

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

MICHAEL G. NEW,	}	
formerly SPC Michael G. New,	}	
	}	
Petitioner,	}	PETITION FOR
	}	EXTRAORDINARY RELIEF IN
	}	THE NATURE OF A WRIT
v.	}	OF ERROR <i>CORAM NOBIS</i>
	}	
	}	
UNITED STATES,	}	Docket No. _____
	}	
Respondent.	}	
	}	

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

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

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IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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

Pursuant to Article 66 of the Uniform Code of Military Justice [hereinafter "UCMJ"], 10 U.S.C. section 866(a), and to the United States Army Court of Criminal Appeals Internal Rules of Practice and Procedure [hereinafter "A.C.C.A.R."], together with Rules 2(b) and 20 of the Joint Rules of Practice and Procedure of the Courts of Criminal Appeals [hereinafter C.C.A.R.], Petitioner, Michael G. New, files this Petition for Extraordinary Relief in the Form of a Writ of *Coram Nobis*.

In accordance with C.C.A.R. 20(1)-(7), Petitioner New alleges, as follows:

HISTORY OF THE CASE

The Court-Martial

1. On 24 October, 17 November, 8 and 13 December 1995, and 18, 19, 23, and 24 January 1996, then Specialist Michael G. New ("Mr. New") was tried on a charge of disobeying a lawful order by BCD Special Court-Martial, composed of officers and enlisted members at Leighton Barracks, Germany. See Record of Trial of Michael G. New, Specialist ("R.") Cover page; Appendix A ("App. A") at A-1.

2. On 24 January 1996, Mr. New was convicted of disobeying a lawful order, in violation of Article 92, UCMJ. (R. at 847, 11.

3-5; App. A at A-51), and was sentenced to a bad conduct discharge. R. at 953, ll. 5-8; App. A at A-54.

3. "The convening authority approved the adjudged sentence." *United States v. New*, 50 M. J. 729, 733 (ACCA 1999).

The Direct Appeal

4. On 28 April 1999, this Court affirmed Mr. New's conviction and sentence. *See id.*, 50 M.J. at 748. Specifically, this Court approved the military judge's findings that the orders that Mr. New disobeyed "were lawful," and that Mr. New had failed to rebut "the long established historic and legal precedent that [military] orders are presumed to be legal." *See id.*, 50 M.J. at 740.

5. On 13 June 2001, the Court of Appeals for the Armed Forces ("CAAF") affirmed. *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001). Specifically, CAAF found that "[t]he military judge correctly determined that the evidence [Mr. New] presented did not overcome the presumption of lawfulness given to military orders" and that Mr. New's argument that the military order "failed to comply with the [UNPA] ... would unacceptably substitute [Mr. New's] personal judgment of the legality of an order for that of his superiors and the Federal Government." *See id.* 55 M.J. at 107.

6. On 10 September 2001, Mr. New filed in the United States Supreme Court a Petition for Writ of Certiorari to CAAF.

7. On 9 October 2001, the petition was denied. *New v. United States*, 534 U.S. 955 (2001).

Mr. New's Collateral Challenges

8. On 16 January, 1996, Mr. New filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia, along with a motion to stay the court-martial. On 28 March 1996, the district court denied the petition on grounds of "comity," ruling that "[o]nce military proceedings are completed, SPC New "may ... move to reopen this proceeding." *United States ex rel New v. Perry*, 919 F. Supp. 491, 500 (D.D.C. 1996).

9. On 25 November 1997, the United States Court of Appeals for the District of Columbia affirmed the district court's denial of the habeas petition on the ground that "[Mr.] New has failed to exhaust his remedies for relief in the pending court-martial action." *New v. Cohen*, 129 F.3d 639, 648 (D.C. Cir. 1997).

10. On 30 March 1998, Mr. New's petition for a writ of certiorari was denied. *New v. Cohen*, 523 U.S. 1048 (1998).

11. On 8 May 2002 Mr. New filed a motion to reopen the 1996 habeas corpus proceeding in the United States District Court for the District of Columbia, seeking leave to file an amended and supplemental petition for a writ of habeas corpus collaterally challenging his court-martial conviction and sentence.

12. On 18 June 2002 the district court granted Mr. New's

motion to reopen, but denied his motion to file an amended habeas petition, treating Mr. New's claim as a nonhabeas collateral attack under *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969).

13. On 22 December 2004, the district court dismissed Mr. New's complaint for failure to state a claim under the *Kauffmann* rule. See *United States ex rel New v. Rumsfeld*, 350 F. Supp. 2d 80 (D.D.C. 2004). Abiding by a standard of judicial deference, the district court concluded that "[p]etitioner's challenge under the UNPA does not raise a claim of fundamental error or unfairness in his court-martial proceeding, and this Court will not re-assess it on collateral review." *Id.* at 96.

14. On 23 May 2006, in like deference to the military courts, the United States Court of Appeals for the District of Columbia affirmed the district court's dismissal. See *United States ex rel New v. Rumsfeld*, 448 F.3d 403, 410 (D.C. Cir. 2006).

15. On 17 August 2006 the U.S. Court of Appeals denied Mr. New's petition for a rehearing.

16. On 15 November 2006, Mr. New filed in the United States Supreme Court a Petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia.

