assuring the military judge and civilian defense counsel that he was in possession of the classified version of PDD 25 and prepared to produce it "now," trial counsel secured from the military judge a modified order that producing the "eight to 10 page[]" document would comply with the order to produce the classified PDD 25 document.

In fact, the "eight to 10" page document was not, and could not have been, the classified PDD 25 document, the pages of which were three times as long, namely 29 in number, not "eight to 10." *See* App. C at 4-32 (PDD).

2. Classified PRD 13.

Just prior to resolving defense counsel's request for the

classified version of PDD 25, trial counsel objected to production of the classified version of PDD 25, not on grounds of relevance, but "[b]ecause sir, it will take us down a road from which there is no return. ... You will see in their request there's a Presidential Directive 13; don't know what that is, but my guess is that --" *Id.*, App. A at A-29 - A-30 (R. at 169, l. 23 - 170, l. 2. Before trial counsel could finish explaining why there might be a connection between PDD 25 and "Presidential Directive 13", the court cut him off:

> I'm going to deal with Presidential Directive 13 in a little bit, but what I want to know right now is, why should I not give the defense ... the opportunity to look at [PDD 25]? [*Id.*, App. A at A—30 (R. at 170, ll. 3-6).]

Later, the military judge asked: "What is Presidential Decision Directive 13 ...?" *Id.*, App. A at A—35 (R. at 180, ll. 18-19). Civilian defense counsel replied that it appeared to be a document concerning "new policies regarding U.S. support of United Nations operations" that is "sometimes referred to in the press accounts as Review Directive and sometimes as Presidential Decision Directive 13...." *Id.*, App. A at A—35 - A-36 (R. at 180, l. 20 - 181, l. 1). Additionally, defense counsel stated that it appeared that PRD 13 or PDD 13 was closely related to PDD 25: "Your honor, ... you can't understand PDD 25, I'm told, without understanding what was done under PDD 13." *Id.*, App. A. at A-36 (R. at 181, ll. 19-21).

The following colloquy then occurred:

> MJ: Well, I'm going to worry about that at a later date. We're looking at a potential statutory violation, and that's the U.N. Participation Act. I'm not inclined to order the government to look for PDD 13. If, in fact, it was a document in the public arena, you should have as good as chance of locating it as the government, so I will not make an order that the government product that item.
>
> CDC2: Could I just ask, Your honor, if trial counsel has a copy of that document or any documents related to –
>
> MJ: My impression was, from an earlier argument, he didn't have any idea what it was.
>
> TC: That's correct.

[*Id.*, App. A at A-36 - A-37 (R. at 181, l. 22 - 182, l. 8).]

If trial counsel "didn't have any idea what [PDD 13} was," why did trial counsel initially limit his objection to production of PDD 13 or PRD 13 to the single ground of relevance? *See id.*, para. 40. More pointedly, if counsel knew nothing of such a document, why did trial counsel later object to the production of the classified version of PDD 25 on the ground that, by granting production of that document, it "might take us down the road" to a document entitled "Presidential Directive 13"? *See id.*, App. A at A—29 - A-30 (R. at 169, l. 23 - 170, l. 2). When civilian defense counsel inquired of trial counsel if he had a document entitled PDD 13 or PRD 13 (*id.*, App. A at A—37 (R. at 182, ll. 4-5)), why did the military judge cut in, stating his "impression" that trial counsel had no idea "what it was"? *Id.*, App. A at A-37 (R. at 182, ll. 6-7). And why did trial counsel act so

quickly to confirm the military judge's "impression"? *Id.*, App. A at A—37 (R. at 182, l. 8).

Contrary to the cavalier response by trial counsel, and the apparent indifference of the military judge, there was a classified document entitled Presidential Review Directive 13, or PRD 13, and it was connected to the classified PDD 25. *See id.*, Pet., para. 60 and App. C at C-51 – C-55 (PRD 13 at 1-5).

D. Mr. New Was Prejudiced by the Government's Failure to Produce at the Court Martial the Classified Documents, PDD 25 and PRD 13.