17. On 23 April 2007, Mr. New's petition for a writ of certiorari was denied. *United States ex rel New v. Gates*, 550 U.S. 903 (2007).

No Other Actions Taken or Pending

18. There have been no other actions filed in this or any other court seeking any additional relief from Mr. New's 1996 court-martial conviction and sentence.

STATEMENT OF FACTS

The Court-Martial Charge: Disobedience of Lawful Deployment Order

19. On 17 October 1995, charges were preferred against Mr. New for violation of Article 92(2), UCMJ, as set forth in the following specification:

In that Specialist Michael G. New, US Army, having knowledge of a lawful order issued by LTC Stephen R. Layfield on 2 OCT 95 and CPT Roger H. Palmateer on 4 OCT 95, to wear the *prescribed uniform for the deployment to Macedonia, i.e., U.N. patches and cap*, an order which it was his duty to obey, did, at or near Schweinfurt, Germany, on or about 10 OCT 95, fail to obey the same. [R. at 15(a); App. A at A-4 (emphasis added).]

20. On 17 November 1995, before entering a plea (R. at 16, 11. 9-11; App. A at A-5), Mr. New's civilian defense counsel verbally requested that pre-trial motions be deferred until defense counsel gained access to certain "*classified*" documents in the custody of the Government. R. at 16, 1. 24 -17, 1. 16; App. A at A-5 - A-6 (emphasis added).

**Discovery Requested:
Classified Presidential Decision Directive 25**

21. Foremost among the classified documents verbally sought on 17 November 1995 by civilian defense counsel from trial counsel was the classified version of Presidential Decision Directive 25 ("PDD 25"). R. at 17, ll. 9-14; App. A at A-6.

22. In support of this discovery request, civilian defense counsel stated, as follows:

PDD 25 has been represented to Specialist New's unit as one of the bases for their ... deployment in this uniform. It's, therefore, clearly relevant. In fact, the government made it relevant when the government provided an information briefing to Task Force Able Sentry and mentioned PDD 25. We would like to see that document that forms the basis of what the government has asserted in that briefing is the legality of the order pertaining to Specialist New. [R. at 19, ll. 14-22; App. A at A-7.]

23. On 30 November, 1995, the Government declined to produce the classified PDD 25, "because PDD 25 is a classified document, and because the Government believes PDD 25 to be irrelevant to this trial, the Government does not intend to disclose this document." Appellate Exhibit (hereinafter "App. Exh.") XXIV, "Supplemental Discovery Response," para. 1(e); Appendix B ("App. B") at B-24.

24. On 6 December 1995, civilian defense counsel resubmitted Mr. New's request for the classified PDD 25 document, in writing, seeking the production of the classified PDD document "and all documents, reports, or other writings pertaining to its

preparation, revision, adoption, including the official summary thereof." App. Exh. XXII, "Request for Discovery/Motion to Compel Discovery", para. 1(a); App B at B-11.

25. On 8 December 1995, the Government again declined to produce the classified PDD 25, stating that "any and all collateral documents [are] *irrelevant* to the proceeding." App. Exh. XXIII, para. 1(a); App. B at B-20 (emphasis added).

26. Prior to the issuance of the order to wear the UN uniform for the Macedonian Deployment, and at the request of Mr. New's commanding officer, Major David Charles Osborne briefed Mr. New on the *relevance* of PDD 25 to the legality of the U.N. Macedonian operation, at which time Major Osborne (i) explained the connection between PDD 25 and the upcoming deployment, (ii) "read portions of the text" of PDD 25, and furnished to Mr. New "a portion of the text" of PDD 25 for Mr. New to read. App. Exh. LXXV, Sworn Statement, Major David Charles Osborne at 2 (24 Dec. 1995); App. B at B-181.

27. On 2 October 1995, prior to the issuance of the order to Mr. New to wear the UN uniform for the Macedonian deployment, Mr. New's unit received a special "Information Briefing," at which briefing trial counsel, then acting in the capacity as briefing officer, stated that PDD 25 is one of the "legal bases for the deployment to Macedonia," in particular (R. at 64, l. 12 - 66, l. 21; App. A, at A-8 - A-10), as well as one of the legal

bases "for the participation of U.S. soldiers in UN peacekeeping operations," in general. R. at 73, l. 1 - 75, l. 5; App. A at A-11 - A-13. See also, App. Exh. XXVIII, p. 18; App. B at B-43.

28. Following this Information Briefing, and in response to an invitation to any one who had any questions about the Macedonian deployment, Mr. New again met with Major Osborne "for information," in response to which Major Osborne provided Mr. New with what the Major represented to be the "complete version" of PDD 25. App. Exh. LXXV at 2; App. B, at B-181.

29. At Mr. New's court martial, despite civilian defense counsel's oral and written requests, the Government declined at this point to provide Mr. New with the *classified* version of the PDD 25 document, insisting that there was nothing in the unclassified "summary" of PDD 25 to demonstrate that the classified document was relevant. R. at 167, l. 11 - 170, l. 12; App. A at A-27 - A-30.

**Order to Produce Classified Presidential Decision Directive 25:
Subverted by the Government**

30. After the military judge was advised that both civilian defense counsel had received "security clearances" R. at 167, ll. 15-20; App. A at A-27), the military judge asked trial counsel why the classified PDD 25 document should not be made available to Mr. New's counsel under "an appropriate instruction," and "let them examine it and make the determination for themselves that it

is not relevant?" R. at 169, ll. 14-22; App. A at A-29.

31. Trial counsel replied, "[i]t will take us down a road from which there is no return.... You will see a request there's a Presidential Directive 13...." R. at 169, ll. 23-24 - 170, l. 1-2; App. A at A-29 - A-30. Interrupting trial counsel, the military judge persisted, but trial counsel resisted, asserting that "to the extent that [civilian defense counsel] have been provided the substance of that classified document argues even stronger for the prevention of the unnecessary dissemination of classified information." R. at 170, ll. 3-12; App. A at A-30.

32. Despite the Government's persistent resistance, the military judge "order[ed] that the defense ... be given the opportunity to view [PDD 25]" under conditions compliant with civilian defense counsel's security clearance. R. at 171, l.14 - 172, l.12; App. A at A-31 - A-32.

33. Civilian defense counsel requested that disclosure of "the classified document [be] at Fort Knox" at a future date to be agreed on. R. at 172, ll. 1-2; App. A at A-32. In response, trial counsel replied:

If ... by saying to Fort Knox is going to delay this proceeding past the time table that you have already set, then the government would argue that, being as how it's - they *can look at it now*. [R. 172, ll. 15-18; App. A at A-32. (emphasis added).]

34. In response to trial counsel's offer to make the classified PDD document available "now," the military judge asked

defense counsel if that was "acceptable," to which defense counsel asked "[h]ow long a document is it?" R. at 172, ll. 21-23; App. A at A-32. After being advised by trial counsel that the document in question was "somewhere in the eight to 10 pages" in length, defense counsel accepted trial counsel's offer with the express approval of the military judge. R. at 172, l. 23 - 173, l. 3; App. A at A-32 - A-33.

35. After the military judge approved the modified timetable for the Government to comply with the order to produce the classified version of PDD 25, trial counsel asked the military judge to confirm that the document that he had just described as "eight to 10 pages" and ready for inspection "now" was "all ... the government has to give them," to which the military judge replied: "Very well. Thank you...." R. 173, ll. 4-8; App. A at A-33.

36. Immediately thereafter, the military judge rehearsed for the benefit of all counsel the terms and conditions of civilian defense counsel's "security clearance," including review by "assigned government security personnel" and an "in camera proceeding" before the military judge before disclosure of any "classified information," eliciting concurrence from counsel on both sides. R. at 173, ll. 8-25; App. A at A-33.

37. In reliance on trial counsel's representations that:
(a) he was in possession of the classified version of PDD 25; (b)

the document was "eight to 10 pages" in length, and (c) the document would be made available to defense counsel immediately after court adjournment, the military judge asked civilian defense counsel if "there [are] any remaining issues with respect to defense request for discovery number one (PDD 25)," to which civilian defense counsel replied: "None, your honor." R. at 174, ll. 1-3; App. A at A-34.

38. Unknown to civilian defense counsel, however, the classified PDD 25 document was not a document of "eight to 10 pages" as represented by trial counsel at the court-martial, but is a 29-page document, a copy of which was first discovered by Mr. New on November 18, 2009, the document having been declassified and furnished to Mr. New pursuant to his Mandatory Review Request dated June 10, 2008. See Letter dated November 18, 2009 from William J. Clinton Library to Herbert W. Titus, and enclosed classified Presidential Decision Directive/NSC 25 dated May 3, 1994, a copy of which is included in Appendix C [hereinafter "App. C."] at C-1 - C-32 (PDD 25).

**Presidential Decision Directive 13 and/or
Presidential Review Directive 13:
Discovery Summarily Denied**

39. In addition to Mr. New's request for the classified version of PDD 25, civilian defense counsel sought production of "Presidential Decision Directive 13 ("PDD 13") and/or Presidential Review Directive ("PRD 13") [hereinafter collectively

"PPD/PRD 13"] and all documents or information pertaining" thereto. App. Exh. XXII, para. 11 (p. 5); App. B at B-13.

40. Initially, trial counsel denied this request solely "on the grounds of relevance." App. Exh. XXIII, para. 11; App. B at B-21.

41. Following the military judge's order to produce the classified version of PDD 25, and in an effort to identify the specific subject matter of PDD/PRD 13, civilian defense counsel explained that there had been mention in the press in 1993 of a "document related to ... new policies regarding U.S. support of United Nations operations." R. at 180, l. 18 - 181, l. 1; App. A at A-35 - A-36.

42. In a further effort to establish that a document entitled either "PDD 13" or PRD 13" existed and that it related to PDD 25, civilian defense counsel stated that, while a portion of the document may be classified, the document may have been made public in 1993, and that it pertained to the Macedonia deployment, in that it appeared to be the "forerunner" to the classified PDD 25. R. at 181, ll. 1-16; App. A at A-36.

43. In summation, civilian defense counsel explained that "you can't understand PDD 25 ... without understanding what was done under PDD 13." R. at 181, ll. 19-21; App. A at A-36.

44. Without making any effort to determine whether a PRD 13 or PDD 13 exists, and if so, whether it was in the public domain

or classified, the military judge denied Mr. New's request, stating:

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 (civilian defense counsel) should have as good a chance of locating it as the government, so I will not make an order that the government produce that item. [R. at 181, l. 22 - 182, l. 3; App. A at A-37.]