The UNPA plainly distinguishes between "peace keeping" and "peace enforcement," putting them into separate legal categories. *See* New Pet., para. 48, n. 1. Section 7 applies to the detailing of American armed forces to U.N. noncombatant operations under Chapter VI of the U.N. Charter. *See id.*, para. 48, n. 2. Section 6 applies to combatant operations under Chapter VII of the Charter. *See id.*, para. 48, n. 3. Section 7 limits the total number of American armed forces detailed to the U.N. as noncombatants to 1,000 at any one time. *Id.* Section 6, however, expressly requires specific *prior* approval from Congress before even one member of the American armed forces may be detailed to a UN combatant mission. *Id.*, para. 48, n. 2. Trial counsel brushed aside the legality of the deployment order, arguing that the President has "keeping with the spirit of the War Powers Resolution, *notified* Congress every six months of the status of

the forces deployed...." *Id.*, App. B at B-84 (App. Exh. LII, Facts, para. 5) (emphasis added). By refusing to provide Mr. New with the revealing classified versions of PDD 25 and PRD 13, the Government denied Mr. New his opportunity to a full defense that the order to wear the U.N. Uniform for the Macedonian deployment was unlawful, in violation of the UNPA.

1. PDD 25 Authorized Deployment of Mr. New in Service to the United Nations in Violation of the UNPA.

With respect to UN combatant peace enforcement operations under Chapter VII of the U.N. Charter, the conflict between PDD 25 and the UNPA could not be more stark. Section 6 of the UNPA states:

> The President is authorized to negotiate a special agreement or agreements with the Security Council which *shall be subject to the approval of Congress* by appropriate *Act or joint resolution*, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining peace and security in accordance with *Article 43* of said Charter. [22 U.S.C. § 287d (emphasis added).]

In contrast, Annex II to PDD 25 identifies political factors to be considered for U.S. troop participation in peace enforcement operations under ... Chapter VII (Article 43), such as whether "[t]here is domestic and Congressional support for U.S. participation, or such support can be marshalled (*sic*)." New Pet., App. C at C-21 (PDD 25, Annex II, Factor E). Unlike PDD 25, 22 U.S.C. § 287d states that Congressional approval by Act of

Congress or Joint Resolution must precede deployment.

Additionally, 22 U.S.C. § 287d requires that the congressional Act or Joint Resolution approving the deployment of American Armed forces "provide for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance." PDD 25, however, erroneously treated such matters as within the complete discretion of the President, including whether U.S. armed forces would serve under "the aegis of the United Nations pursuant to Chapter VII" of the U.N. Charter. *See* New Pet., App. C at C-21 (PDD 25, Annex II, Factors G, H, and I).

With respect to UN noncombatant peacekeeping operations under Chapter VI of the U.N. Charter, Section 7 states that the President:

> [M]ay authorize ... the detail to the United Nations, under such terms and conditions as the President shall determine, of personnel of the armed forces of the United States to serve as observers, guards, or in any other noncombatant capacity, *but in no event shall more than a total of one thousand of such personnel be so detailed at any one time*.... [22 U.S.C. § 287d-1 (emphasis added).]

The number, 1,000, as prescribed by this statute imposes an absolute limit:

> [E]xcept as authorized in section 287d-1 of this title, nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in

such agreement or agreements. [22 U.S.C. § 287d.]

There is absolutely no mention of this statutory limit in PDD 25, either as a limit to, or even as a factor to be considered by, the President in deployment of U.S. armed forces to peacekeeping operations under Chapter VI of the U.N. Charter. Rather, throughout PDD 25, peacekeeping under Chapter VI and peace enforcement under Chapter VII are treated in almost exactly the same manner under a more generic definition of "peace operations." *See* New Pet., App. C at C-8 – C-16, C-20, C-29 (PDD 25 at 1-9, Annexes II and VII). In Annex II of PDD 25, where the two kinds of peace operations are treated separately, there is not even a reference to Section 287d-1 limit on the number of U.S. Armed Forces. To the contrary, Annex II states that the factors pertinent to the deployment of armed forces are whether:

> A. [T]he unique and and general risks to American personnel have been weighed and are considered acceptable;
>
> B. Funds, personnel and other resources are available for U.S. participation.
>
> ***
>
> D. The role of U.S. forces is tied to clear objectives and an end point for U.S. participation can be identified.
>
> E. There is domestic political and Congressional support for U.S. participation, or such supported can be marshalled.
> [*Id.*, App. C at C-21(PDD 25, Annex II).]

2. The Classified PDD 25 Circumvented the UNPA.

Having obtained the declassification of the previously classified versions of PDD 25 and PRD 13, we now know that PDD sanctioned American armed force participation in UN multilateral peacekeeping operations without any regard to whether the Clinton Administration's new policy complied with UNPA requirements limiting U.S. participation in either U.N. peace enforcement or peace keeping operations. *See id.*, App. C at C-4 - C-32 (PDD 25). Despite President Clinton's instructions in PRD 13 to determine whether the desired policy would require the UNPA to be "modified" or "amended,"[3] PDD 25 made no mention that the policies adopted therein would satisfy the critical statutory limitation that at no one time would the President detail more than 1,000 military personnel to UN peacekeeping operations, as required under Section 7 of the UNPA. Nor is there any reference in PDD 25 to the statutory requirement that the President obtain advance formal approval from Congress before deploying any American service member to a UN Chapter VII peace enforcement operation. *See id.*, App. C at C-8 - C-9, C-21, and C-29 (PDD 25, pp. 5-6, Annex II and Annex VII)).

To the contrary, PDD 25 provided a pathway to circumvent the UNPA statutory strictures with an inventory of factors, none of which ensured UNPA compliance. *See id.*, App. C at C-21 (PDD 25,

[3] *See id.*, App. C at C-53 - C-54, (PRD 13 at 4-5).

Annex II). Ignoring (i) the statutory limits on the number of members of the US armed forces that could be detailed to a UN peace keeping operations, and (ii) the statutory requirement of prior approval of Congress for deployment of American service members to a UN peace enforcement operation, the Clinton Administration instead adopted a policy of consultation "to ensure that Congress is regularly and fully briefed on [UN peace operations], and whenever possible, consulted about the participation of U.S. armed forces in them." *Id.*, App. C at C-6, C-30 - C-31 (PDD 25 at 3 and Annex VIII).

To be sure, PDD 25 stated the Clinton Administration's commitment to "expand its consultations" with Congress. *See id.*, App. C at C-30 - C-31 (PDD 25, Annex VIII). Even so, such consultations would be limited to "bipartisan leaders and senior leadership of the relevant committees of both Houses of Congress ... to ascertain [their] views when [the Clinton Administration] is giving serious consideration to deployment of military units in a UN peace operation." *See id.*, App. C at C-30 (PDD 25, Annex VIII, para. 1). But such consultations were not designed to obtain Congressional approval or to demonstrate compliance with the UNPA. Rather, as PDD 25 indicated, the purpose of such consultations was simply to inform members of Congress, not to comply with the law. *Id.*, App. C at C-30 - C-31, (PPD 25, Annex VIII, paras. 1, 2, and 6).

Additionally, Annex II of PDD 25 demonstrates conclusively that the Clinton Administration adopted a policy governing the deployment of U.S. armed forces in disregard of its legality under either Section 6 or Section 7 of the UNPA. Specifically, PDD 25 states that:

> The Administration *will consider the factors* in Annex II when assessing whether to recommend to the President that U.S. personnel participate in a given UN or regional operation. The recommendation will be based on the cumulative weight of the factors, with *no single factor* necessarily being an *absolute determinant*. [*Id.*, App. C at C-8 (PDD 25, Policy Guidance, para. 3) (emphasis added).]

Compliance with UNPA is not among the factors listed in Annex II. *See* App. C at C-21 (PDD 25, Annex II). Indeed, the formula prescribed in PDD 25 -- that no single factor could be an "absolute determinant" -- violates both sections 6 and 7 of the UNPA, each of which prescribes specific rules governing deployment of American armed forces in service of a UN peace operation. According to PDD 25, the Clinton Administration did not discriminate between a UN operation which was governed by UNPA, or a "regional" operation which was not.