45. In a final effort to persuade the military judge to issue an order to produce PDD/PRD 13, civilian defense counsel asked "if trial counsel has a copy of that document or any documents related to --," but before he could complete his question, the military judge interrupted civilian defense counsel, answering the question for trial counsel: "My impression was, from an earlier argument, he didn't have any idea what it was." To which statement, trial counsel said: "That's correct." R. at 182, ll. 4-8; App. A at A-37.

46. In fact, trial counsel had previously resisted Mr. New's request for a document labeled as PDD 13 or PRD 13, not on the ground that "he didn't have any idea what it was," but on the ground that it was "irrelevant." See App. Exh. XXIII, para. 11; App. B at B-21. Only later would trial counsel state that he did not know "what [PDD/PRD13] is." See R. at 170, ll. 1-2; App. A at A-30.

47. In fact, there did exist a 16-page government classified document dated February 15, 1993, entitled

Presidential Review Directive 13 on "Multilateral Peacekeeping Operations," a copy of which was first discovered by Mr. New on November 18, 2009, the document having been declassified and furnished to Mr. New, pursuant to Mr. New's Mandatory Review Request dated June 10, 2008. See Letter dated November 18, 2009 from the William J. Clinton Presidential Library to Herbert W. Titus, and enclosed 5-page classified PRD 13 dated 15 Feb. 1993, a copy of which is included in App. C at C-51 - C-55 (PRD 13).

**Motion to Dismiss:
October 1995 Order violated the UNPA**

48. Although Mr. New was denied his request for access to both classified PDD 25 and PRD 13, he nevertheless filed a motion to dismiss on the ground that the October order to deploy Mr. New in a U.N. uniform to the UN peace operation¹ in the former Republic of Macedonia was unlawful, because the deployment violated "22 U.S.C. Code Sec. 287d,² or in the alternative, 22 U.S.C. Sec. 287d-1"³ (Sections 6 and 7 of the UNPA,

¹ According to PDD 25, a "peace operation" may either be a peace keeping operation under Chapter VI of the UN Charter or a peace enforcement operation under Chapter VII of the Charter. See App. C, p. 29C (PDD 25, Annex VII).

² According to 22 U.S.C. Section 287d, the President is not authorized to deploy American armed forces in support of a U.N. combatant peace enforcement operation under Article 43 of the United Nations Charter without prior specific approval of both the House of Representatives and the Senate.

³ According to 22 U.S.C. Section 287d-1, the President is authorized to deploy American Armed Forces in support of a U.N.

respectively). App. Exh. XLVIII, para. (a); App. B at B-67.

49. According to the Government Motion in Limine I, trial counsel objected to the production of "any documentary or testimonial evidence challenging the legality of the deployment of United States Forces in support of multilateral operations," including "[e]vidence concerning the legality of the deployment of United States Forces in the former Yugoslav Republic of Macedonia." App. Exh. XX, para. I.A; App. B at B-1.

50. The military judge refused to grant the Government's Motion in Limine I and, thus, permitted civilian defense counsel to introduce evidence of the illegality of the order to deploy to Macedonia, including the claim that the order to deploy violated the United Nations Participation Act ("UNPA"). R. at 157, l. 4 - 164, l. 24; App. A at A-18 - A-25.

51. Mr. New's claim that the deployment order violated Section 6 of the UNPA rested on the ground that the UN peace operation in Macedonia was an integral part of the UNPROFOR peace enforcement operation in the former Yugoslavia under Article VII of the U.N. Charter which had never been specifically approved by Congress, as required by Section 6 of the UNPA (22 U.S.C. § 287d). App. Exh. XLVIII, Preliminary Memorandum in Support to

noncombatant peacekeeping operation, "but in no event shall more than a total of one thousand of such personnel be so detailed at any one time."

Motion to Dismiss: Unlawful Deployment at 3-6; App. B at B-69 - B-72.

52. Mr. New's alternate claim that the deployment order violated Section 7 of the UNPA rested on the ground that, if the UN peace operation in Macedonia were a separate UN peacekeeping mission under Article VI of the UN Charter, the number of members of the U.S. armed forces detailed to U.N. noncombatant operations exceeded the statutory maximum of one thousand at any one time, in violation of Section 7 of the UNPA (22 U.S.C. § 287d-1). App. Exh. XLVIII, Preliminary Memorandum, at 7; App. B at B-73.

53. In support of these claimed violations of the UNPA, Mr. New called trial counsel - the JAG officer who had briefed Mr. New's unit on the legality of the Macedonia deployment - who testified that the legality of the Macedonian deployment rested, in part, on "the unclassified version" of PDD 25 and Chapter VI of the UN Charter. See R. at 66, ll. 10-20; App. A at A-10. R. at 73, l. 8 -74, l.18; App. A at A-11 - A-12. R. at 75, ll. 1-13; App. A at A-13.

The Failure to Produce the Classified Versions of PDD 25 and PRD 13 Prejudiced Mr. New's UNPA Motion to Dismiss

54. Having been denied access to the classified PDD 25, which had been ordered but not produced at his court-martial, Mr. New was denied the opportunity to overcome the presumption of lawfulness of the order to wear the UN uniform for the Macedonian

deployment,⁴ by demonstrating that, on May 5, 1995 – just five months before Mr. New's unit was ordered to be deployed to the UN peace operation in Macedonia – President William J. Clinton approved classified PDD 25 as the operative policy to govern United States participation in multilateral peace operations, including peacekeeping and peace enforcement under Articles VI and VII of the UN Charter, in disregard of section 6 of the UNPA (22 U.S.C. § 287d) and section 7 of the UNPA (22 U.S.C. § 287d-1) See App. C at C-4 – C-32 (PDD 25).