3. The Classified PDD 25 Undermines the Government's Fall-Back Argument that the Macedonian Deployment was Lawful.

Taking full advantage of the absence of the two classified documents, trial counsel responded to the defense motion to dismiss on the ground that the deployment violated the UNPA, boldly claiming full compliance with the "*guidelines* set out by

22 U.S.C. sec 287d-1."[4] *See* New Pet., App. B, p. B—84 (App. Exh. LII, Argument, para. 4)(emphasis added). In support, trial counsel attached a document identified as "the unclassified summary of PDD 25"[5] which omitted entirely the Clinton administration's decision to ask Congress to amend the UNPA "to remove the limitations on detailing personnel to the UN in Chapter VI operations ... and to delete the prohibition against using that section as authority to support Chapter VII operations and combat missions." *Compare id.*, App. B at B-160 - B-176 (App. Exh. LII, Encl. IV) *with id.*, App. C at C-16 (PDD 25 at 9).

Having never disclosed the actual classified version of PDD 25 at the court-martial, trial counsel was free to claim that "the deployment of soldiers in support of the [U.N. peace operation in Macedonia] ... [was] well within the 1000 soldier limit,"[6] as if the Government's operational policy in PDD 25 had committed the Clinton Administration to faithful compliance with the UNPA. By trial counsel's failure to produce the actual

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[4] Trial counsel considered the specific rules laid down sections 6 and 7 of the UNPA as merely "guidelines." A guideline is "an indication or outline of future policy or conduct." Webster's *Third International Dictionary* 1009 (1964). In contrast, a rule is "a legal precept applied to a given set of facts as stating the law applicable to a case." *Id.* at 1986.

[5] *Id.*, App. B at B-86 (App. Exh. LII, Argument para. 5).

[6] *See*, *id.*, App. B at B-86 (App. Exh. LII, Argument para. 4 and Encl. II).

classified PDD 25, civilian defense counsel were denied access to official information that would have cast serious doubt upon and helped unravel the Government's claim of UNPA compliance.

Additionally, having denied civilian defense counsel of access to the classified PDD 25 document, trial counsel negated civilian defense counsel's effort to refute the Government's claim that the Macedonian deployment was "not a Chapter VII peace enforcement deployment but instead is a peacekeeping deployment wholly consistent with Chapter VI and its mandate for the pacific settlement of disputes." *See id.*, App. B at B-86 (App. Exh. LII, Argument, para. 4). Had the classified version of PDD 25 been made available to civilian defense counsel, serious doubts about this claim could have been created by the fact that PDD 25 conflated U.N. Chapter VI "peacekeeping" and Chapter VII "peace enforcement" into a single category of "multilateral peace operations," the implementation of which would be subject only to an executive cost/benefit analysis. *See id.*, App. C, at C-21 (PDD 25, Annex II).

In a further effort to defeat Mr. New's UNPA defense, trial counsel submitted to the military judge four letters from President Clinton addressed to the Speaker of the House in support of his contention that the Macedonian deployment complied with the UNPA. *Id.*, App. B at B-88 - B-96 (App. Exh. LII, Encl. I). In a letter dated October 13, 1993, the

President referred to the overall UNPROFOR mission in Yugoslavia as an "enforcement effort" with the "United States ... playing a major role by contributing combat-equipped fighter aircraft ... while our U.S. Army light infantry battalion to Macedonia has become an *integral part* of the UNPROFOR monitoring operations there." *Id.*, App. B at B—90 - B-91 (App. Exh. LII. Encl. I) (emphasis added).

In light of this representation, and a similar one made by the President in a letter dated February 17, 1994[7], the military judge found:

> As early as 9 July 1993, the President ... determined that it was in the interests of the United States to deploy *combat-equipped* United States armed forces as part of a multinational effort to resolve the continuing civil war in the former Yugoslavia. Based on this determination, the President ordered the deployment of *combat-equipped* United States armed forces to *Macedonia* as part of a multilateral effort to bring stability to the former Yugoslavia. [*Id.*, App. A at A-44 (R. at 424, ll. 8-18) (emphasis added).]

In contradiction to these two letters and this finding, trial counsel submitted two additional letters from the President to the Speaker, indicating that the action in Macedonia was a noncombatant peacekeeping operation undertaken

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[7] *Accord*, *id*. App. B at B-94 - B-95 (App. Exh. LII, Encl. 1, Letter dated February 17, 1994 ("The United States has played an important role by contributing combat-equipped fighter aircraft .... Our U.S. Army light infantry battalion in Macedonia is an integral part of UNPROFOR monitoring efforts in that area.")

pursuant to Section 7 of the UNPA. *See id.*, App. B at B-88 - B-89 and B-92 and B-93 (App. Exh. LII, Encl. I, letters dated July 9, 1993 and January 8, 1994)). But the military judge found only that the President "*felt* his actions in deploying United States *combat-equipped* forces to Macedonia ... was in accordance with Section 7 of the [UNPA]," not that, in fact, the President had acted in accord with that section. *See id.*, App. A at A-44 - A-45 (R. at 424, l. 22 - 425, l. 2) (emphasis added). Neither letter contained any hard facts indicating that the deployment, if undertaken pursuant to section 7 of the UNPA was in compliance with that section. Instead, both letters appeared to have been written to the Speaker in pursuance of the PDD 25 policy of keeping selected members of Congress generally apprised of American participation in UN multilateral peace operations without careful distinction between noncombatant peacekeeping governed by section 7 of UNPA and combatant peace enforcement governed by section 6.

Indeed, there is strong evidence in the classified versions of PDD 25 and PRD 13 to support a claim that the the Clinton Administration viewed UNPA as an obstacle to be avoided, rather than a law to be obeyed. Thus, PRD 13 posed the question: "What options are there for *amending the United Nations Participation Act* of 1945 and other legislation related to multilateral peacekeeping? Would any of the options suggested in this study

require such amendment?" *Id.*, App. C at C-53 - C-54 (PRD 13, at 4-5). PDD 25 responded that "at some future appropriate time, the [Clinton] Administration will seek the following legislative changes":

> Amending Section 7 of the U.N. Participation Act first to remove the limitations on detailing personnel to the UN in Chapter VI operations and then, to the extent feasible, to delete the prohibition against using that section as authority to support Chapter VII operations and combatant missions. [*Id.*, App. C at C-16 (PDD 25 at 9).]

In the meantime, under the protection of the classification of PDD 25 and PRD 13, the Clinton Administration was free to implement its own policy of deployment of American armed forces to UN operations,regardless of whether any particular deployment, such as the one to Macedonia, was UNPA compliant. Had defense counsel been afforded access to PDD 25 and PRD 13, he would have been armed with official documents that undermined the credibility of the President's representations that the Macedonian deployment was legal.

E. By the Government's Failure to Produce the Classified PDD 25 and PRD 13 Documents, Mr. New Was Denied Due Process of Law and Discovery Rights Secured by Military Law.

1. Mr. New Was Denied Due Process of Law.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Brady, 373 U.S. at 87. Since its articulation in 1963, the *Brady* rule has been consistently applied to both civilian criminal proceedings and military courts-martial. *See, e.g., California v. Trombetta*, 467 U.S. 479 (1984) and *United States v. Trigueros*, 69 MJ 604 (ACCA 2010). As the Supreme Court stated in *Trombetta*, and as cited in *Trigueros*,[8] the purpose of this due process guarantee is to ensure that "criminal defendants [are] afforded a *meaningful* opportunity to present a *complete* defense." *Trombetta*, 467 U.S. at 485 (emphasis added). As the *Trombetta* Court observed, "this constitutionally guaranteed access ... delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."