55. Additionally, such denial of access to the classified PDD 25 at the court-martial proceeding, deprived Mr. New of the opportunity to demonstrate that President Clinton approved as current official policy the deployment of American armed forces in support of UN multilateral peace operations without regard for UNPA strictures, favoring a legislative strategy to remove such strictures "at some future appropriate time":

-- 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 that it is politically feasible, to delete the prohibition against using that section as authority to support Chapter VII operations and combatant missions.*" [App. C at C-16 (PDD

⁴ "An order is presumed to be lawful.... A soldier disobeys an order 'on his own personal responsibility and at his own risk' ... Appellant contested the orders' legality both at trial and on appeal. Appellant bears the heavy burden of showing that the orders were illegal." *New*, 50 M.J. at 739.

25, Policy Guidance: "Strengthening U.S. Support for Multilateral Peace Operations" at 9). (emphasis added).]

56. Additionally, such denial of access to the classified PDD 25 at the court-martial proceeding deprived Mr. New of the opportunity to demonstrate that instead of conforming its policies to meet the requirements of the UNPA, the Clinton administration disregarded UNPA strictures, opting to substitute consulting and briefing Congress about U.S. participation in UN peace operations instead of complying with the UNPA requirements. App. C at C-6, C-29 - C-31 (PDD 25, Memorandum on U.S. Policy Reforming Multilateral Peace Operation at 3 and Annexes VII and VIII).

57. Specifically, such denial of access to PDD 25 at the court-martial proceeding, deprived Mr. New of the opportunity to challenge effectively the Government's claim that the Macedonian deployment was in compliance with the statutory requirements of Section 6 of the UNPA, namely, that Congress expressly approve the deployment of American armed forces to any UN Chapter VII peace enforcement action. See App. C at C-20 - C-21, C-29 (PDD 25, Annexes I, II and VII).

58. Specifically, such denial of access to PDD 25 at the court-martial proceeding, deprived Mr. New of the opportunity to challenge effectively the Government's claim that the Macedonian deployment was in compliance with the statutory requirements of

Section 7 of the UNPA limiting the number of armed forces members to 1000 at any one time to UN Chapter VI noncombatant peacekeeping operations. App. C at C-21 and C-29 (PDD 25, Annexes II and VII).

59. By summarily refusing to address civilian defense counsel's request for PPD/PRD 13, the military trial judge denied Mr. New opportunity to discover the Clinton Administration's classified PRD 13 directed review as to whether "the U.N. Participation Act need[s] to be modified," in light of "the new challenges and environments for multilateral peacekeeping operations." App. C at C-54 (PRD at 4).

60. Having successfully blocked Mr. New's attempts to gain access to the classified versions of PDD 25 and PRD 13 at the court-martial, trial counsel urged the military judge to dismiss Mr. New's claim that the uniform/deployment order violated Sections 6 and 7 of the UNPA, on the ground that the issue whether such order violated a statute raised non-justiciable political questions - "things having to do with the [UNPA], things having to do with government policy - all things that are rightfully a province of the legislature and the executive, not the province of courts...." R. at 129, ll. 3-9; App. A at A-14.

61. As a direct result from having been denied access to material and exculpatory information in the classified versions of PDD 25 and PDD/PRD 13 demonstrating noncompliance with UNPA,

the military judge ruled that Mr. New failed to carry his "heavy burden of demonstrating [the order's] unlawfulness," R. at 430, ll. 13-14; App. A at A-47), ruling, on the one hand, that the deployment order complied with the *noncombatant* force limitation of Section 7 of the UNPA (R. at 427, ll. 14-19; App. A at A-46), but contradictorily on the other hand, that the President had determined "that it was in the interests of the United States to deploy *combat-equipped* United States armed forces to Macedonia as part of a multilateral effort to resolve the continuing civil war in the former Yugoslavia." R. At 424, ll. 8-14; App. A at A-44 (emphasis added).

62. Also, as a direct result of having been denied material and exculpatory information in the classified versions of PDD 25 and PRD 13 demonstrating noncompliance with UNPA, the military judge ruled that "the decision and subsequent deployment of United States armed forces to Macedonia ... is a political question, inviting this Court to improperly review and possibly interfere with the President's activities as Commander-in-Chief in the realm of foreign affairs." R. at 431, l. 23 - 432, l. 7; App. A at A-48 - A-49.

63. On appeal to this Court, material and exculpatory information having been withheld by the Government at the court-martial, this Court adopted the military judge's findings and conclusions:

Considering the long established historic and legal precedent that orders are presumed to be legal, the evidence of record supporting the legality of the charged orders, the military judge's detailed and specific findings, which we adopt as our own, and the political, nonjusticiable nature of the underlying FYROM UNPREDEP mission, we find that the military judge was correct in determining ... that as a matter of law, the orders were lawful. There was no error. [*United States v. New*, 50 M.J. at 740 (emphasis added).]