In order to trigger this due process protection, a defendant is required to demonstrate (i) that the "evidence" that he seeks is "favorable" to him (*Brady*, 373 U.S. at 87) and (ii) that the evidence is "material" to his defense. *Id.*

a. Classified PDD 25 and PRD 13 Support Mr. New's UNPA Defense

"Impeachment evidence ..., as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). As pointed out in III.D. above, the classified

[8] *Trigueros*, 69 MJ at 609.

versions of both PDD 25 and PRD 13 contained information that called into question the correctness of the representations made by trial counsel that the Macedonian deployment was carried out within the limits set forth in the UNPA. Indeed, the classified version of PDD 25 contains ample evidence that the Clinton Administration adopted a multilateral noncombatant and combatant policy deploying American armed forces in deliberate disregard of the UNPA. *Id.* By blocking access to the classified PDD 25 and PRD 13 documents, the Government prevented Mr. New from developing fully his UNPA defense, and thereby overcoming the strong presumption of the lawfulness of a military order.

b. Classified PDD 25 and PRD 13 Are Material to Mr. New's UNPA Defense.

Mr. New made a specific request for the production of the classified PDD 25 document. By a deliberate effort to subvert the military judge's order to produce the classified version of PDD 25, trial counsel deprived defense counsel of access to that document, substituting an "eight to 10" page document for the actual 29 page classified document. *See* New Pet., paras. 33-38. While civilian defense counsel could not describe PRD 13 with the same degree of precision, his description of PDD 13 or PRD 13 was sufficiently specific to establish the possible existence of such a document, and a possible relation to PDD 25. *See* New Pet., paras. 39-47. Civilian defense counsel were misled by

trial counsel's response to his request for production of the classified PDD 25. And neither trial counsel nor the military judge gave an adequate response to the request for PRD 13.

"[A]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist." *Bagley*, 473 U.S. at 682. Indeed, as the Government conceded in *Bagley*, "[i]n reliance on [a] *misleading* representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it would have otherwise pursued." *Id.* (emphasis added.) Thus, the *Bagley* Court concluded:

> [T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. [*Id.*, 473 U.S. at 682-83.]

Depriving defense counsel of access to the classified PDD 25 and PRD 13 documents caused defense counsel to change strategies. Initially, defense counsel sought the two classified government documents in an effort to demonstrate that the Macedonian deployment was unlawful, including that it violated the UNPA. New Pet., paras. 22 and 39-43. If the deployment was unlawful, then the order to wear the UN uniform prescribed for that deployment was unlawful, and Mr. New could

not legally have been convicted of, and punished for, disobeying a lawful order.

After having been deprived of access to the classified documents, civilian defense counsel was compelled to rely primarily on the testimony of an expert witness in an attempt to counter the Government's claim that the Macedonian deployment was a UN Chapter VII peace enforcement operation, not a Chapter VI peacekeeping one, with the specific goal of refuting the four letters from President Clinton to the Speaker of the House which had been introduced by trial counsel in support of the government's claim. *See* New Pet., App. A at A—38 - A-40 (R. at pp. 321, l. 3 - 323, l. 10).

If civilian defense counsel had been given access to the classified documents, he could have used the Government's own documents to impeach the Government's claim. Just as the President's signature appeared on the four letters to the Speaker, the President's signature appeared on the classified version of PDD 25. *See id.*, App. B., pp. B-86 - B-94 (R., App. Exh. LII, Encl. I) and *id.*, App. C at C-7 (PDD Memorandum at 4). Without access to the classified documents, defense counsel was forced to pit the testimony of an expert witness (who also had no access to the classified materials) against the President of the United States. In such a case, a military judge would be hard-put to choose between the President, who is his commander-

in-chief, and a "retired Senate staff member," no matter how extensive his experience and education (*id.*, App. A at A-40 - A-43 (R. at 323, l. 15 - 326, l. 12)). Had defense counsel been provided with the classified version of PDD 25, he could have impeached four signed presidential letters with a presidential decision directive signed by the same President.

In sum, Mr. New was denied due process of law by the actions of trial counsel and the ruling of the military judge depriving defense counsel of access to the classified documents PDD 25 and PRD 13, because such denial created a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See Bagley*, 473 U.S. at 682. As the *Bagley* rule states, such a "'reasonable probability'" arises if the evidence to which a party was denied access was "'sufficient to undermine confidence in the outcome.'" *Id.*

2. Mr. New Was Denied a Meaningful Opportunity to Present a Complete Defense in Violation of the Military Rules Governing Discovery.

Apart from the due process standard established in *Brady*, and applied in *Bagley*, it is well-established that military law "provides for broader discovery than due process and *Brady* require." *Trigueros*, 69 M.J. at 610. As stated by the Court of Appeals for the Armed Forces: "The military justice system has been a leader with respect to open discovery and disclosure of

exculpatory information to the defense." *Williams*, 50 M.J. at 439. Broader than the *Brady* rule, Article 46, UCMJ "mandate[s] that 'the trial counsel, the defense counsel, and the court-martial shall have *equal opportunity* to obtain witnesses and other evidence in accordance with regulations as the President may prescribe.'" *Id.*, 50 M.J. at 440 (emphasis added). According to regulations, "documents, tangible objects, and reports ... must be disclosed upon request. RCM 701(a)(2) and (5)." *Id.*, at 440, n.3. Not only must trial counsel turn over evidence in his files, but he has "'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case....'" *Williams*, 50 M.J. at 441. Indeed, in *United States v. Simmons*, 38 M.J. 376 (CMA 1993),the United States Court of Appeals for the Armed Forces "held that the prosecution 'must exercise due diligence' in reviewing the files of *other government entities* to determine whether such files contained discoverable information." *Williams*, 50 M.J. at 441 (emphasis added). This due diligence rule applies to any "files, as designated in a defense discovery request, that involved a specified type of information within a specified entity." *Id.*

a. Trial Counsel Violated His Duty to Disclose.

Although Mr. New could not identify the particular Government entity with custody of the classified PDD 25, there

is no question that trial counsel had sufficient access to information upon which to find the custodian. After all, prior to the court-martial, in his role as briefing officer, trial counsel had obtained an unclassified version of the document, or some portion thereof, which he and others had used in an effort to persuade Mr. New that the Macedonian deployment was lawful. New Pet., paras. 26-28. Yet, trial counsel either (i) misrepresented the "eight to 10" page document as the 29-page classified document, or (ii) neglected his duty to ensure that the "eight to 10" page document that he represented for production as the classified PDD 25 was, in fact, as he represented it to be.

As for classified PRD 13, Mr. New explicitly tied it to PDD 25 (New Pet., paras. 44-46), which should have sufficed to lead trial counsel to make appropriate inquiries. There is nothing in the record to support any claim other than trial counsel's having made no such inquiry, dismissing defense counsel's query with an offhand remark that he had no idea if PRD 13 even existed. *Id.*, 45-46. "The prosecutor's obligation under Article 46[,] [however,] is to remove obstacles to defense access to information and to provide such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *Williams*, 50 M.J. at 442.

Trial counsel failed to perform that duty. Instead,

initially, trial counsel asserted that PRD 13 was "irrelevant." New Pet., para. 46. Then, he "guessed" what it might be. *Id.* And, finally, he decided that he had no idea whether the document even existed. *Id.* Plainly, trial counsel engaged in the very kind of "gamemanship" that the broad military discovery rule is designed to eliminate. *See Adens*, 56 M.J. at 731.

b. The Government Cannot Meet Its Burden that Its Failure to Disclose Classified PDD 25 and PRD 13 Did Not Prejudice Mr. New.

Because the military standards set forth by R.C.M. 701 and Article 46, UCMJ, are "broader than the Brady constitutional standard[,] the government bears the higher burden of proving [that a] nondisclosure in response to a specific request is harmless beyond a reasonable doubt." *Trigueros*, 69 M.J. at 609. The Government must meet this higher standard in this case. Mr. New made a specific request for the classified document PDD 25, and a sufficiently specific request for the classified document, PRD 13. *See* New Pet., paras. 21-22, 39-43.