64. On appeal to CAAF, material and exculpatory information having been withheld by the Government, the United States Court of Appeals for the Armed Forces summarily dismissed Mr. New's UNPA claims "because they would unacceptably substitute appellant's personal judgment of the legality of an order for that of his superiors and the Federal Government." See *United States v. New*, 55 M.J. at 107.

GROUND FOR EXTRAORDINARY RELIEF

Count I

In the court-martial of Petitioner, Respondent denied Petitioner his liberty and property without due process of law by unlawfully suppressing material and exculpatory information respecting the illegality of the order of which Petitioner was charged to have disobeyed, and thereby, (i) denying Petitioner a meaningful opportunity to present a complete defense, and (ii) impugning the neutrality and integrity of the court-martial proceeding.

Count II

In the court-martial of Petitioner, Respondent unlawfully denied Petitioner access to documents material and favorable to Petitioner's defense within control of Respondent in violation of the "equal opportunity" principle of Article 46, UCMJ, and R.C.M. 701, thereby (i)prejudicing Petitioner's claim that the order to wear the UN uniform for deployment to the UN peace operation in Macedonia violated UNPA and (ii)impugning the neutrality and integrity of the court-martial proceeding.

STATEMENT OF THE ISSUES

Whether Petitioner's conviction on the charge of disobedience of a lawful order was based upon a fundamental flaw in the proceedings, namely, breach of the Government's duties to disclose material and exculpatory information, thereby denying Petitioner of (i) his liberty and property without due process of law, and (ii) his fundamental rights under Article 46, UCMJ, and R.C.M. 701?

SPECIFIC RELIEF SOUGHT

Petitioner prays for an order overturning Petitioner's court-martial conviction, reversing that conviction and vacating Petitioner's bad conduct discharge and sentence, with instructions to issue an honorable discharge, or in the alternative, to order a new trial on the issue of the lawfulness of the order to deploy to Macedonia under Section 6 or 7 of the

UNPA with full disclosure by Respondent of all material and exculpatory information related to the order's lawfulness.

REASONS FOR GRANTING THE WRIT

This Court has jurisdiction to entertain Mr. New's *coram nobis* petition. See *United States v. Denedo*, 556 U.S. 904, 914 (2009). Because Mr. New's earlier judgment of conviction "was flawed in a fundamental respect," this Court "must take all appropriate means ... to ensure the neutrality and integrity of [its] judgment[,], other judicial processes for correction [being] unavailable." *Id.*, 556 U.S. at 917.

At his court-martial, Mr. New submitted discovery requests explicitly seeking the classified version of PDD 25, and a related document identified as PDD 13 or PRD 13, to support his motion to dismiss the court-martial on the ground, *inter alia*, that the order to wear the "prescribed [U.N.] uniform for the deployment to Macedonia was unlawful because it did not conform to the requirements of the UNPA." See Paras. 20-22, 39, and 48 *supra*.

1. PDD 25.

In an attempt to evade Mr. New's request for the classified PDD 25, trial counsel asserted that it was irrelevant, even though the Government, prior to the court-martial proceeding, had repeatedly relied upon PDD 25 to support the lawfulness of the

Macedonian deployment in a concerted effort to persuade Mr. New to comply with an order to wear the UN uniform required to deploy as part of a UN peace operation. See paras. 23-30, *supra*. After trial counsel failed to persuade the military judge that Mr. New's discovery request for the classified version of PDD 25 should be denied on the ground of irrelevance, the military judge ordered trial counsel to produce the classified PDD 25 document, civilian defense counsel previously having been granted security clearance. See paras. 29-30, *supra*.

In response to this order, trial counsel represented to the military judge and civilian defense counsel that the classified version of PDD 25 was in his immediate possession, and in order to avoid delay, that the classified version would be made available "now" for civilian defense counsel's review. See para. 33, *supra*. In response to civilian defense counsel's inquiry concerning the length of the classified version, trial counsel stated that it was "eight to 10" pages in length. See para. 34, *supra*. In reliance upon this representation, civilian defense counsel acceded to trial counsel's offer. *Id.*, *supra*.

Immediately following, trial counsel secured the military judge's assent that the production of the "eight to 10" page document would constitute full compliance with the military judge's order. See paras. 35, *supra*. In fact, the classified PDD 25 document was a different document – a 29-page document, not discovered by

Mr. New until November 18, 2009, when, in response to a Mandatory Review Request, the classified document was declassified and a copy thereof provided to Mr. New. See para. 38, *supra*.

2. PRD 13.

In an initial attempt to evade Mr. New's request for PDD/PRD 13, trial counsel represented to the military judge that the document was irrelevant. See paras. 39-40, *supra*. Then, upon further inquiry of civilian defense counsel, trial counsel inexplicably and inconsistently claimed that he "didn't have any idea what [PDD 13 or PRD 13] was." Paras. 45-46, *supra*. Although the document referred to as PDD 13 or PRD 13 was clearly a government-generated document, and possibly related to PDD 25, the military judge summarily refused to grant civilian defense counsel's request for its production on the sole ground that civilian defense counsel was in just as good a position as trial counsel to find it. See para. 44, *supra*. In fact, there was a 16-page classified document entitled PRD 13, a copy of which Mr. New obtained in November 2009 pursuant to his filing a Mandatory Review Request with the federal government. See para. 47, *supra*.