Both documents contain information demonstrating that the policy adopted by the Clinton Administration respecting the detailing of American armed forces to U.N. peace operations, both combatant and noncombatant, disregarded the UNPA limits on presidential deployment authority to UN multilateral peace keeping or peace enforcement operations. By denying Mr. New access to the classified versions of PDD 25 and PRD 13, the

Government was relieved of having to address the stark inconsistencies between the documents that it produced at the court-martial supporting its claim that the Macedonian deployment was UNPA compliant, and the information contained in PDD 25 and PRD 13 that demonstrated substantial noncompliance with the UNPA. Especially damaging to the Government's claim, PDD 25 established a policy of armed force deployment to U.N. peace operations without regard to UNPA's statutory limitations upon presidential discretion, and adopted a strategy whereby those limits would not only be ignored, but "at an appropriate time," amended so as to conform the law to executive discretion, instead of the other way around.

The government cannot meet its burden to demonstrate beyond a reasonable doubt that its failure to disclose the classified versions of PDD 25 and PRD 13 was harmless error.

CONCLUSION

In *United States v. New,* 55 M.J. 95 (CAAF 2001), the United States Court of Appeals for the Armed Forces recognized that, although a member of American Armed forces is obliged to obey orders, and although military orders are presumed lawful, the "term 'lawful' recognizes the right to challenge the validity of a[n] order with respect to a superior source of law." *Id.* at 100. At stake in this petition is whether Michael G. New was denied his constitutionally and statutorily guaranteed right to

access classified government documents that supported his claim that an order to wear a foreign uniform in service of a foreign government violated a statute duly enacted by the Congress of the United States.

To overturn Mr. New's conviction, it is not necessary for this Court to determine that the deployment order of President Clinton was unlawful. It is only necessary for this court to determine that the actions of the trial counsel and trial judge denying Mr. New his right to present a complete defense challenging the lawfulness of President Clinton's order were unlawful.

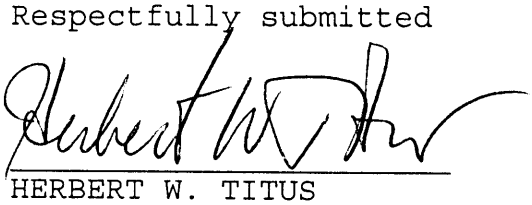
However, with respect to both the Macedonian deployment and the New court martial, government officials disrespected the rule of law. PDD 25 was generated by Anthony Lake, then Assistant to the President for National Security Affairs. *See* New Pet., App. C at C-5 (PRD 13 at 5).[9] When the subject matter of these Executive Orders governs the most serious issues we face as a nation — deploying members of the U.S. Armed Forces overseas — one would expect that the strictures of statute would be carefully followed. Now that PDD 25 has been declassified, obtained, and reviewed, the Executive Order can be seen as

[9] During the Clinton Administration, the National Security Council were responsible for the development of Executive Orders involving matters of national security, which were known as Presidential Decision Directives and Presidential Review Directives. *See* http://www.fas.org/irp/offdocs/direct.htm.

little more than camouflage for a presidential administration to do what it wanted to do, irrespective of the law. Rather than analyze each of the two possible statutory bases for deployment under UNPA, PDD 25 conflates those statutory provisions, rendering them meaningless. If PDD 25 had been provided to civilian defense counsel for Mr. New, it would have been a persuasive indication that the UNPA limitations were being circumvented by the President, unlawfully ordering the Macedonian deployment under the authority of the United Nations, without compliance with the Congressionally-enacted UNPA. One man, Michael G. New, an Army Specialist, possessed the insight and courage to obey the soldier's oath to defend the Constitution, only to be court-martialed.

Because of a fundamental flaw in the court-martial proceedings, Mr. New was denied his right of access to classified documents the disclosure of which would have demonstrated at his court-martial that the order of which he was charged with, and convicted of, disobeying was truly unlawful. To rectify this error, Mr. New's Petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis* should be granted, and Mr. New's conviction for disobedience of a lawful order and bad conduct discharge should be vacated.

Respectfully submitted



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