3. Materiality of PDD 25 and PRD 13.

Both classified document PDD 25 and PRD 13 contained information that would have provided ample support for Mr. New's claim that the order to wear the UN uniform violated the UNPA.

See paras. 54-60, *supra*. Specifically, the classified version of PDD 25 adopted a policy of American armed force participation, both combatant and noncombatant, in disregard of whether the deployment of those armed forces complied either with Section 6 or Section 7 of the UNPA. See paras. 54, 58-59, *supra*. Additionally, the classified version of PDD 25 revealed the existence of a classified plan by the Clinton Administration to seek legislative change at an appropriate future time to remove the limitations placed by the UNPA on presidential discretion to commit American armed forces to multilateral UN peace operations. See paras. 55 and 60, *supra*. Thus, the classified versions of both PDD 25 and PRD 13 demonstrated the validity of Mr. New's contention that the Macedonian deployment violated the UNPA – and demonstrated that Mr. New's contention was not, as the CAAF majority characterized it, an “unacceptabl[e] substitute [of Mr. New's] personal judgment of the legality of an order for that of his superiors and the Federal Government.” See paras. 5 and 66, *supra*.

4. Denial of Due Process of Law.

Under the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has a duty to disclose evidence favorable to the defendant where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87. The due process principle underlying Brady is to avoid an unfair trial: "our system of the administration of justice suffers when any accused is treated unfairly." *Id.* The Government fell short of this due process standard in two ways: (1) It failed to produce the classified version of PDD 25 even though ordered by the military judge to do so; and (2) It failed to conduct a reasonable search for the classified PRD 13. Additionally, the military judge failed to exercise due diligence to ensure that: (i) the classified PDD 25 document was produced as ordered, and (ii) a reasonable search for the classified version of PRD 13 was made. Trial counsel and the military judge, having so failed, Mr. New was denied "a meaningful opportunity to present a complete defense" since the classified PDD 25 and PRD documents contained "evidence that [was] material and favorable" to Mr. New's claim that the order that he was charged to have disobeyed was unlawful, in violation of UNPA. See *United States v. Trigueros*, 69 M.J. 604, 609 (ACCA 2010).

5. Violation of Article 46, UCMJ and R.C.M. 701.

Additionally, trial counsel's failure to produce the classified PDD 25 and PRD 13 documents violated "the statutory and executive order standards set forth in R.C.M. 701 and Article 46, UCMJ" in that such failure denied to Mr. New "equal opportunity" of access to documents within the control of the Government. *Id.*, 69 M.J. at 609-10. And the Government cannot

meet its burden "of proving beyond a reasonable doubt" that nondisclosure in response to Mr. New's specific requests was "harmless," as required under R.C.M. 701 and Article 46, UCMJ. See *Trigueros*, 69 M.J. at 609.

JURISDICTIONAL BASIS FOR RELIEF SOUGHT

A petition for extraordinary relief in the nature of a petition for coram nobis "may be filed at any time without limitation," provided that the "petitioner ... meet[s] [six] stringent threshold requirements." *Denedo v. United States*, 66 M.J. 114, 126 (CAAF 2008). Mr. New's petition meets the six "threshold criteria." *Id.*

- (1) **The alleged errors are "of the most fundamental character."** *Denedo*, 66 M.J. at 126.

The breach of the prosecutorial duty to disclose exculpatory and material information, as alleged herein, constitutes an error of the most fundamental character. Such a breach is both a denial of liberty and property without due process of law under the *Brady* rule and a violation of the "equal opportunity" principle under R.C.M. 701 and Article 46, UCMJ, as applied in *United States v. Adens*, 56 M.J. 724, 731 (ACCA 2002). Adherence to the *Brady* due process principle is necessary to ensure a "fair" trial so that "'justice is done [American] citizens in the courts.'" *Brady*, 373 U.S. at 87. Adherence to the higher "broad military discovery rule [is] 'essential to the administration of

military justice.'" *United States v. Adens*, 56 M.J. 724, 731 (ACCA 2002). See Brief of Petitioner in Support of his Petition in the Nature of a Writ of Coram Nobis [hereinafter "Pet. Br."], at 3-7.

- (2) **[T]here is no other adequate remedy, other than consideration of coram nobis by [ACCA], to rectify the consequences of the alleged error."** *Denedo*, 66 M.J. at 126.

Habeas corpus is not currently available to Mr. New in that he is not now in custody. *Id.* Although there are avenues of administrative relief available to Mr. New, none of those would provide the relief that Mr. New is seeking, namely, the overturning of his court-martial conviction and vacating his bad conduct discharge. *Id.* at 127. See Pet. Br. at 7-8.

- (3) **There are "valid reasons for not seeking relief earlier."** *Denedo*, 66 M.J. at 127.

At his court-martial, Mr. New submitted timely discovery requests for the classified PDD 25, and the related PDD 13 or PRD 13. Mr. New sought production of both documents on information and belief that they contained exculpatory information material to his claim that the order to deploy to Macedonia was unlawful, specifically the claim that the order violated sections 6 and 7 of the UNPA (22 U.S.C. §§ 287d and 287d-1, respectively). See Pet. Br. at 8-12.

A. Classified PDD 25.

In response to the military judge's order to produce the classified version of PDD 25, trial counsel represented to the military judge that (i) he had the classified document in his possession, and (ii) that the classified document was "eight to 10" pages in length. See paras. 33-34. Additionally, trial counsel secured from the military judge and production of the "eight to 10" page document would satisfy the order to produce. Para. 35. At that time, civilian defense counsel did not know, nor have reason to know, that the classified PDD 25 document was anything other than the document as represented by trial counsel. In fact, however, the classified PDD 25 document was 29 pages in length, three times as long. But, that fact did not come to light until 2009 well after the 1994 court-martial proceeding when the classified version of PDD 25 was obtained by Mr. New by means of a separate mandatory declassification request. Having no reason to have questioned trial counsel's veracity, civilian defense counsel had no ground upon which to appeal the failure of the Government to produce the actual classified document.

B. Classified PRD 13.

Unlike the classified version of PDD 25, trial counsel was unsure whether a classified document entitled PDD 13 or PRD 13 existed. While civilian defense counsel had, on information and belief, described the PDD 13 or PRD 13 document as related to the

classified PDD 25 document, the information that he had was slim. Additionally, trial counsel represented to the military judge that he had never heard of such a document. In response, the military judge decided, in light of the possibility that the document had been made public, civilian defense counsel had as good an opportunity as the Government to find it. And on that basis denied Mr. New's motion to produce. Having been deprived of access to both PDD 25 and PRD 13, civilian defense counsel had no legal theory on which to predicate an appeal based on its nonproduction.

- (4) **"The new information ... could not have been discovered through the exercise of reasonable diligence prior to the original judgment."** *Denedo*, 66 M.J. at 127.

Mr. New's civilian defense counsel had no reason to suspect that the document that trial counsel had represented as the classified version of PDD 25 was not, in fact, the classified version of the document that trial counsel represented it to be. Nor could Mr. New's civilian defense counsel have discovered the existence of the either the actual classified PDD or PRD 13 in time to have accessed it during the period of the court-martial proceeding. It was not until November 18, 2009, that the Government finally produced copies of the classified PDD 25 and PRD 13 documents, and then, only in response to a Mandatory Review request filed on July 24, 2007 by the Michael New Action Fund, on behalf of Mr. New, pursuant to Sections 3.5 and 3.6 of

Executive Order 13292 (amending EO 12958) and 22 C.F.R. Section 171.21. See App. C. at C-1 and C-33. At the time of the court-martial in December 1995 and January 1996, the information contained in the classified PDD 25 and PRD 13 could not have been discovered, because the classification of the two documents was, at that time, presumed to be in the national security. See Executive Order 12958, as amended on March 23, 2003, Section 1.5(b). See Pet. Br. at 13.

- (5) “[T]he writ does not seek to reevaluate previously considered evidence or legal issues.” *Denedo*, 66 M.J. at 127.

This petition does not seek to evaluate previously considered evidence or legal issues, raised either at the court-martial proceeding, on direct appeal, or in any post-conviction proceeding. See *Denedo*, 66 M.J. at 127. In none of these proceedings was there any review whether Mr. New’s conviction and bad conduct discharge were secured in violation of Mr. New’s due process rights under *Brady*, or discovery rights under R.C.M. 701 or Article 46, UCMJ. See cases cited in paras. 4-17, *supra*. Additionally, the writ does not seek a reevaluation of previously considered evidence. Quite the contrary. The writ seeks evaluation of evidence that was not previously considered, but rather evidence that was both suppressed and ignored, and now newly discovered. See Pet. Br. at 14.

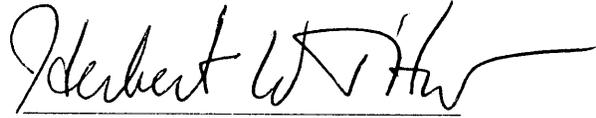
- (6) **Although never Mr. New was never incarcerated, "serious consequences persist."** *Denedo*, 66 M.J. at 127.

While Mr. New was never incarcerated, he was sentenced to a bad conduct discharge. As the military judge stated in his instructions to the military court, a bad conduct discharge is "commonly recognized" as an "ineradicable stigma of a punitive discharge." R. at 946, ll. 23-25; App. A at A-51. Also, certain serious disabilities persist attendant upon his having received a bad conduct discharge, including but not limited to, loss of (i) educational assistance under the Montgomery GI Bill⁵; (ii) civil service preference and retirement credit (5 U.S.C. §§ 2108(1), 3309-3316, 3502 and 3504); (iii) unemployment compensation for ex-Service members (5 U.S.C. § 8521(a)(1)(A) and 5 U.S.C. § 8522); (iv) all privileges of wearing of the Army uniform (10 U.S.C. §§ 771A, 772; AR 670-1, c. 30, § 30-4); and (v) burial in a Army national (AR 290-5, C. 2, §2-9(b)) or post cemetery (AR 210-190, § II, 2-5). See R. at 946, l.25 - 947, l. 14; App. A at A-51 - A-52. See Pet. Br. at 14-16.

WHEREFORE, and for the reasons stated in the brief filed this day in support of this Petition, it is submitted that this Petition should be granted.

⁵ Montgomery GI Bill Active Duty (MGIB-AD), Category I http://www.gibill.va.gov/benefits/montgomery_gibill/active_duty.html

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Herbert W. Titus", with a long horizontal flourish extending to the right.

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